

Rethinking the character power as it relates to refugees and asylum seekers in Australia

Dr Jason Donnelly

I Introduction

Under a web of provisions in the *Migration Act 1958* (Cth) (*Migration Act*),¹ both the Minister for Home Affairs and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs have significant legal power to either cancel or refuse a visa to refugees and asylum seekers on character grounds. In making character decisions, although not bound by ministerial policy,² the relevant Minister often applies considerations reflected in the New Ministerial Direction No 79 (*Direction 79*).³

This paper argues that *Direction 79* requires significant changes to better advance the fundamental rights of both refugees and asylum seekers in Australia.⁴ Presently, relevant considerations reflected in *Direction 79* give far too much weight to the protection of the Australian community at the expense of safeguarding and promoting the human rights of non-citizens in Australia.⁵ This paper further argues that a number of considerations, as currently reflected in *Direction 79*, are likely to reflect policy principles that do not accord with the *Migration Act*. Therefore, such policy principles need to be ultimately removed from *Direction 79*.

II Relevant statutory regime

In accordance with s 501(1) of the *Migration Act*, the Minister or their delegate may refuse to grant a visa to a non-citizen if that person does not satisfy the decision-maker that he or she passes the character test. Similarly, pursuant to s 501(2) of the *Migration Act*, either the Minister or their delegate may cancel a visa that has been granted to a person if the decision-maker reasonably suspects that the non-citizen does not pass the character test and the person does not satisfy the Minister that the person passes the character test. Decisions made under ss 501(1)–(2) of the *Migration Act* require the rules of procedural fairness to be both observed and applied.

Under s 501(3) of the *Migration Act*, the Minister may either refuse to grant a visa to a person or cancel a visa that has been granted to a person if the decision-maker reasonably suspects that the non-citizen does not pass the character test and the decision-maker is otherwise satisfied that the refusal or cancellation is in the national interest. Critically, where decisions are made in accordance



Minister for Home Affairs, Peter Dutton
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with s 501(3) of the *Migration Act*, the rules of procedural fairness do not apply. Only the Minister, acting personally, can make a decision pursuant to s 501(3) of the *Migration Act*.

Pursuant to s 501(3A) of the *Migration Act*, the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the non-citizen has:

- been sentenced to death, been sentenced to imprisonment for life, been sentenced to a term of imprisonment of 12 months or more;⁶ or
- a court in Australia or a foreign country has either convicted the person of one or more sexually based offences involving a child or 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,⁷ and
- 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 ('mandatory cancellation decision').⁸

A non-citizen can seek revocation of a mandatory cancellation decision made under s 501(3A) of the *Migration Act*.⁹ Where a delegate exercises statutory power by reference to ss 501(1)–(2) and 501CA(4) of the *Migration Act*, they are bound to apply relevant principles espoused in *Direction 79*.¹⁰

Section 501(6) of the *Migration Act* prescribes a detailed range of jurisdictional facts which mandates when a person is taken not to pass the character test. For example, pursuant to s 501(6)(a), a person does not pass the character test if that person has a 'substantial criminal record'. A person has a substantial criminal record if the person has been sentenced to death, sentenced to imprisonment for life, sentenced to a term of imprisonment of 12 months or more, 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 the person has been found by a court to not be fit to plead in relation to an offence and the court has nonetheless found that on the evidence available the person committed the offence and as a result, the person has been detained in a facility or institution.¹¹

A person may otherwise fail the character test for reasons associated with:

- committing offences in immigration detention or escape from immigration detention;¹²
- having an association with a criminal organisation;¹³
- offences related to trafficking in persons;¹⁴
- crimes related to genocide;¹⁵
- crimes against humanity;¹⁶
- offences concerning torture or slavery;¹⁷
- crimes that involve matters of serious international concern;¹⁸
- having regard to either the person's past and present criminal conduct or the person's past and present general conduct, the person is not of good character; and¹⁹
- sexually based offences involving a child.²⁰
- where there is a risk that a person would engage in various forms of adverse conduct in Australia,²¹
- the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security,²²
- it being reasonable to infer that a non-citizen presents a risk to the Australian community or a segment of that community by reason of being the subject of an Interpol notice that is in force.²³

Where delegates apply *Direction 79*, they are required to have regard to primary considerations related to the protection of the Australian community, expectations of the Australian community and the best interests of children affected by a character related decision.²⁴ Delegates must also have regard to other considerations such as international non-refoulement obligations (in certain cases), impact on family members in Australia, impact on victims and impact on Australian business interests.²⁵

Having detailed, in summary, the relevant statutory regime related to the character power in the *Migration Act*,²⁶ the balance of this paper explores various shortcomings with numerous policy principles reflected in *Direction 79*. As will be demonstrated, significant reform is required in relation to *Direction 79*.

iii **Difficulty one: taking the relevant considerations into account**

In accordance with cl 8(4) of *Direction 79*, primary considerations should generally be given greater weight than the other considerations. Critically, the effect of this policy principle is to mandate that non-refoulement obligations should generally be given less weight than the primary considerations. In other words, at a lower level of abstraction, this means that the primary consideration related to protection of the Australian community is generally given greater weight than considerations related to Australia's non-refoulement obligations.

It is contended that the consideration related to non-refoulement obligations should be treated as a primary consideration for the purposes of *Direction 79*. After all, non-refoulement obligations concern serious considerations related to a threat to a person's life or liberty, involving significant physical harassment, significant physical ill-treatment, significant ill-treatment, significant economic hardship (that threatens the person's capacity to subsist), denial of access to basic services (where the denial threatens the person's capacity to subsist) and denial of capacity to earn a livelihood of any kind (whether the denial threatens the person's capacity to subsist).²⁷

It seems unthinkable that in circumstances where a non-citizen has a well-founded fear of facing serious harm if they are returned to their home country, that such a consideration is generally given less weight than the primary considerations reflected in *Direction 79*. However, as Colvin J confirmed in *Suleiman*,²⁸ 'absent some factor that takes the case out of that which pertains "generally"', primary considerations are to be given greater weight.

iv **Difficulty two: deferral of decision-making**

Clauses 10.1(4), 12.1(4) and 14.1(4) of *Direction 79* mandate that it is unnecessary for delegates to determine whether non-refoulement obligations are owed to a non-citizen for the purposes of determining whether their visa should be cancelled, refused or a mandatory cancellation decision revoked in circumstances where:

1. The non-citizen makes claims which may give rise to international non-refoulement obligations; and

2. The non-citizen is able to make a valid application for a Protection Visa in the future.
3. There are three fundamental difficulties with this policy principle.

First, despite the fact that a non-citizen may advance claims that give rise to international non-refoulement obligations in the context of a character case, there is judicial authority that those claims need not be considered by the decision-maker.²⁹ As such, non-citizens could potentially lose a powerful discretionary consideration (as related to non-refoulement obligations) being taken into account in determining whether their visa should be cancelled, refused or a mandatory cancellation decision revoked on character grounds.³⁰

Secondly, the apparent lack of necessity to consider non-refoulement claims (advanced in the context of character cases) may directly or indirectly contribute to the non-citizen remaining in immigration detention for a substantial period of time.³¹ If consideration of a non-citizen's non-refoulement claims are deferred until he or she lodges an onshore Protection Visa application in the future (after their character case is decided unfavourably), the non-citizen will be required to remain in immigration detention for a substantial period of time until their Protection Visa claims are assessed.³²

Had a compelling non-refoulement claim been considered in the context of a character case decided under s 501 of the *Migration Act*, the non-citizen may have been granted a visa, not had their visa cancelled or been successful in having a mandatory cancellation decision revoked (thus avoiding the necessity for continued immigration detention as an unlawful non-citizen in Australia). As Bromberg and Mortimer JJ make plain in *BCR16*,³³ in determining a character case under s 501 of the *Migration Act*, the Minister is able to give greater weight to a small risk of persecution than is otherwise permitted where a decision-maker formally considers a Protection Visa application.³⁴

Thirdly, it is fairly arguable that cl 14.1(4) of *Direction 79* is inconsistent with the statutory regime mandated by s 501CA(4) of the *Migration Act*. Pursuant to s 501CA(4)(b)(ii), a decision-maker has a statutory power to revoke a mandatory cancellation decision if satisfied 'that there is another reason why the original decision should be revoked'.

In *Viane*,³⁵ the Full Court of the Federal Court of Australia interpreted s 501CA(4) of the *Migration Act* to mean that a decision-maker has an obligation to consider matters that carry significant weight or significance to satisfy the decision-maker to revoke a mandatory cancellation decision.³⁶

If a non-refoulement claim is 'seriously and substantively advanced'³⁷ by a non-citizen in the context of a case that concerns s 501CA(4) of the *Migration Act*, it is likely that such a representation would need to be considered by the decision-maker (regardless of an opposite conclusion being reflected in cl 14.1(4) of *Direction 79*); this is because the advancement of a clearly expressed non-refoulement claim is likely to be characterised as a 'significant matter'. To contend otherwise would be a failure to conform to the statute.³⁸ 'The statutory requirement for the Minister to invite representations must lead to the conclusion that if representations are made as to significant matters then the Minister must consider whether to revoke the original cancellation and do so by considering the representations as to those matters'.³⁹

v Difficulty three: status of indefinite immigration detention

Clauses 10.1(6), 12.1(6) and 14.1(6) of *Direction 79* outline that:

Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person's Protection Visa were cancelled, they would face the prospect of indefinite immigration detention.

It appears that this policy principle is arguably not correct as a matter of law.⁴⁰ This policy principle appears to indicate that if a non-citizen's Protection Visa is cancelled, the non-citizen faces the prospect of indefinite immigration detention in Australia (on the assumption that Australia will not remove the non-citizen to his or her home country).

The preceding policy principle appears to squarely conflict with s 197C(1) of the *Migration Act*, which makes plain that it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.⁴¹ Further, under s 197C(2) of the *Migration Act*, an

officer's duty to remove (as soon as reasonably practicable) an unlawful non-citizen pursuant to s 198 arises 'irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen'.⁴²

Thus, 'if the Minister did not exercise one of his discretionary powers to grant the non-citizen a visa', the effect of s 198 (when read with section 197C of the *Migration Act*) 'appears to be that the non-citizen would be required to be removed from Australia regardless of Australia's international non-refoulement obligations'.⁴³ Indefinite detention is not a possibility.⁴⁴

vi Conclusion

Direction 79 formally commenced in Australia on 28 February 2019. Despite the relatively recent nature of this ministerial direction,⁴⁵ it is clear that relevant principles espoused in this significant policy document are arguably not correct as a matter of law. Critically, a matter of significant concern, various of the impugned policy principles identified in this paper have the potential to adversely impact the rights of refugees and asylum seekers in Australia.⁴⁶

Serious and urgent reform to *Direction 79* is required. Non-refoulement obligations, when raised in character cases, should always be treated as primary considerations by the relevant decision-maker. The nature of such a consideration, being non-refoulement obligations, inherently raises matters of international concern that are significant and important.

Where a non-citizen raises a non-refoulement claim in the context of their character case, there should be a mandatory obligation to consider such a claim (regardless of whether the non-citizen may make a future onshore Protection Visa application). Such a proposal could potentially reduce the time non-citizens spend in Australian immigration detention and otherwise expressly demonstrate that Australia takes its non-refoulement obligations seriously.

Finally, if a non-citizen's Protection Visa has been refused on character grounds, it is clear that they are required to be removed from Australia in accordance with s 198 of the *Migration Act*. In those circumstances, given the statutory effect of s 197C of the *Migration Act*, the non-citizen does not face the prospect of indefinite immigration detention in Australia (but faces likely refoulement). As such, this state of affairs should be correctly

reflected in ministerial policy (so that decision-makers, many of whom are not legally trained, fully understand the legal implications of cancelling, refusing or affirming a mandatory cancellation decision made to the detriment of a non-citizen).

Although refugees and asylum seekers may have committed serious criminal offences in Australia or overseas, the complexity of a person's criminality must be considered against the backdrop of a non-citizen's prospect of facing serious harm overseas and the historical basis upon which Protection Visa claims are advanced.⁴⁷ Presently, *Direction 79* is failing non-citizens who are either refugees or asylum seekers in Australia. ¹

Dr Jason Donnelly is the Course Convenor of the Graduate Diploma in Australian Migration Law program at Western Sydney University, where he is also a Senior Lecturer within the School of Law. Dr Donnelly has appeared in some of Australia's leading immigration cases, published widely in Australian public law, and has assisted several Commonwealth parliamentary inquiries in the area of Australian migration law.

Dr Jason Donnelly, BA (Macq), LLB (Hons 1 & Uni Medal) (UWS), GDLP (College of Law), Ph.D. (UNSW), Senior Lecturer (WSU), Barrister of the Supreme Court of New South Wales and High Court of Australia.

References

- 1 *Migration Act 1958* (Cth) ss 499–503A ('*Migration Act*').
- 2 *Bochenski v Minister for Immigration and Border Protection* (2017) 250 FCR 209, 214 [30] ('Bochenski').
- 3 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (28 February 2019) ('*Direction 79*').
- 4 See also Arjen Leerkes et al, 'Civic Stratification and Crime: A Comparison of Asylum Migrants with Different Legal Statuses' (2018) 69(1) *Crime, Law and Social Change* 41, where the authors argue that 'social exclusion actually contributes to certain crime issues, and that the chances of such issues occurring decrease when asylum migrants are more fully integrated, ie given similar rights as citizens, rather than being excluded': at 63.
- 5 Peter Billings, 'Getting Rid of Risky Foreigners: Promoting Community Protection at the Expense of Administrative Justice?' (2019) 47(2) *Federal Law Review* 231.
- 6 *Migration Act* (n 1) s 501(3A) (a)(i).
- 7 *Ibid* s 501(3A)(a)(ii).
- 8 *Ibid* s 501(3A)(b).
- 9 *Ibid* s 501CA(4).
- 10 *Ibid* s 499(2A); *Bochenski* (n 2) [62], [65], [78].
- 11 *Migration Act* (n 1) ss 501(6) (a), 501(7).
- 12 *Ibid* s 501(6)(aa).
- 13 *Ibid* s 501(6)(b).
- 14 *Ibid* s 501(6)(ba).
- 15 *Ibid*.
- 16 *Ibid*.
- 17 *Ibid*.
- 18 *Ibid*.
- 19 *Ibid* s 501(6)(c).
- 20 *Ibid* s 501(6)(e).
- 21 *Ibid* s 501(6)(d). Under this provision, adverse conduct includes harassing, molesting, intimidating or stalking another person in Australia, vilifying a segment of the Australian community, or inciting discord in the Australian community or in a segment of that community.
- 22 *Ibid* s 501(6)(g).
- 23 *Ibid* s 501(6)(h).
- 24 *Direction 79* (n 3) cl 9.
- 25 *Ibid* cl 10.
- 26 See also Jason Donnelly, 'Tale of Two Characters: The Paradoxical Application of the Character Test between Visa Holders and Applicants for Australian Citizenship' (2018) 25 *Australian Journal of Administrative Law* 104.
- 27 *Migration Act* (n 1) s 5J(5).
- 28 *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 [23] ('Suleiman').
- 29 *Ali v Minister for Immigration and Border Protection* [2018] FCA 650; *Greene v Assistant Minister for Home Affairs* [2018] FCA 919; *Turay v Assistant Minister for Home Affairs* [2018] FCA 1487.
- 30 Cf *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 [48]–[49] ('BCR16').
- 31 Oppressive delays have been a feature of administrative processes with 153 days as the average processing period for challenges to mandatory visa cancellation: *Martin v Minister for Immigration and Border Protection* [2017] FCA 1 [11] (Katzmann J); Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (Report No 8, 21 December 2016), 3 [1.4].
- 32 *Migration Act* (n 1) s 189(1).
- 33 *BCR16* (n 30).
- 34 *Ibid* [49].
- 35 *Viane v Minister for Immigration and Border Protection* (2018) 162 ALD 13 ('Viane').
- 36 *Ibid* 27 [68], 28 [72], 28–29 [75]–[76].
- 37 *Omar v Minister for Home Affairs* [2019] FCA 279 [46].
- 38 *Viane* (n 35) [75].
- 39 *Ibid*.
- 40 *PRHR v Minister for Immigration and Border Protection (Migration)* [2017] AATA 2782 [109], [141]–[155].
- 41 *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576 ('DMH16').
- 42 *AQM18 v Minister for Immigration and Border Protection* [2019] FCAFC 27 [17] ('AQM18').
- 43 *DMH16* (n 41); *KLQF v Minister for Home Affairs (Migration)* [2019] AATA 933 [261].
- 44 *AQM18* (n 42) [25].
- 45 *Direction 79 replaced Direction 65: Direction 79* (n 3) cl 2. There is considerable overlap of content between the new and old ministerial direction. Notably, relevant clauses of *Direction 79*, analysed in this paper, were also reflected in *Direction 65*.
- 46 *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 [1] (Mortimer J).
- 47 See Robyn Creyke and John McMillan, 'Administrative Justice: The Concept Emerges' in Robyn Creyke and John McMillan (eds), *Administrative Justice: The Core and the Fringe* (Australian Institute of Administrative Law, 1999) 1, 3–4, who refer to administrative justice as a philosophy that the rights and interests of individuals should be safeguarded properly in administrative decision-making.

The need for statutory reform



Farina, South Australian Outback
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