Representing Non-Citizens in Trouble with the Law; *the Migration Act 1958 (Cth) for Criminal Lawyers*

Stephen Lawrence, Barrister, Black Chambers & *Nathan Willis*, Solicitor and Migration Agent, Visa Assist Australia-

Introduction[1]

1. Every criminal lawyer will act for a non-citizen on criminal charges at some stage.

2. In many respects their legal needs will be the same as clients who are Australian citizens, though a range of particular criminal law issues do arise, including:

    - Special protections at the investigative stage, (breach of which may have consequences for the admissibility of evidence)[2]
    - The impact of immigration status on bail proceedings and the liberty of a client in the lead up to sentence and/or trial[3]

[1] Migration law in Australia is complex and changes regularly, sometimes quickly. This paper aims to be a useful starting point for criminal lawyers and should not be relied upon as legal advice or as a correct statement of the law.

[2] Be aware of section 124 and 127 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the contents of Part 3 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) made under that Act in respect of vulnerable persons, which includes persons of a non-English speaking background.

[3] Section 18(1)(a) of the *Bail Act 2013* (NSW) requires a bail authority to consider community ties in determining a bail application. Section 17(2) provides that a risk a person will fail to appear at any proceedings for the offence is a bail concern relevant to the decision to grant or refuse bail. A decision to grant bail to a foreign national can also be effectively frustrated by visa cancellation and the refusal to issue a 'criminal justice stay visa' as in *Jiang v Minister for Immigration* [2018] FCCA 832 (10 April 2018)

- The impact of immigration status on sentence proceedings[4]
- The impact of immigration status on parole decisions[5]

3. Of increasing (and sometimes paramount) importance however to foreign nationals charged with criminal offences are the provisions of the *Migration Act 1958* (Cth) that allow for the termination of the foreign nationals right to be in Australia on account of alleged and/or proven criminal offending.

4. These provisions may indeed have a far graver impact on the client's life than any sentence they receive in the criminal court.

5. In the author's view it is not possible to provide proper advice and representation to a foreign national without being in a position to advise broadly on the way in which the client may be affected by the operation of migration law[6] and how decisions made in the criminal litigation may impact on that.

6. Accordingly, the aims of the paper are:

   - To assist criminal lawyers to be aware of some of the main migration law issues likely to affect their clients;

---

[4] **Hardship in custody** - *R v Chu* (unrep, 16/10/98, NSWCCA), R v Faneite (unrep, 1/5/98, NSWCCA), R v Sugahara (unrep, 16/10/98, NSWCCA), R v Huang (2000) 113 A Crim R 386, Yang v R [2007] NSWCCA 37, Nguyen v R [2009] NSWCCA 181. **Parole** - R v Shrestha [1991] HCA 26; (1991) 173 CLR 48, Parhizkar v R (2014) 245 A Crim R 515 and Islam v R [2014] ACTCA 2. **Counting time in immigration detention** - Giri and Karki [1999] NSWSC 1269, R v Latumetan and Murwento [2003] NSWCCA 70, R v Satui [2002] QCA 323, R v Van Hong Pham [2005] NSWCCA 94. Islam v R [2006] ACTCA 21 (17 November 2006). **Risk of deportation and severity of sentence** - R v Pham *[2005] NSWCCA 94,* He v R *[2016] NSWCCA 220,* R v Mirzaee *[2004] NSWCCA 315*. **Effect on third parties** - *R v Hull* [2016] NSWSC 634 (3 June 2016).

[5] See *Attorney General of New South Wales v Chiew Seng Liew* [2012] NSWSC 1223 (11 October 2012) and its discussion of the State Parole Authority 'Operating Guidelines' and the relevant provisions of the *Crimes (Administration of Sentences) Act 1999* (NSW).

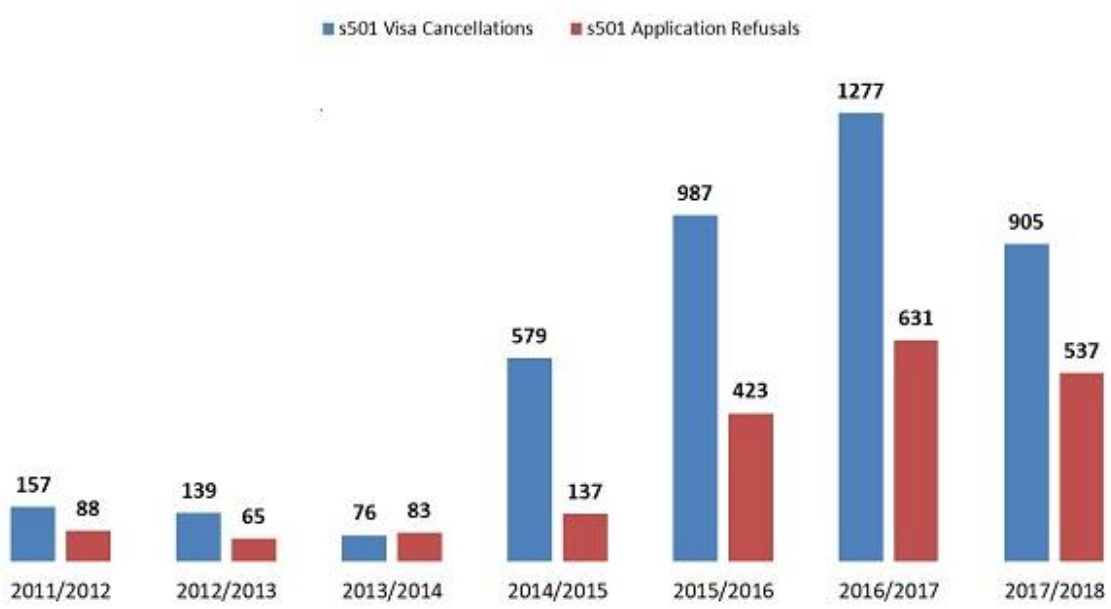
[6] Interestingly the recent decision in *Thafer v R* [2019] NSWCCA 143 (5 July 2019) involved an appeal ground alleging a miscarriage of justice on the basis that immigration law consequences had not been properly explained to a client. The ground failed, on the basis it seems that the lawyer was not apprised of the relevant facts that gave rise to the immigration law issue.

- To explain some of the main cancellation provisions and the factors relevant to their exercise[7]
- To emphasise the strict time limits on responding to proposed decisions and seeking merit and judicial review of adverse decisions
- To explain how criminal lawyers can assist migration lawyers to obtain the best outcomes for clients in migration proceedings

7. The increaed importance of a proper knowledge of the law in this area is demonstrated by these tables:[8]

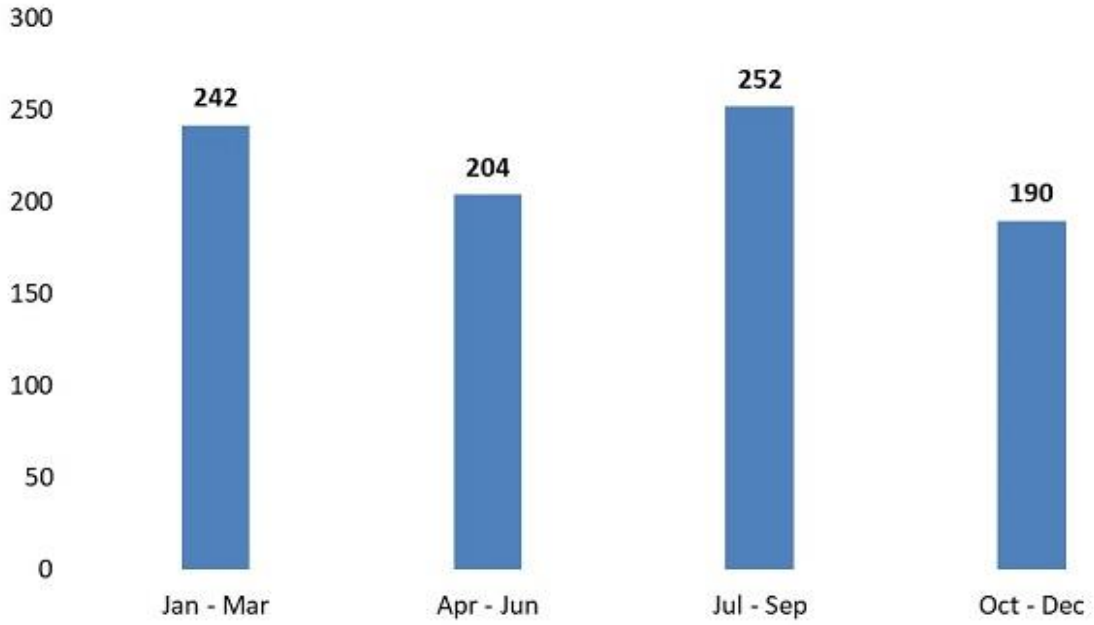
TAKE HOME POINT 1 – HAVE A LIST OF MIGRATION LAWYERS YOU CAN REFER CRIMINAL CLIENTS TO IF YOU DO NOT PRACTISE IN MIGRATION LAW. IF IN DOUBT REFER.

Section 501 Character Cancellations 2011 to 2018

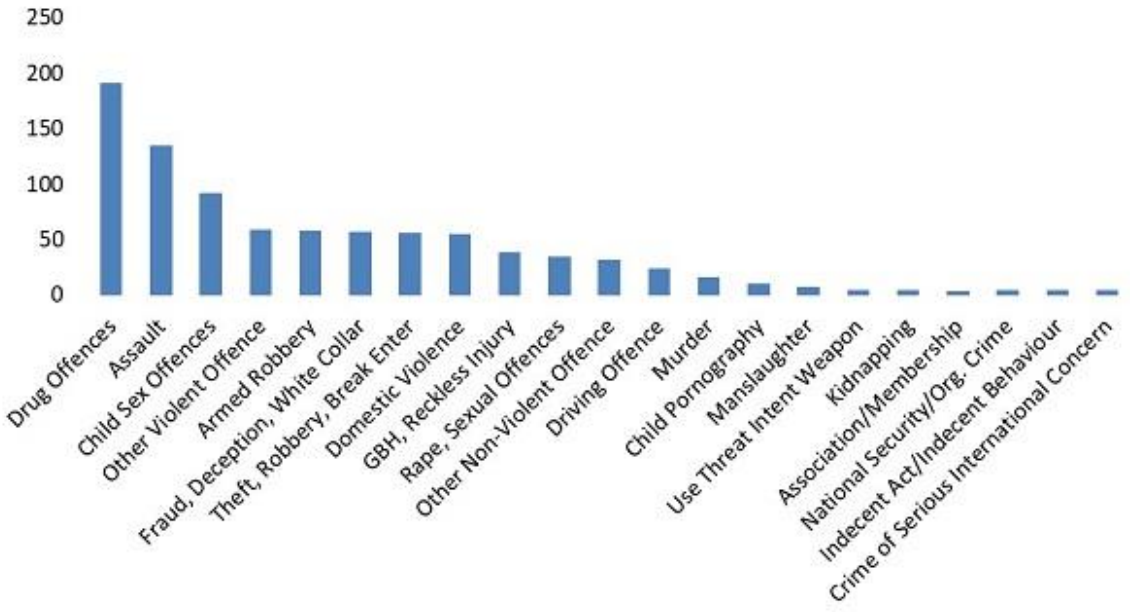


[7] There are numerous cancellation and like powers in the Act. This paper only discusses some.
[8] https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation

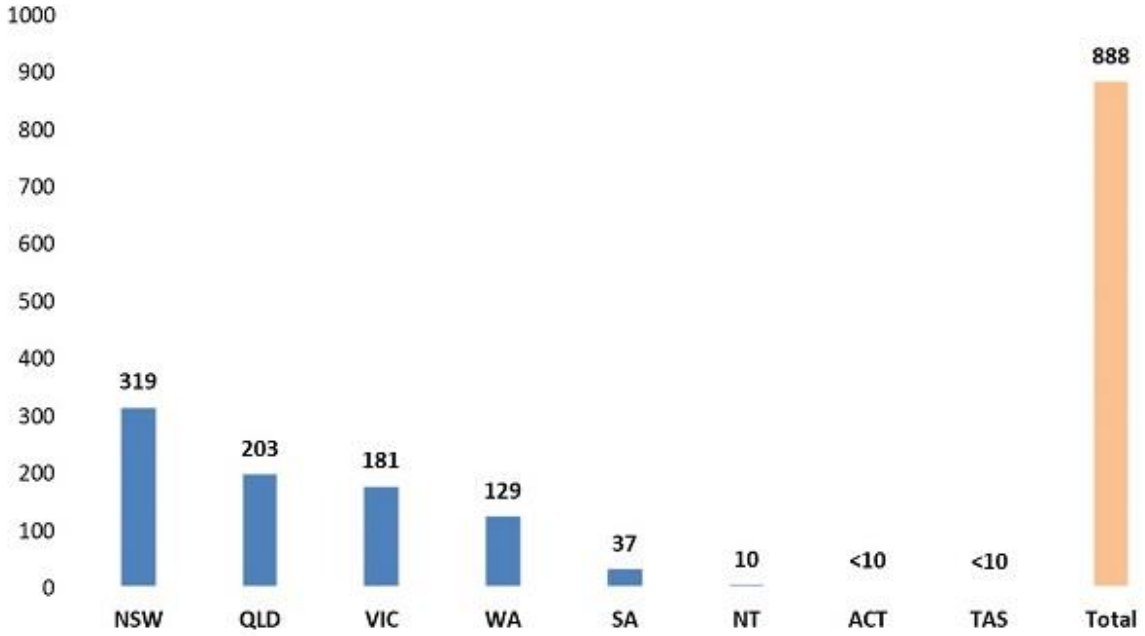
Character Cancellations in the Twelve Months to December 2018



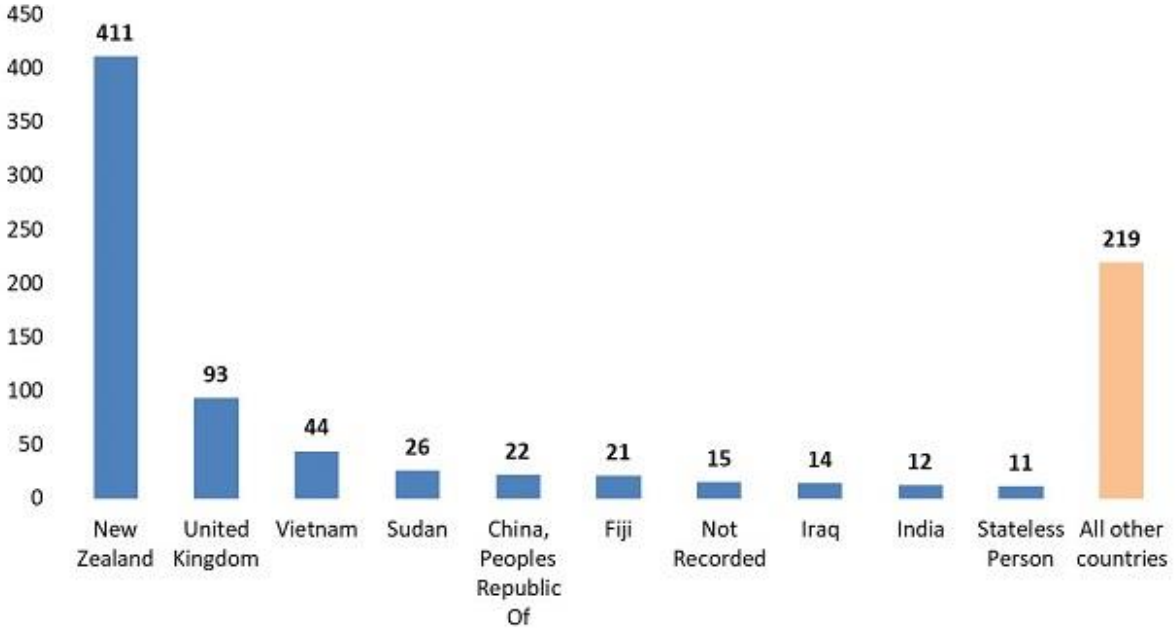
Offence Types in Character Cancellations in the twelve months to December 2018



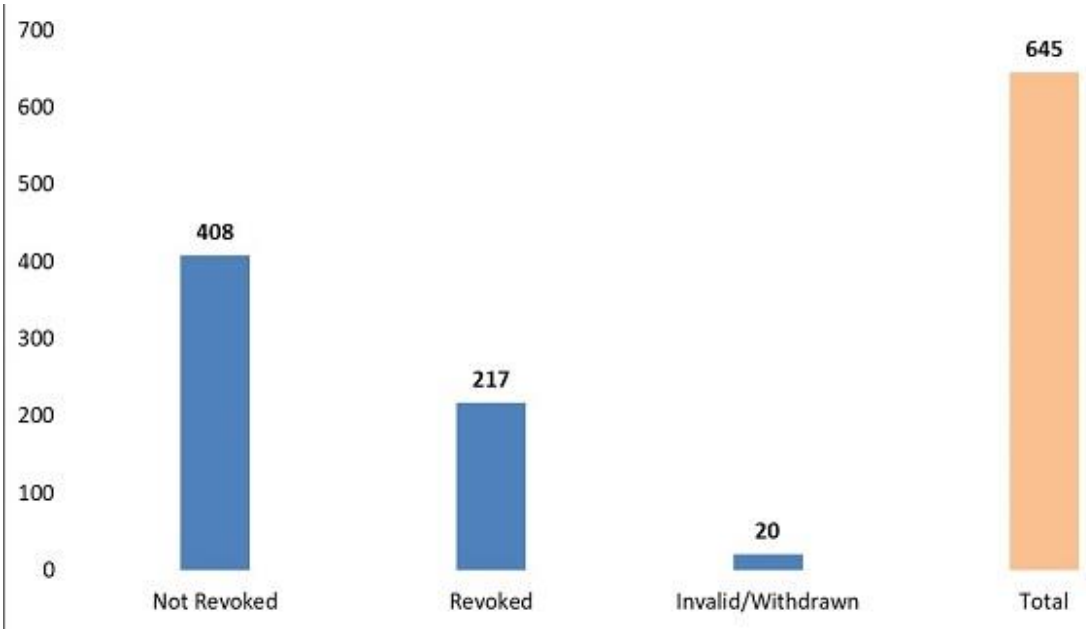
Character cancellations by state or territory in the twelve months to December 2018



Top 10 Nationalities featured in Character cancellations in the twelve months to December 2018



Revocation outcomes for Character cancellations in the Twelve Months to December 2018



Is Your Client a Citizen?

8. A threshold question to consider when representing someone on criminal charges is their nationality.

9. It is not uncommon at all for people to wrongly believe they are citizens and indeed for them to have been treated as citizens by government for an extended period.

10. In some circumstances it will be prudent to ask people if they are Australian and perhaps why they believe they are Australian.

11. The question of whether someone is a citizen is generally straightforward, but can be complex and is beyond the scope of this paper.[9]

TAKE HOME POINT 2 – ASK YOUR CLIENT IF THEY ARE A CITIZEN AND IN DOUBTFUL CASES, WHY THEY BELIEVE THEY ARE OR ARE NOT.

[9] *Australian Citizenship Act 2007* (Cth)

Deportation Before Trial

12. The fate of a foreign national charged with criminal offending is heavily dependent on executive discretion.

13. As discussed below the Minister may cancel a visa as a consequence of the allegations of offending.

14. The Minister can issue a criminal justice visa under section 158 of the *Migration Act 1958* (Cth) to allow an accused person with no other visa to remain for the proceedings.

15. If such a visa is refused, or not sought, the person may be detained in immigration detention if they are not remanded in state or territory custody pursuant to a bail refusal.

16. However, in some matters federal officials will act using *Migration Act 1958* (Cth) powers and deport accused persons despite bail having been granted or not imposed.

17. In these circumstances the prosecution of the criminal proceeding will be frustrated.

18. An interesting question might arise as to the legality of this pursuant to section 198(6) of the Act, notwithstanding section 153 of the Act.[10]

TAKE HOME POINT 3 – NEVER ASSUME YOUR CLIENT'S VISA WON'T BE CANCELLED AND THEY SOON AFTER DEPORTED, EVEN BEFORE THE CONCLUSION OF CRIMINAL PROCEEDINGS

[10] For examples of this, albeit in relation to ongoing federal litigation see *Mastipour v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1571 at [34] and *SZSPI v Minister for Immigration and Border Protection and Another* [2014] FCAFC 140 at [17]–[21]. Another perhaps arguable point might be whether a federal law is invalid to the extent it purports to authorise in the interference of the operation of a state court seized of a criminal prosecution. Such invalidity might arise as a consequence of the Melbourne Corporation principle *stated in Melbourne v Commonwealth ("State Banking case")* (1947) 74 CLR 31

The Main Visa Cancellation/Refusal Powers

Section 116

19. Section 116 of the Act contains an array of cancellation powers and provides the broadest visa cancellation powers in the Act. The section in full is at Attachment A.

The Nature of the Test in (1)(e)

20. The power in (1)(e) is perhaps the most likely to apply to criminal clients:

> *(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;*

21. It was described this way by Judge Smith in *Gong v Minister for Immigration & Anor* [2016] FCCA 561 (8 April 2016) at [41] to [42]:

> *"While it is true, as the applicant submits, that the word "risk" entails an element of futurity, the addition of the words "or may be" and "or might be" by the 2014 amendments undermines the balance of the applicant's arguments. Simply put, the fact that sub-s. 116 (1)(e) is engaged where the Minister is satisfied that a visa holder's presence "may be a risk" to certain matters means that there does not have to be, as the applicant suggests, any direct, solid or certain foundation before the power to cancel a visa can arise. In other words, it can arise on the possibility that some event occurred in the past. In this case, that possibility was supported by the laying of the charges. That is to say that that fact alone was not legally irrelevant to the question posed by sub-s. 116 (1)(e).*

22. It is frequently used when the more specific provisions of section 501 are not necessarily enlivened. It is frequently used for people charged with less serious criminal offences, including driving offences and where persons are charged but not yet tried. In respect of a criminal client sub paragraph (e) can be utilised prior to conviction and particularly where a person is charged with offending (but not yet convicted) and they have a criminal record in Australia. Alternatively, it can be and is used following an acquittal.

TAKE HOME POINT 4 – THIS IS A VERY LOW TEST AND HEAVILY DEPENDENT ON EXECUTIVE DISCRETION. NEVER ASSUME

YOUR CLIENT IS NOT IN REAL DANGER OF VISA CANCELLATION, EVEN FOR A MATTER YOU AS A CRIMINAL LAWYER DO NOT CONSIDER SERIOUS

The Power in (1)(g)

23. This sub paragraph provides cancellation can occur when:

> *"a prescribed ground for cancelling a visa applies to the holder".*

24. For certain visa holders (Bridging Visa E) being charged with a criminal offence is a 'prescribed ground' under subparagraph (g) and a visa can be cancelled regardless of seriousness.[11]

The Power in (1)(b)

25. This sub paragraph provides cancellation can occur when:

> *"its holder has not complied with a condition of the visa".*

26. For certain visa holders not engaging in criminal conduct is a visa condition.

Procedure

Permanent Visas

27. The power in section 116(1) does not apply to permanent visas, unless the visa holder is off-shore, see section 117.

Notice of Intention

28. Procedurally the person will receive a 'Notice of Intention to Consider Cancellation Under Section 116 of the Migration Act 1958'. This should set out the grounds and particulars for possible cancellation.

Procedural Fairness

29. The person should be invited to comment in writing providing supporting evidence and stating why they believe their visa should not be cancelled.

Deemed Service

[11] See Ministerial Direction No. 63.

30. It is important to be aware that service is deemed under various provisions of the Act and a client will be taken to have waived the right to be heard if they don't respond.[12]

TAKE HOME POINT 5– THE CLIENT NEEDS TO MAKE SURE HOME AFFAIRS HAS THEIR CORRECT CONTACT DETAILS AND THESE ARE KEPT UP TO DATE

Mandatory Cancellations Under Section 116(3)

31. Note that under section 116(3) certain cancellations are mandatory, it providing that *'[i]f the Minister may cancel a visa under subsection (1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled'*.

32. Those circumstances are set out in sub-regulation 2.43(2) of the Migration Regulations.[13]

Time Limits on Responding

33. Strict time frames apply to responding, five days if the person is in Australia.[14]

TAKE HOME LESSON 6– THE MIGRATION ACT HAS VERY STRICT TIME LIMITS ON RESPONDING TO PROPOSED DECISIONS AND SEEKING REVIEW. THESE ARE GENERALLY INFLEXIBLE AND NEED TO BE OBSERVED. IT IS NOT LIKE CRIMINAL LAW STATUTES WHERE EXTENSION OF TIME IS OFTEN A FORMALITY

Discretion

34. The decision maker then decides firstly whether the applicable portion of section 116 is enlivened and if so, whether in their discretion the visa will be cancelled.

Ministerial Directions

35. When a delegate or the AAT makes a decision they will be guided by a Ministerial Direction that sets out the relevant matters that must be considered as a matter of executive policy:

---

[12] See for example section 494C of the Act; *Cheng v Minister for Immigration and Citizenship* [2011] FCA 1290 (11 November 2011)
[13] http://classic.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/s2.43.html
[14] *Migration Regulations 1994* - REG 2.44
http://classic.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/s2.44.html

36. Which Direction applies will depend on the nature of the visa.

37. For example, in respect of Bridging Visa E, cancellations must be undertaken by applying Ministerial Direction No. 63, which requires the decision maker to consider a number of 'primary' and 'secondary' considerations:

Primary

- *'The Government's view that a person on a bridging visa who has been convicted of an offence, charged with an offence, is the subject of an adverse Interpol notice, is being investigated by law enforcement and is considered a threat, or does not have the intention to leave Australia, should be considered for cancellation'.*

- *'The best interests of children under the age of 18 in Australia who would be affected by the cancellation'.*

Secondary

- *'The impact of a decision to cancel the visa on the family unit'*
- *The degree of hardship that may be experienced by the visa holder*
- *The circumstances; mitigating factors, the seriousness of the offence, the reason for the person being the subject of an Interpol notice, or under investigation by law enforcement*
- *Consequences of cancellation, including indefinite detention and Australia's non-refoulment obligations*
- *Any other matter delegates consider relevant*

TAKE HOME POINT 7– BRIDGING VISAS ARE OFTEN MUCH MORE EASILY CANCELLED, WITH MORE STRINGENT CONDITIONS AND LESS GENEROUS MINISTERIAL DIRECTIONS

38. Sections 118 to 133 contain a code of procedure for section 116 cancellations.

39. Section 133C contains a personal power for the Minister to cancel visas relying on section 116 personally.

40. The Minister also has additional powers under section 133C to revoke favourable decisions not to cancel visas under section 116 made by delegates or on merit review in the AAT.

41. It is important to be aware that proposed section 116 cancellations can occur more than once, sometimes relying on a different limb of the section after a successful decision not to cancel a visa.

Review of Cancellations

42. Decisions made personally by the Minister cannot be reviewed on merits reviews in the Administrative Appeals Tribunal ("AAT").

43. Certain decisions made personally by the Minister do not attract the requirements of procedural fairness.

44. Adverse decisions by delegates under section 116 however can be reviewed in the AAT but clients need to be aware of the strict time limits on appeals, which currently are unable to be extended.

45. These reviews are heard in the Migration Division of the AAT.

TAKE HOME POINT 8 – GENERALLY DECISIONS MADE BY THE MINISTER ARE NOT REVIEWABLE ON THE MERITS AND OFTEN WILL HAVE HAD PROCEDURAL FAIRNESS DISAPPLIED

Time Limits on Merit Review

46. Some time limits at the date of writing were:

- Two working days if the person is in immigration detention and the visa was a bridging visa
- Seven working days if the person is held elsewhere for example in a jail and the visa was a bridging visa

- Seven days for review of a substantive visa cancellation

47. Judicial review relief is then available in the Federal Circuit Court[15] if it can be demonstrated a decision is vitiated by jurisdictional error.

Time Limits on Judicial Review

48. Under section 477(1) there is a 35-day time limit on applications. This can be extended on application upon satisfaction of the statutory test.

Section 501

49. Section 501 of the Act is the most significant visa cancellation power in the Act for criminal lawyers. It also creates powers to refuse applications. The section has generated significant controversy and even international concern in recent years.[16] This followed the amendment of the Act in 2014 to introduce mandatory cancellation in a range of circumstances. The number of visa cancellations, often involving long term residents of Australia, have skyrocketed since, as demonstrated in the graphs above.

50. The section is lengthy and at Attachment B.

Powers

51. Broadly speaking section 501 can be used in the following three circumstances:

Discretionary - "*the minister may*"

- **Subsection Two**

  The Minister reasonably suspects that the person does not pass the character test; and the person does not satisfy the Minister that the person passes the character test.

- **Subsection Three**

  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.[17]

[15] See Part 8 of the Act as to jurisdiction of courts in judicial review proceedings.
[16] https://www.lowyinstitute.org/the-interpreter/australia-new-zealand-and-corrosive-character-test
[17] Natural justice does not apply to this power and nor (as a personal ministerial power) can it be reviewed on the merits.

Mandatory – "*the minister must*"

- **Subsection Three A**

  The Minister must cancel a visa that has been granted to a person if: 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.

The Character Test

52. The character test is contained within section 501(6). In short it provides a person does not pass the character test if:

- The person has a substantial criminal record as defined by sub-section 7[18]

- The person has been convicted of an offence that was committed while the person was in immigration detention; or during an escape by the person from immigration detention; or after the person escaped from immigration detention but before the person was taken into immigration detention again; or the person has been convicted of an offence against section 197A;

- **The Minister reasonably suspects: (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and (ii) that the group, organisation or person has been or is involved in criminal conduct;**

- The Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following: (i) an offence under one or more of sections 233A to 234A

[18] See discussion below as to sub-section (7)

(people smuggling); (ii) an offence of trafficking in persons; (iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern; whether or not the person, or another person, has been convicted of an offence constituted by the conduct;

- **Having regard to either or both of the following: (i) the person's past and present criminal conduct; (ii) the person's past and present general conduct; the person is not of good character;**

- **In the event the person were allowed to enter or to remain in Australia, there is a risk that the person would: (i) engage in criminal conduct in Australia; or (ii) harass, molest, intimidate or stalk another person in Australia; or (iii) vilify a segment of the Australian community; or (iv) incite discord in the Australian community or in a segment of that community; or (v) represent a danger to the Australian community or to a segment of that 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;**

- A court in Australia or a foreign country has:(i) convicted the person of one or more sexually based offences involving a child; or (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction;

- The person has, in Australia or a foreign country, been charged with or indicted for one or more of the following: (i) the crime of genocide; (ii) a crime against humanity; (iii) a war crime; (iv) a crime involving torture or slavery; (v) a crime that is otherwise of serious international concern;

- The person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*);

- An Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Substantial Criminal Record

53. The concept of a 'substantial criminal record', by virtue of which someone is deemed to fail the character test, is contained within subsection 7 (my emphasis):

> *"For the purposes of the character test, a person has a substantial criminal record if: (a) the person has been sentenced to death; or (b) the person has been sentenced to imprisonment for life; or* ***(c) the person has been sentenced to a term of imprisonment of 12 months or more; or (d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more;*** *or (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or (f) the person has: (i) been found by a court to not be fit to plead, in relation to an offence; and (ii) the court has nonetheless found that on the evidence available the person committed the offence; and(iii) as a result, the person has been detained in a facility or institution".*

54. The term of imprisonment referred to in 7(c) is the head sentence, not the non-parole period.[19]

55. Imprisonment is defined in the section to include, "*any form of punitive detention in a facility or institution".*

56. Suspended sentences have been held to count for the purposes of determining whether a person has been sentenced to imprisonment for twelve months or more.[20]

[19] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; 24 ALR 577; *Te v Minister for Immigration and Multicultural and Ethnic Affairs* [1999] FCA 111; (1999) 88 FCR 264; *Seyfarth v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 142 FCR 580, [2005] FCAFC 105.

[20] *Meng Kok Te v Minister for Immigration and Ethnic Affairs* [1999] FCA 111, *Stretton v Minister for Immigration and Border Protection* (No. 2) [2015] FCA 559)

TAKE HOME POINT 9 – THE 12 MONTH RULE IS IMPORTANT, BUT EVEN WHERE IT IS NOT ENGAGED VISAS CAN BE AND REGULARLY ARE CANCELLED

Procedure

57. As with section 116 a person has a right to be heard. (except for personal ministerial powers to which natural justice does not apply or mandatory cancellations).

58. A Notice of Intention to Consider Cancellation (or refusal) should be served identifying the grounds, issues and evidence.

Time Limits

59. A person who receives such a notice must respond within 28 days.[21]

60. As with discretionary decisions under section 116(1) it is important to appreciate that the powers in (2) and (3) are discretionary. Once the decision maker is satisfied that the person fails the character test there is still an important discretion as to whether to cancel or refuse a visa.

61. This discretion will be exercised (if the decision is not made personally by the Minister) taking into account the contents of Ministerial Direction Number 65. Even where the decision is made personally the Minister will generally indicate that the Ministerial Direction should be taken as a guide to the matters the Minister will consider.

Revocation of Mandatory Cancellations

62. Visa revoked under the mandatory provisions in subsection (3A) can be the subject of applications to 'revoke' the cancellations.

63. These occur under section 501CA.

64. Procedural fairness applies to these decisions and the Minister must decide whether, "*the person passes the character test (as defined by section 501); or that there is another reason why the original decision should be revoked*".

[21] Regulation 2.53 (made under s501D) .

65. A person had 28 days to request revocation and this time limit cannot be extended.[22]

Review of Cancellations

Merit Review

66. If the decision was not made personally by the Minister then merit review in the AAT will be available for discretionary cancellation decisions under section 501 as well as decisions not to revoke mandatory cancellations under section 501CA. This review occurs under section 500 of the Act. These reviews are heard in the 'General Division' of the AAT.

Time Limits

67. Strict time limits apply and they cannot be extended.

68. Some currently are:
    - 9 days for decisions to cancel a visa under section 501 or not to revoke a cancellation under section 501CA if you are in Australia.
    - 28 days in certain other circumstances

Judicial Review

69. The Federal Court is the appropriate venue for seeking judicial review relief in respect of decisions under section 500 and 501.[23] Under section 477A a 35-day time limit applies to certain decisions.[24]

Ministerial Power to Set Aside and Substitute Decisions

70. There are various powers to set aside decisions (made by delegates or the AAT). These include sections 501A, 501B, 501BA.

Applying for Visas Post Cancellation/Criminal Justice Visas

71. The Act is very strict on what persons can apply for what visas and in many situations repeat or multiple applications are prohibited.[25]

72. Generally speaking post-cancellation a person will only be able to apply for a protection visa or a visa pending removal.

[22] Be aware of the provisions of section 500, including subsection 6(L) as to decisions being taken to be affirmed by the AAT in certain circumstances.
[23] See sections 476 and 476A of the Act.
[24] http://classic.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s477a.html
[25] See for example sections 48 and 501E of the Act which limit a person's capacity to apply for visas following cancellation under sections 116 and 501 respectively.

73. Another important category of visa for criminal clients is a 'criminal justice visa', which are used to allow victims, witnesses and sometimes accused persons to remain in Australia for the purposes of the administration of criminal justice.

74. Sections 155 to 164 of the Act govern these visas.

75. They will in some cases allow an accused person to remain in Australia at liberty to defend criminal charges.

TAKE HOME POINT 10 – CONSIDER WHERE APPROPRIATE APPLYING FOR A CRIMINAL JUSTICE STAY CERTIFICATE AND VISA FOR A CLIENT WHO WILL BE IN AUSTRALIA FOR AN EXTENDED PERIOD TO DEFEND CRIMINAL CHARGES AND WHOSE VISA HAS BEEN CANCELLED OR OTHERWISE CONCLUDED

How Criminal Lawyers Can Assist Migration Lawyers

76. As discussed above depending on the decision maker and the type of visa there will be a range of mandatory relevant considerations that a decision make must consider.

77. These will generally include matters such as
    - The nature of the conduct involved
    - The risk the person poses
    - The person's family connections and responsibilities
    - The effect on the person of deportation

78. These are matters in respect of which a criminal lawyer will often have considerable factual material on their file as well as considerable expertise.

79. For example, a decision maker may propose to rely upon a police facts sheet in considering cancellation.

80. You however may have the full brief. Provision of the brief with an explanation of why the client is highly unlikely to be found guilty may assist the client greatly in these discretionary administrative processes.

81. Similarly, subjective material such as may have been obtained for section 32 proceedings or sentence proceedings may be of great assistance.

TAKE HOME POINT 11 – YOU MAY HAVE A LOT OF MATERIAL IN YOUR CRIMINAL FILE AND RELEVANT EXPERTISE OF GREAT ASSISTANCE TO THE CLIENT'S MIGRATION CASE

Conclusion

82. The authors are happy to be contacted with feedback, comments, questions and corrections.

Stephen Lawrence

Barrister

Black Chambers, NSW.

stephen@blackchambers.com.au

0498882269

Nathan Willis

Solicitor and Migration Agent

Visa Assist Australia

nathan@visaassist.com.au

0434154782

27 July 2019