*Samuel C Duckett White**

GOD-LIKE POWERS: THE CHARACTER TEST AND UNFETTERED MINISTERIAL DISCRETION

Abstract

The ability to deport or cancel the visas of non-citizens, regardless of the length of their residency in Australia, remains a controversial topic. Whilst it reflects long-standing Australian policy, the widening scope of s 501 of the *Migration Act 1958* (Cth) should provoke reflection and criticism. The legislative provision empowers the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs with a non-delegable, non-reviewable and non-compellable discretion to expel from Australia those deemed not to be of good character. I explore the history of the character test in Australia, highlighting the relevant international and domestic legal frameworks with a particular focus on visa holders to whom Australia owes non-refoulement obligations, followed by key issues arising from the current regime: the potential inconsistency of domestic legislation with international law; the inherent irrationality of assessing future risk; and the consequences of mandatory detention. I will then explore the current review process and its legal and practical barriers, before concluding with select solutions.

* LLM (Hons I) (Melb); BA (Classics) / LLB (Hons) (UQ). This article finds its origins whilst the author was Associate to the Hon Justice JA Logan RFD of the Federal Court of Australia in 2018 and was finalised in a subsequent paper submitted as part of coursework undertaken for a Master of Laws at Melbourne Law School, the University of Melbourne. The development of administrative law occurs at such an exponential rate, arising from the plethora of immigration cases, that the cases cited herein were current at the time of writing, but may have been overruled subsequently. One example of this is the recent decision in *BAL19 v Minister for Home Affairs* [2019] FCA 2189 (Rares J) who decided that, inter alia, the Minister failed to apply the correct character test in that the Public Interest Criterion ('PIC') in PIC 4001 did not apply to individuals seeking a temporary protection visa, as the criteria are inconsistent with the *Migration Act 1958* (Cth) s 36 provisions. Given the volume of visa applicants and appellants whom this decision would affect, it is likely to be appealed.

I Introduction

The notion of expelling an individual deemed to be a risk to the state is neither novel nor unique. The Achaemenid Empire, held by some as the original model for state governance,[1] regularly utilised mass exile to maintain community safety.[2] The very word deportation — from the Latin *deportatio* — denoted a practice of banishing an individual to an outlying province of the Empire.[3] Exile was a continued practice throughout the Middle Ages and Victorian Era, evolving into the transportation of a 'criminal class' that was fundamental to the British settlement of Australia.[4] Even within colonial Australia, individuals viewed as risky to the fledgling Sydney community were exiled to secondary penal colonies in Van Dieman's Land and Moreton Bay,[5] and, if necessary, to Norfolk Island.[6] Australia's current policies relating to immigration are thus somewhat unsurprising, continuing the tradition of rejecting those considered 'stained' by bad character from residing here.[7]

I specifically explore s 501 of the *Migration Act 1958* (Cth) ('*Migration Act*'), which provides the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (as the position is currently) ('the Minister') with both mandatory and discretionary refusal and cancellation powers of a visa on character grounds. The use of character tests as a part of administrative decision-making raises multiple concerns on the breadth of discretion given to the Minister,[8] as well as the lack of

1 Philip L Groisser, *Mastering World History* (Keystone Education Press, rev ed, 1960) 16.

2 Diodorus Siculus, *The Library of History*, tr Charles H Oldfather (Loeb Classical Library, 1921) bk 12, [46].

3 William Walter, 'Deportation, Expulsion, and the International Police of Aliens' (2002) 6(3) *Citizenship Studies* 265, 269.

4 John Braithwaite, 'The Criminal Class and the Making and Breaking of Australia' (1991) 24(2) *Australian and New Zealand Journal of Criminology* 99, 103. Over 160,000 convicts were transported over an 80-year period: National Library of Australia, *Convicts* (Web Page, 25 November 2018) <https://www.nla.gov.au/research-guides/convicts>.

5 See especially Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787–1868* (Collins Harvill, 1987) for an unparalleled history of the transportation system.

6 See generally Margaret Anderson, 'A Mill to Grind Rogues Honest' (2007) 38 *Australian Historical Studies* 154.

7 Michael Grewcock, 'Reinventing "The Stain": Bad Character and Criminal Deportation in Contemporary Australia' in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2017) 121.

8 A topic which, by academic and judicial commentary, remains relevant. As at the time of writing, the Minister is granted the most 'personal discretion of any Minister by an overwhelming margin': see Liberty Victoria, *Playing God: The Immigration Minister's Unrestrained Power* (Report, 2017) 3.

robust accountability mechanisms.[9] The empowerment of the Minister with such discretion has, from early discussions, revolved around concerns that such power may be obscure, arbitrary and politically charged.[10] It is submitted that the powers granted under s 501 are undesirable from a policy perspective and are possibly in breach of international obligations.

II History of the Character Test

In 1992, the *Migration Reform Act 1992* (Cth) overhauled the system by which a non-citizen could enter and reside within Australia. The legislation introduced a power for the Minister to cancel or refuse a visa to a non-citizen who was not of good character.[11] The original rationale for this power was to exclude undesirable characters from entering or residing in Australia.[12] The main targets for the legislative amendments were unauthorised maritime arrivals; much less attention was given to the implications of the character test on other sectors.[13]

In 1998, the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998 (Cth) was passed, with some criticism on its effect on civil liberties[14] and for putting the 'ease of administration and economic factors ahead of equity and due process'.[15] The amendments strengthened Ministerial powers and expanded provisions by which non-citizens could fail the character test,[16] as well as shifting the onus of proof onto the applicant.[17] The amendments were justified as a means of preventing the entry into Australia of 'undesirable political activists or known criminals'.[18] This was on the basis of three important cases which

9 Conditions in detention centres are harsh and prison-like: Australian Human Rights Commission, *2008 Immigration Detention Report: Summary of Observations Following the Inspection of Mainland Immigration Detention Facilities* (Report, December 2008).

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1229 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

11 *Migration Act 1958* (Cth) ('*Migration Act*') s 180A. This evolved into s 501.

12 Michelle Foster, 'An "Alien" by the Barest of Threads: The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33(2) *Melbourne University Law Review* 483.

13 Grewcock (n 7) 125.

14 Susan Rimmer, *The Dangers of the Character Tests: Dr Haneef and Other Cautionary Tales* (Discussion Paper No 101, October 2008) 8.

15 Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997* (Parliamentary Paper No 399, 23 March 1998) 47.

16 Khanh Hoang and Sudrishti Reich, 'Managing Crime Through Migration Law in Australia and the United States: A Comparative Analysis' (2017) 5(1) *Comparative Migration Studies* 1, 13.

17 Senate Standing Committees on Legal and Constitutional Affairs (n 15) 5–6.

18 Grewcock (n 7) 126.

generated significant media attention: the refusal to grant a visa to Mr David Irving (a Holocaust-denying academic);[19] the refusal to grant a visa to Mr Gerry Adams (leader of left-wing Irish political party Sinn Fein);[20] and the initial cancellation of the visa of Mr Lorenzo Ervin (a member of the Black Panther party).[21]

Section 501 of the *Migration Act* was expanded on 11 December 2014 by the passage of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) ('*2014 Character Amendment Act*'). The legislation was premised on two foundations: that the character provisions and general visa cancellation provisions had changed little since their implementation; and that 'the environment in relation to entry and stay in Australia of non-citizens [had] changed dramatically, with higher numbers of temporary visa holders entering Australia'.[22] The Explanatory Memorandum to the *2014 Character Amendment Act* noted that while the system fundamentally worked, 'it was clear there remained a small number of non-citizens who were not effectively and objectively being captured for consideration'.[23]

III Relevant Legal Framework

A *International Framework*

The *Convention Relating to the Status of Refugees* ('*Refugee Convention*'),[24] as modified by the *1967 Protocol Relating to the Status of Refugees ('Refugee Protocol')*,[25] represents a compromise between humanitarian ideals and concerns over host state community safety.[26]

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19 *Irving v Minister for Immigration, Local Government & Ethnic Affairs* (1996) 68 FCR 422.

20 *Adams v Minister for Immigration and Multicultural Affairs* (1997) 70 FCR 591.

21 See Transcript of Proceedings, *Re The Minister for Immigration and Multicultural Affairs; Ex parte Ervin* (High Court of Australia, B29/1997, Brennan CJ, 10 July 1997).

22 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) 1 ('Explanatory Memorandum 2014').

23 Ibid Attachment A, 1.

24 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*').

25 Opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*'). This removed the geographic and temporal limits of the *Refugee Convention*.

26 For Australian case law, see *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 583 [213] (Crennan J). See also Canadian jurisprudence in *Febles v Canada (Minister of Citizenship and Immigration)* [2014] 3 SCR 431, [29]–[30].

The *Refugee Convention* is both a status- and rights-based instrument, underpinned by certain principles, none of which are more important than non-refoulement.[27] While providing the definition of a refugee, it further provides for instances where recognition of refugee status may be refused[28] and for the revocation of protection afforded to a person found to be a refugee.[29] Pertinently, art 33(2) of the *Refugee Convention* allows for refoulement of

> a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[30]

In ratifying and implementing the *Refugee Convention*, an increasing global acceptance for a 'culture of exclusion'[31] has caused tension between international obligations and state domestic legislation and procedures. Australia is one such example. Although affecting only certain visa holders — those visa holders to whom Australia owes protection obligations — the following critique of the interaction between s 501 of the *Migration Act* and the *Refugee Convention* is important in questioning its legality.

B *Domestic Framework*

The *Constitution* grants the Commonwealth broad powers to manage immigration with respect to 'aliens'.[32] The *Migration Act* provides for the sole right for a non-citizen to enter Australia[33] and aims 'to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.[34] The overarching aim of the legislation is advanced through the implementation of visas which permit non-citizens the right to enter or remain within Australia. The notion of citizen and non-citizen under the *Migration Act* is statutorily binary,[35] although a recent decision of the High Court has introduced a special status for non-citizens who are of recognised Indigenous or

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27 United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees* (Report, December 2010) 4. Non-refoulement is the obligation not to return a refugee to where they have a well-founded fear of persecution: *Refugee Convention* (n 24) art 33(1).

28 Article 1F of the *Refugee Convention* materially excludes an individual from being granted refugee status, even if they were to meet the definition in art 1A(2).

29 *Refugee Convention* (n 24) art 33.

30 Ibid art 33(2).

31 Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 244.

32 *Constitution* s 51(xix).

33 *Migration Act* (n 11) s 4(2).

34 Ibid s 4(1).

35 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.

Torres Strait Islander descent.[36] Whether or not a non-citizen is lawfully or unlawfully residing in Australia remains binary under the *Migration Act*.[37]

The *Migration Act* provides the mechanism to deal with protection claims under the *Refugee Convention*, importing the obligations and the exceptions,[38] subject to modifications.[39] Regardless of the type of visa, the Minister must be satisfied that the person applying for a visa does not fail the character test:[40]

> **501 Refusal or cancellation of visa on character grounds**
>
> …
>
> (6) For the purposes of this section, a person does not pass the ***character test*** if:
>
> (a) the person has a substantial criminal record (as defined by subsection **(7)); or**
>
> (aa) the person has been convicted of an offence that was committed:
>
> (i) while the person was in immigration detention; or
>
> (ii) during an escape by the person from immigration detention; or
>
> (iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or
>
> …
>
> (b) 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; or
>
> …

36 *Love v Commonwealth* [2020] HCA 3.

37 *Migration Act* (n 11) ss 13(1), 14(1).

38 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, 62 [123] (Gummow J).

39 Peter Billings, 'Refugee Protection and State Security in Australia: Piecing Together Protective Regimes' (2017) 24(4) *Australian Journal of Administrative Law* 222, 224.

40 If not satisfied, the Minister must refuse to grant the visa: *Migration Act* (n 11) s 65(1)(b).

> (c) 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; or
>
> (d) 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 …

There are obvious overlaps between the *Refugee Convention* and the character test,[41] yet the character test goes much further, capturing 'a broad range of non-citizens of character concern, including non-citizens who do not have criminal convictions, but are nevertheless determined to be a risk to the Australian community'.[42]

1 *Discretionary Revocation*

The width of Ministerial discretion is substantial. The Minister or a delegate is empowered to refuse or cancel a visa if they reasonably suspect an individual does not pass the character test, or where the individual does not satisfy the Minister or delegate that they pass the character test.[43] In these circumstances, the principles of natural justice apply.[44]

41 See ibid s 501(6)(d)(v).

42 Jason Donnelly, 'Tale of Two Characters: The Paradoxical Application of the Character Test between Visa Holders and Applicants for Australian Citizenship' (2018) 25(2) *Australian Journal of Administrative Law* 104, 112.

43 *Migration Act* (n 11) ss 501(1)–(2).

44 Ibid.

The Minister may further personally refuse or cancel a visa without applying the principles of natural justice if, once reasonably suspecting an individual does not pass the character test, they determine it to be in the national interest.[45]

Having regard to the legislative framework, the decision to cancel a visa on character grounds — or to revoke an automatic cancellation — is largely discretionary. The decision can be made in two ways: either by the Minister in their personal capacity, or through a delegated decision-maker.[46] When a delegate makes a decision, regard is required to be given to any Ministerial directions in force, which dictate mandatory and discretionary considerations.[47]

Currently there are 17 Directions in force, which broadly can be classed as being procedural, guiding or prescriptive.[48] Of the third category, *Direction No 79*, which came into effect on 28 February 2019, provides a range of considerations when making a decision on whether to refuse or cancel a visa.[49] This Direction expanded on its predecessor — *Direction No 65*[50] — extending '[p]rotection of the Australian community from criminal or other serious conduct' to include violence or offences of a sexual nature against women.

Table 1: Primary and Other Considerations[51]

Primary considerations	Other considerations
Protection of the Australian community from criminal or other serious conduct The best interests of minor children in Australia Expectations of the Australian community	International non-refoulement obligations Strength, nature and duration of ties Impact on Australian business interests Impact on victims Extent of impediments if removed

The effect of primary and other considerations is to mandate policy decisions when assessing visa applications. It is thus illustrative to note that consideration of non-refoulement obligations is secondary to the interest of the Australian community, and

45 Ibid s 501(3).

46 Delegation can occur by implication of ibid s 501B(1).

47 Ibid s 499.

48 See Christopher Chiam, 'Characterising Migration Directions as Legislative Instruments: Implications for Judicial Review' (2018) 24(4) *Australian Journal of Administrative Law* 234, 241–2.

49 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 No 79*').

50 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 65: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (22 December 2014).

51 *Direction No 79* (n 49) cls 9(1), 10(1).

that the 'existence of a non-refoulement obligation does not preclude cancellation of a non-citizen's visa'.[52] These directions do not bind the Minister.[53]

2 *Mandatory Revocation*

The significance of the *2014 Character Amendment Act* was to introduce a regime of mandatory cancellations under specified circumstances. These circumstances were in reference to certain elements of the character test. The legislation provides:

> **501 Refusal or cancellation of visa on character grounds**
>
> …
>
> (3A) The Minister must cancel a visa that has been granted to a person if:
>
> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph (6)(e) (sexually based offences involving a child); and
>
> (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

What a substantial criminal record[54] means is discussed in later paragraphs. The mandatory nature was justified under the premise that

> a decision to cancel a person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued …[55]

IV Issues with the System

This power of cancellation in s 501(3A) of the *Migration Act* is not subject to natural justice.[56] Since the amendment, the number of visa cancellations has increased by

52 Ibid cl 10.1(2).

53 *Dunn v Minister for Immigration and Border Protection* [2016] FCA 489, [15] (North ACJ).

54 *Migration Act* (n 11) s 501(3A)(a)(i).

55 Explanatory Memorandum 2014 (n 22) 8 [34].

56 *Migration Act* (n 11) s 501(5).

over 1,100%.[57] The character test therefore captures a wide class of non-citizens, and accordingly has a wide range of legal implications and issues.

A *Particularly Serious Crime*

As outlined above, the intention of art 33(2) of the *Refugee Convention* is to protect the host state. Different domestic ratifications have resulted in differing interpretations. The Canadian view on art 33(2) is that there is an implied high bar to its proper use.[58] Whilst persuasive, such an observation is not binding in Australia. Locally, it has been stated in the High Court that 'ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the [convention]'.[59]

This sentiment is codified under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which provides that legislation must be compatible with various human rights instruments.[60] These instruments, however, cannot be relied upon in litigation to ground an expectation of compliance or as a source of rights. Relevantly, this captures the *Refugee Convention*, the *International Covenant on Civil and Political Rights* ('*ICCPR*')[61] and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*').[62]

Article 33(2) of the *Refugee Convention*, as outlined above, provides the foundation by which Australia has justified its deportation of criminals. Section 501(7) of the *Migration Act* aims to domestically interpret Australia's rights of exclusion, as provided by art 33(2) of the *Refugee Convention*. Of interest is the definition in the *Migration Act* of 'serious criminal conduct' (which triggers the Minister's mandatory visa cancellation):

> **501 Refusal or cancellation of visa on character grounds**
>
> …
>
> (7) For the purposes of the character test, a person has a substantial criminal record if:

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57 Department of Home Affairs, *Key Visa Cancellation Statistics* (Web Page, 14 October 2019) <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.

58 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

59 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J).

60 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3.

61 Opened for signature 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

62 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*').

> (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 (whether on one or more occasions), where the total of those terms is 2 years 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 …

Section 501(7) of the *Migration Act* expands beyond art 33(2) the scope for an individual to be deemed a serious criminal threat. An initial issue therefore is whether Australia's interpretation of art 33(2) is consistent with the terms in the *Refugee Convention*.

The notion of a particularly serious crime is not defined within the *Refugee Convention*. As an oft-quoted observation of Lord Steyn illustrates:

> In principle therefore there can only be one true interpretation of a treaty… In practice it is left to national courts, faced with a material disagreement on the issues of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.[63]

Conveniently, the search for this one true meaning was undertaken in 2003.[64] Pertinently, the opinion held that 'particularly serious crime' — subject to the double qualification of 'particular' and 'serious' — emphasised that only crimes such as 'murder, rape, armed robbery, arson, etc'[65] would come within the purview. Article 33(2) is thus to be read in a restrictive manner and attempts to proportionately balance the risk to the community with the gravity of the crime. Accordingly, '[t]he application of this exception must be the *ultima ratio* … to deal with a case reasonably'.[66]

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63 *R v Secretary of State for the Home Department; Ex Parte Adan* [2001] 2 AC 477, 516–17 (Lord Steyn).

64 Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87, 121.

65 Ibid 139. See also Paul Weis, *The Refugee Convention, 1951* (Cambridge University Press, 1995) 342.

66 *Kenya National Commission on Human Rights v A-G (Kenya)* (High Court of Kenya, Judge Matrio, 9 February 2017).

This view would appear to be endorsed by the United Nations High Commissioner for Refugees, whose recommendation is that refoulement should only be considered

> when one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where other measures, such as detention, assigned residence or resettlement in another country are not practical to prevent him or her from endangering the community …[67]

There does not appear to be any geographic limitation to where the crime was committed.[68]

The effect of the *2014 Character Amendment Act* was to reduce the threshold of a serious criminal offence from 24 to 12 months.[69] This was understood to reflect the concerns 'as to the person's character, including that there may be a history and high risk of recidivism and a clear disregard for the law'.[70] This rhetoric is important when juxtaposed with the actual offences that have triggered the character test, as disclosed by the Minister.

Table 2: Offence Type Justifying *Migration Act* s 501 Visa Cancellations 1 January 2014–29 February 2016[71]

Offence Type	No. of Cancellations
Other Violent Offence	214
Assault	210
Drug Offences	148
Other Non-Violent Offence	111
Armed Robbery	105
Theft, Robbery, Break Enter	93
Child Sex Offences	88
Rape, Sexual Offences	59
GBH, Reckless Injury	55
Fraud, Deception, White Collar	45

67 UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement* (November 1997) pt F.

68 Lauterpacht and Bethlehem (n 64).

69 *Migration Act* (n 11) s 5C(2)(d) as amended by the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth). This 12-month test includes where the sentence was wholly suspended: see *BNNN v Minister for Home Affairs* [2019] AATA 27.

70 Explanatory Memorandum 2014 (n 22) 12.

71 Commonwealth Ombudsman, *The Department of Immigration and Border Protection: The Administration of Section 501 of the* Migration Act 1958 (Report No 8, December 2016) 7 ('*The Administration of Section 501 of the* Migration Act 1958').

Offence Type	No. of Cancellations
Murder	18
Child Pornography	17
(Not Recorded)	15
Use Threat Intent Weapon	12
Manslaughter	13
Kidnapping	<10
Nation Security/Organised Crime	<10
People Smuggling	<10
TOTAL	**1,219**

There are some significant and obvious issues with the format and collation of the data. The manner by which the Minister publishes the above data, which subsequent sources draw upon, groups offences too broadly. This in turn creates a barrier to conducting proper analysis of the crimes so as to ascertain whether or not they are particularly serious. For example, the term 'assault' can include non-aggravated assault and even the threat of assault, and the term 'drug offences' covers instances from possession of cannabis to importation and supply of methamphetamines.[72]

Regardless, the statistics show that, between 1 January 2014 and 29 February 2016, only 23.5% of visa cancellations under the character test were based on crimes found by the 2003 opinion[73] to be capable of triggering the exclusion powers of the *Refugee Convention*. Australia's implementation thus seeks to import the power without adopting the relevant limitations.

A leading reason for this is the 12-month imprisonment threshold for mandatory visa cancellations. Section 501(7A) requires that concurrent sentences be aggregated for the purpose of assessing time spent in prison. Case law has highlighted how this specific section can 'operate in a way which is inconsistent with an application of the totality principle in the sentencing of the person concerned'.[74] This is so where the ultimate legal consequence may be the deportation of an individual from Australia, despite failing to reach the threshold of a year's imprisonment. Whether deportation may be considered in sentencing is currently piecemeal and varies across states.[75]

72 Ibid.

73 Lauterpacht and Bethlehem (n 64).

74 *Ogawa v Minister for Immigration and Border Protection* [2018] FCA 62, [21] ('*Ogawa*').

75 In New South Wales and Western Australia, it is irrelevant: *R v Latumetan* [2003] NSWCCA 70, [19]; *Dauphin v The Queen* [2002] WASCA 104, [22]. In Victoria and Queensland, it is relevant to the extent that deportation would cause hardship: *Guden v The Queen* (2010) 28 VR 288, 295 [29]; *R v Schelvis* (2016) 263 A Crim R 1.

B *Assessing Future Risk*

It is important to note that it is not simply the crime itself that triggers the refoulement, but the prospective future harm to the community. The character test is said to reflect community values and Australian standards[76] and to reflect Commonwealth policy that 'there is an expectation that non-citizens will be law-abiding, respect important Australian institutions and not pose a risk of harm to individuals or the Australian community'.[77]

Predicting an individual's risk of future offending has long been a central question in Australian law, notably in sentencing.[78] As part of the *2014 Character Amendment Act*, s 501(6)(d) was modified to omit the word 'significant' when assessing future risk.

This has raised the controversy of whether, through its scope and purpose, s 501 has an implied requirement that the Minister must consider the future risk of someone who does not pass the character test as a relevant consideration in the *Peko-Wallsend* sense.[79] There have been differing views by the Full Court of the Federal Court of Australia as to the nature of Ministerial discretion when assessing risk. The 'unresolved tension' between the decisions of *Moana v Minister for Immigration and Border Protection* ('*Moana*')[80] and *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* ('*Huynh*')[81] was noted by the Full Court in *Minister for Home Affairs v Ogawa*, but the majority found the point unnecessary to consider.[82]

I argue that the tension between *Moana* and *Huynh* is an important area that requires clarification for a number of reasons. If future risk was to be a mandatory consideration, consequential questions are what level of risk and what standard of proof is required. Although not binding, it has been suggested in the United Kingdom that

> [t]here must be material on which proportionately and reasonably [the Secretary of State] can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a 'high civil degree of probability'.[83]

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76 *Direction No 79* (n 49) cl 6.2(1).

77 Donnelly (n 42) 109 (citations omitted).

78 *Fardon v A-G (Qld)* (2004) 223 CLR 575; *Kable v DPP (NSW)* (1996) 189 CLR 51; *Sentencing Act 1991* (Vic) s 5(1).

79 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J).

80 (2015) 230 FCR 367.

81 (2004) 139 FCR 505.

82 *Minister for Home Affairs v Ogawa* (2019) 369 ALR 553, 571 [86] (Davies, Rangiah and Steward JJ). There is an argument that there is indeed no tension: *Le v Minister for Immigration and Border Protection* (2015) 237 FCR 516, 529 [51].

83 *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 184 [22] (Lord Slynn). It is important to note that the decision was delivered one month after the 9/11 attacks in the United States.

Within Australia, assessing risk has been held to call for a broad, evaluative judgment.[84] The question remains, however, how either the Minister or the judiciary can assess accurately whether someone is a future risk. A recent decision by the Federal Court looked at whether risk to the Australian community should or could distinguish 'hands on' child sex abuse (which can be prevented by removing an individual from Australia) and possessing child pornography downloaded from the internet (which would occur anywhere regardless).[85] The matter highlights the multifaceted considerations that must be taken into account by an individual decision-maker.

1 *Past and Present Criminal Conduct*

As it stands, when assessing future risk, regard is often given to past and present criminal conduct. For the purpose of the *Migration Act*, criminal conduct requires conduct that is both punishable by law, and has actually been punished by a conviction for an offence.[86] It is interesting to note that deportation of non-citizens with criminal convictions is not viewed as a double punishment, but as a 'public affirmation by the state that certain types of deviance, constructed through arbitrary intersections of criminal offending and immigration status, cannot be accommodated within the community'.[87]

The Federal Court has also drawn distinctions according to the nature of the crime, French J noting that '[t]he want of good character in persons convicted of offences against the person or dealing in addictive drugs may be very different in kind from that of persons who have lied in order to get into the country'.[88] While it is insufficient to merely refer to the offence as being determinative of future risk,[89] as it stands the Minister may form the view that the *nature* of an offence is such that *any* risk to the Australian community is intolerable.[90] The Minister's assessment must occur with regard to the personal and proper circumstances of the crime committed.[91]

84 *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417, 426 [44] (Bromberg J).

85 *FPU18 v Minister for Immigration and Border Protection* [2018] FCA 1606, [52] (Moshinsky J).

86 *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567, [23] (Chappell DP).

87 Grewcock (n 7) 124.

88 *Powell v Administrative Appeals Tribunal* (1998) 89 FCR 1, 15 (French J).

89 *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, 447–8 [109] (Mortimer J) ('*Tanielu*').

90 *Te Puke v Minister for Immigration and Border Protection* (2015) 230 FCR 499.

91 *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513, 527 [44] (Flick, Griffiths and Perry JJ) (citations omitted).

An alternative often taken is for the Minister to make a judgement call. This tends to ignore the fact that no individual is 'no risk'.[92] On this topic, the Supreme Court of Victoria reflected that

> [t]he making of a prediction requires expertise which judges do not have. It calls for observation and assessment of those who commit the particular type of offence and a detailed knowledge of the types of factors, both personal and environmental, which increase or reduce the risk of further offending. The necessary expertise combines the ability to make a qualitative assessment of the individual and the ability to utilise the available quantitative risk assessment instruments. A risk assessment report would ordinarily be at the centre of any court evaluation of the level of risk.[93]

The observation that unstructured individual judgement is not indicative of future risk might equally extend to Ministerial decisions. The Federal Court has agreed, noting the risk of re-offending is 'pre-eminently a matter for expert opinion'.[94] In a 2016 study, Ian Coyle and Patrick Keyzer suggested that risk models have poor success rates when applied to individuals.[95] Despite this, as it stands, the Minister is not required to undertake 'any particular form of risk assessment or evaluation'.[96] When any assessment is made, the weight ascribed to any factors, and the balance to be struck, is one for Ministerial discretion.[97]

2 *Past and Present General Conduct*

Acts that are not criminal may still be used to indicate general bad conduct.[98] The compendious concept of 'past and present general conduct' is one that requires assessment of an individual over time.[99] *Direction No 79* dictates that evidence of character through general conduct can be reflected in:

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92 A reality recognised within the prison system: see Adult Parole Board Victoria, *Parole Manual: Adult Parole Board of Victoria* (5th ed, 2018) 7.

93 *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 392–3 [124].

94 *Applicant in WAD 230/2014 v Minister for Immigration and Border Protection [No 2]* [2015] FCA 705, [60] (Gilmour J).

95 Ian Coyle and Patrick Keyzer, 'The Removal of Convicted Noncitizens from Australia: Is There Only a 'Minimal and Remote' Chance of Getting it Right?' (2016) 41(2) *Alternative Law Journal* 86, 87.

96 *Tanioria v Minister for Immigration and Border Protection* [2015] FCA 965, [55] (Nicholas J).

97 *Renzullo v Assistant Minister for Immigration and Border Protection* [2016] FCA 412, [64] (McKerracher J).

98 Such as 'brothel keeping, usury, exploitation of child labour and defaulting on child maintenance': *Baker v Minister for Immigration and Multicultural Affairs* (1996) 69 FCR 494, 500.

99 *Mujedenovski v Minister for Immigration and Citizenship* [2009] FCAFC 149, [47] (Ryan, Mansfield and Tracey JJ).

- where an individual has been involved in activities indicating contempt or disregard for the law or human rights more generally;

- past deportations or removal from Australia or other countries, and the relevant circumstances that led to that action; and

- whether an individual has been dishonourably discharged from the Armed Forces of another country.[100]

Case law has suggested a balancing approach which gives increasing weight to actions — good or bad — closer to the date of assessment. The Full Court in *Minister for Immigration and Ethnic Affairs v Baker* ('*Baker*')[101] considered in what way a person's general conduct was reflective of whether they were of good character. Justices Burchett, Branson and Tamberlin found that '[j]ust as a person's criminal conduct on a few occasions may be very revealing of character, so also some instances of general conduct, as we understand the term, displayed but once or twice, may lay character bare very tellingly'.[102]

Their Honours went on to hold that, as it then stood, the legislative and administrative framework surrounding the execution of s 501 was 'both inhumane and irrational'.[103] *Baker* holds that it is neither just nor equitable for a court or tribunal to find evidence of character on allegations, but requires prosecution and conviction.[104] This concept of general bad conduct is highlighted in the decision in *Nguyen v Minister for Immigration and Border Protection* ('*Nguyen*'),[105] where the pattern of behaviour was such that, through a series of driving offences, the Tribunal found that the individual 'has a singular disregard for the safety of himself and others on the road'.[106] While demonstrative of failing to adhere to Australian standards, the applicant equally posed a future risk to society. Ironically, although failing the character test for the purpose of the *Australian Citizenship Act 2007* (Cth), Mr Nguyen retained his visa due to the different thresholds in the separate legislation.[107]

Thus, there are friction points between the purpose and enactment of the principle of the character test, that being the protection of the community. The scope for which general conduct can be used to reflect an individual is perverse and without any clear limitation. Although values required to be afforded citizenship are not necessarily

100 *Direction No 79* (n 49) Annexure A s 2 cl 5.2(2).

101 (1997) 73 FCR 187.

102 Ibid 195.

103 Ibid 192.

104 Ibid 192–3. See also Bernard Robertson, 'Criminal Allegations in Civil Cases' (1991) 107 (April) *Law Quarterly Review* 194.

105 [2017] AATA 1157.

106 Ibid [32].

107 *Fenn v Minister for Immigration and Multicultural Affairs* [2000] AATA 931, [8]; *Bhatia v Minister for Immigration and Border Protection* [2017] AATA 927, [60].

synonymous with residing in Australia — such as loyalty and a belief in democratic government[108] — it appears at odds with the purpose of the legislative sections.

C *Offences in Immigration Detention*

Consequential to disturbances within Villawood Immigration Detention Centre ('VIDC') and Christmas Island in 2011, the character test was expanded.[109] The effect of the amendments is such that any conviction of any offence while in immigration detention will result in that person failing the character test,[110] regardless of the 'gravity of the crime, the sentence imposed, or danger they present to the community'.[111] Accordingly, any criminal law infraction is sufficient[112] — for example, possessing a weapon,[113] spitting on an official,[114] or even theoretically breaking a toilet seat.[115]

The lowering of the level of criminality when compared to that required outside immigration detention centres would appear inconsistent with the primary premise of the *Migration Act*: protecting the Australian community. While not attempting to defend destruction of property, or assaults against the person, the short and long-term effect of detention and its alteration of patterns of general behaviour — either in exacerbating underlying problems or by making new ones — must be acknowledged.[116]

Detention for an indeterminate length of time has increased the 'propensity for people to act out of character or engage in anti-social and criminal conduct as a result of the length and circumstances of their detention'.[117] To justify the revocation of a visa on character grounds, as evidenced by disturbances within immigration detention, is irrational and illogical — the character of an individual and their risk to the community cannot be assessed through their actions while indefinitely detained.

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108 Donnelly (n 42) 109.

109 Explanatory Memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (Cth) 1 ('Explanatory Memorandum 2011').

110 *Migration Act* (n 11) s 501(6)(ab).

111 Billings (n 39) 230.

112 *WASB v Minister for Immigration and Citizenship* (2013) 217 FCR 292, 301–2 [38]–[43] (Barker J).

113 *Migration Act* (n 11) s 197B.

114 *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44, 51.

115 *Criminal Code Act 1995* (Cth) s 132.8A.

116 *MZYYO v Minister for Immigration and Citizenship* (2013) 214 FCR 68, 70 [9]–[12]. See *R v Chenarjaafarizad* [2013] NSWSC 388, [58]; Billings (n 39) 231.

117 Billings (n 39) 231. There equally is a large body of research on this topic in Melissa Bull et al, 'Sickness in the System of Long-Term Immigration Detention' (2013) 26(1) *Journal of Refugee Studies* 47.

D *Membership and Association with a Criminal Group, Organisation or Person*

Section 501(6)(b) provides two alternative limbs for failing the character test which may be summarised as the 'membership limb' and the 'association limb'.[118] The former relates to actual membership of a group or organisation suspected of involvement in criminal conduct; the latter is suspicion of mere association.

The nature and scope of association was considered by Spender J, who found that 'association'

> has the connotation that there is an alliance or link or combination between the visa holder with the persons engaged in criminal activity. That alliance, link, or combination reflects adversely on the character of the visa holder. Such a meaning would exclude professional relationships, or those which are merely social or familial. It would exclude the victim of domestic violence.[119]

Notwithstanding this, in establishing association, *Direction No 79* notes that a delegate must have a reasonable suspicion that

> the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation — mere knowledge of criminality of the associate is not, in itself, sufficient to establish association … the association must have some negative bearing upon the person's character.[120]

Some case law has held the notion of association to extend to persons who did not know about the criminal links, and even to those whose link to criminality was mere family connection.[121] As such, it would appear there is no requirement for actual conviction; the test authorises the detention of a person based on a suspicion in relation to the person's lawful association with others.[122] Evidently, the scope of the power is such that it may impact on the right and freedom of association, which can be limited or derogated under international law,[123] and has been historically limited

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118 *Roach v Minister for Immigration and Border Protection* [2016] FCA 750, [23] (Perry J) ('*Roach*').

119 *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 81 [230].

120 *Direction No 79* (n 49) Annexure A s 2 cl 3(5).

121 *Mrishaj v Minister for Immigration and Border Protection* (2016) 247 FCR 224, 232–3 [37] (Besanko J), cited with approval in *Roach* (n 119) [147] (Perry J).

122 See generally Billings (n 39) 229.

123 Freedom of thought, conscience and religion cannot be derogated, but it can be limited: *ICCPR* (n 61) arts 4(2), 18(3). The right of peaceful assembly and the right to freedom of association can be derogated: *ICCPR* (n 61) arts 4, 21, 22. However, contrary legislation is still valid: *Tajjour v New South Wales* (2014) 254 CLR 508, 554 [48] (French CJ), 567 [98] (Hayne J), 576 [136] (Gageler J).

in British[124] and Australian law.[125] However, such limitations on freedom of association are not without controversy. The broadening of the limbs in 2014 was justified as to show that

> [t]he intention is that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. There is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.[126]

The association limb bears many similarities with consorting laws, except without the relevant checks and balances. Consorting laws, even when used judiciously, have long been noted to be 'used against some of the most vulnerable members of community'[127] to the point of being subject to a New South Wales Ombudsman report even as recently as 2016.[128] Criminalising and punishing association is antithetical to the traditional purpose of the criminal justice system, which aims to investigate and punish criminal conspiracies and acts, as they occur.[129] For the purpose of the *Migration Act*, there must be reasonable suspicion of association; that is, suspicion which is 'less than a certainty or a belief, but more than a speculation or idle wondering'.[130] Other legislative instances that aim to curtail the freedom of association, such as restrictions of people on bail[131] or as an element of a sentence,[132] require submissions by prosecution and the state with specific reference to the risk posed by an individual.[133] The association limb of the character test has none of these checks and balances.

Furthermore, regardless of membership or association, there remain issues with defining criminal activity. The notion has yet to be judicially considered, although the Explanatory Memorandum 2014 provides that the section aims to regulate '[a] person who is a member of a criminal group or organisation, such as a criminal

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124 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 34 [2.19].

125 *Crimes Act 1900* (NSW) s 93X.

126 Explanatory Memorandum 2014 (n 22) 9 [41].

127 Jane Sanders, 'Consorting Laws in New South Wales' (2013) 38(2) *Alternative Law Journal* 130, 130.

128 New South Wales Ombudsman, *The Consorting Law: Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900* (Report, April 2016).

129 David Brown et al, *Criminal Law: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) 101.

130 *Direction No 79* (n 49) Annexure A s 2 cl 3(2).

131 *Bail Act 2013* (NSW) s 25.

132 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A.

133 New South Wales Ombudsman (n 128) 23.

motorcycle gang, terrorist organisation or other group involved in war crimes, people smuggling or people trafficking'.[134]

The obvious issue with the provisions is the lack of clarity: there is no express limitation on the kinds of criminal activities about which Parliament is concerned, or their seriousness.[135] Thus, groups that regularly engage in criminal activity could be found to include: members of religious orders that engage in child sex abuse to an extent of more than 40%;[136] environmental groups breaking anti-protest laws;[137] or even Teachers for Refugees who breach the *Australian Border Force Act 2015* (Cth).[138] As it stands, of the 184 visa cancellations under s 501(6)(b) to date, 139 (76%) involved suspected members or associates.[139]

E *Risk of Arbitrary Detention*

It is evident that there are varied and wide grounds on which a non-citizen may not pass the character test. As outlined above, in circumstances where a visa is cancelled under character grounds, the consequentially illegal non-citizen shall be taken into immigration detention until they are granted a new visa or removed from Australia. Visa cancellation under a character ground precludes any further application for a visa, as well as the automatic refusal of any visa currently applied for, except for a protection visa.[140] Importantly, if the cancelled visa was a protection visa, the non-citizen is precluded from applying for any further protection visa unless the Minister decides to exercise their personal discretion in lifting the bar to application.[141]

While art 33(2) of the *Refugee Convention* might suggest it can be used to avoid Australia's non-refoulement obligations, other binding international obligations prevent

134 Explanatory Memorandum 2014 (n 22) 9.

135 *Roach* (n 118) [79].

136 Phillipa McDonald and Riley Stuart, 'Royal Commission into Child Sex Abuse: 1800 Alleged Perpetrators Identified in Catholic Church', *ABC News* (online, 7 February 2017) <https://www.abc.net.au/news/2017-02-06/royal-commission-into-child-sexual-abuse-begins-in-sydney/8242600>.

137 See Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (WA).

138 Paul Farrell and Josh Wall, 'Nauru Teachers Speak out for Children: "We Don't Have to Torture Them"', *The Guardian Australia* (online, 11 August 2016) <https://www.theguardian.com/news/2016/aug/11/nauru-teachers-speak-out-for-children-we-dont-have-to-torture-them>.

139 Justice John Griffiths, 'Review of Visa Cancellation or Refusal Decisions on Character Grounds: A Comparative Analysis' (Speech, Public Law Weekend, Australian National University, 2–3 November 2018) 10.

140 *Migration Act* (n 11) ss 501E, 501F.

141 Ibid s 48B.

this — specifically, the *ICCPR*[142] and the *CAT*.[143] *Direction No 41* acknowledges Australia's obligations under international law as absolute:

> There is no balancing of other factors if the removal of a person from Australia, including if that removal followed as a consequence of the refusal or cancellation of a visa, would amount to refoulement under the *ICCPR* or the *CAT*.[144]

At its widest, a 'legal limbo' can occur when a non-citizen, residing in Australia under a protection visa, does not pass the character grounds (thus being liable to mandatory, indefinite detention) and the Minister fails to make specific allowances for their return.[145] Figure 1 outlines the countries of origin for character revocations in 2017; it is obvious that certain countries raise first instance concerns with non-refoulement.[146]

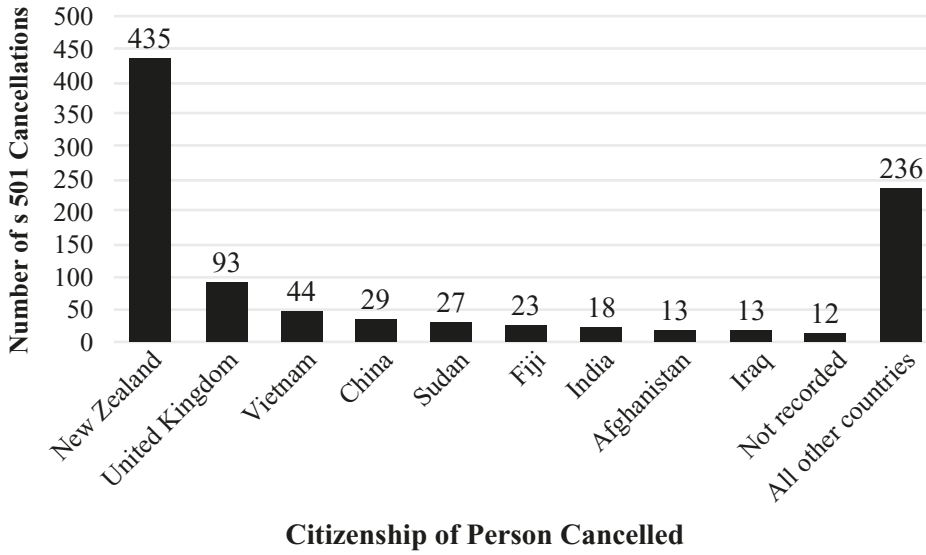

Figure 1: Top 10 Nationalities Featured in Character Cancellations from 1 July 2018–30 June 2019[147]

142 *ICCPR* (n 61) arts 6(1), 7, which give the right to life and the right to not be subject to torture.

143 *CAT* (n 62) art 3(1)

144 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 41: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (15 June 2009) cl 10.4.3(1)(c).

145 A good example of this limbo can be found in *Greene v Assistant Minister for Home Affairs* [2018] FCA 919.

146 Such as Sudan, Iraq, Iran and China, whose human rights records are wanting.

147 Department of Home Affairs (n 57).

The case of Mr NK illustrates this very real risk.[148] Mr NK legally entered Australia in 1989 from the People's Republic of China on a student visa. After being found guilty of two counts of murder, his visa was cancelled. After serving a 20-year sentence, he was transferred to VIDC. He was unable to be returned to China under the principles of non-refoulement and spent four years in VIDC. The Government has commented specifically on the matter:

> 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 [*Migration 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.[149]

Mr NK was found by an Australian Human Rights Commission report to have been arbitrarily detained.[150] Despite the reassurance of the government, a 2006 Commonwealth Ombudsman report into the legislation more generally found that it was not uncommon for persons subject to a character cancellation to spend more time in immigration detention than in prison.[151] This is unsurprising when recalling the effect of calculating concurrent sentencing in aggregate. The effect of this legal limbo is a violation of an individual's right to be free from arbitrary detention.[152] It should be noted the requirement that detention be not arbitrary is distinct from that which requires detention to be lawful.[153]

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148 Australian Human Rights Commission, *Mr NK v Commonwealth of Australia Department of Immigration and Citizenship* (Report No 43, February 2011).

149 Department of Immigration and Citizenship, Submission No 16 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* (May 2011) 8.

150 Australian Human Rights Commission (n 148) 101.

151 Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs: Administration of s 501 of the* Migration Act 1958 *as it Applies to Long-Term Residents* (Report No 1, February 2006) ('*Administration of s 501 of the* Migration Act 1958 *as it Applies to Long-Term Residents*').

152 Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); Human Rights Committee, *Views: Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('*C v Australia*'); Human Rights Committee, *Views: Communication No 1014/2001*, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*').

153 Human Rights Committee, *Views: Communication No 305/1988,* 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) ('*Hugo van Alphen v the Netherlands*').

Article 9(1) of the *ICCPR* provides that

> [e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Even when not caught in a legal limbo, the risk of arbitrary detention is, under the current regime, of issue. The Full Court of the Federal Court has interpreted art 9(1) as a right that must be interpreted broadly, looking case-by-case at whether the detention is disproportionate or unjust.[154] International case law relating to Australia has held that detention should not continue beyond a period which is justifiable by the state[155] and where there are less invasive means available which would achieve the same end.[156] I agree with Chris Sidoti that the current mandatory detention regime is inherently arbitrary.[157]

The length of detention in immigration detention can be attributed to the current administration of s 501, which is coordinated through the National Character Consideration Centre ('NCCC').[158] The role of the NCCC is, inter alia, to identify individuals subject to visa cancellations under the character test and to prepare their Notification of Intention to Consider Cancellation.[159] This requires the compilation of documents outlining criminal histories, court transcripts and family information.[160] For non-citizens who arrived in Australia prior to 1980, the files may not be digitised and can therefore require access to paper files.[161]

The methodology employed by the NCCC is piecemeal, relying upon referrals from community 'dob ins' and various state and territory correction services.[162] One 2018

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154 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 92.

155 UN Human Rights Committee, *Views: Communication No 1442/2005*, 97th sess, UN Doc CCPR/C/97/D/1442/2005 (23 November 2009) ('*Kwok Yin Fong v Australia'*); UN Human Rights Committee, *Views: Communication No 625/1995*, 68th sess, UN Doc CCPR/C/68/D/625/1995 (28 April 2000) ('*Freemantle v Jamaica*').

156 International Organization for Migration, *Immigration Detention and Alternatives to Detention* (Global Compact Thematic Paper, 2016).

157 Chris Sidoti, 'Immigration Detention: A Question of Human Rights' (1999) 75 (Spring) *Australian Law Reform Commission Reform Journal* 36.

158 Commonwealth Ombudsman, *The Administration of Section 501 of the* Migration Act 1958 (n 71) 12.

159 Ibid.

160 Ibid 13.

161 Ibid.

162 Ibid 12.

report noted over 30,000 calls a year were received,[163] processed by only 92 staff.[164] There is no current departmental standard or direction for the timeframe in which a revocation is to be processed. The arbitrary nature of the regime is highlighted by the fact that, in select instances, Australian citizens have been detained and deported for not passing the character test.[165] After the arrests of the citizens, a report by the former Inspector General of Intelligence and Security found the NCCC lacked basic quality control over its decisions, and that 'officers do not consistently demonstrate the requisite knowledge, understanding and skills to fairly and lawfully exercise the power to detain'.[166]

In these instances, compensation was paid to the Australian citizens.[167] Of issue, however, is compensation for non-citizens. The question was raised in the primary judgement of *Fernando v Commonwealth [No 5]*[168] where nominal damages of $1.00 were awarded for 1,203 days of false imprisonment.[169] The quantum of damages was based on jurisprudence from the United Kingdom which adopted a 'but for' test that found the individual did not suffer any loss because he would have suffered the loss anyway.[170] As a result, Mr Fernando was denied substantial or aggravated damages but was granted $25,000 in exemplary damages by the primary judge.[171] On appeal, the Full Court set aside the exemplary damages.[172]

The result of this line of case law and the application of the 'but for' test is that the Commonwealth of Australia is immunised against paying damages to a non-citizen who is a victim of false imprisonment under the *Migration Act*.[173]

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163 'Call Centre Hotline to Report Illegal Citizens' (Web Page, 20 April 2016) <https://cxcentral.com.au/industry-news/call-centre-report-illegal-citizens/>.

164 Commonwealth Ombudsman, *The Administration of Section 501 of the* Migration Act 1958 (n 71) 12.

165 Ben Doherty, 'Australian Citizens Wrongly Detained because of Immigration Failures', *The Guardian Australia* (online, 2 February 2018) <https://www.theguardian.com/australia-news/2018/feb/02/australian-citizens-wrongfully-detained-because-of-immigration-failures-report-finds>.

166 Vivienne Thom, *Independent Review for the Department of Immigration and Border Protection into the Circumstances of the Detention of Two Australian Citizens* (Final Report, June 2017) 25.

167 Rory Callinan, 'Secret Payout for Wrongfully Deported Woman', *Sydney Morning Herald* (online, 1 December 2006) <https://www.smh.com.au/national/secret-payout-for-wrongfully-deported-woman-20061201-gdoy55.html>.

168 [2013] FCA 901.

169 Ibid [99]

170 Ibid [93].

171 Ibid [158].

172 *Fernando v Commonwealth* (2014) 231 FCR 251.

173 Michael Douglas, 'What is the Value of Freedom? Nominal Damages for False Imprisonment: *Fernando v Commonwealth of Australia [No 5]*' (2013) 21(3) *Tort Law Review* 117.

V Difficulty with Review

Thus, it is clear that in addition to the wide grounds on which an individual may not pass the character test, the consequence — mandatory, indefinite detention — is severe, and accordingly it is important to have a robust system of review. However, layers of legal and practical barriers significantly impede effective review of migration decisions.

The relevant decision-maker denotes the relevant avenue by which an applicant, or appellant, may attempt to seek review: if the decision was made by a delegate of the Minister, a merits review by the Administrative Appeals Tribunal ('AAT') is available; if the decision is made by the Minister or Assistant Minister, it is subject only to judicial review in the Federal Court. A particularly notable feature of Australia's deportation system is that the only instance when an individual may provide live evidence to a Court or Tribunal is on the day of hearing.[174] Unfortunately, there does not appear to be any explicit, compiled data on the percentage of visa cancellation decisions made by each type of decision-maker, be it the Minister, Assistant Minister or a delegate of the Minister.

A *Merits Review*

A decision by a delegate of the Minister is liable to merits review by the AAT. The AAT is the by-product of an identified need for a 'comprehensive, coherent, accessible and integrated system of administrative review'[175] aimed to counter-balance 'the traditional reticence of the administrative decision-maker … The citizen is thus enabled to challenge, and to challenge effectively, administrative action which affects his interests'.[176]

Ministerial Directions bind not only the Minister's delegates, but also the AAT since it stands in the shoes of a primary decision-maker.[177] This is important, as any failure to abide by a Direction results in jurisdictional error.[178] While the AAT thus attempts to 'afford procedural fairness, there is little discretion, if any, in the application of

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174 See *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 332 [16] (Kiefel, Bell and Keane JJ) where it was held that there is no universal rule that procedural fairness requires oral hearings.

175 Justice Duncan Kerr, 'Reviewing the Reviewer: The Administrative Appeals Tribunal, Administrative Review Council and the Road Ahead' (Speech, Annual Jack Richardson Oration, 15 September 2015) 1.

176 Justice Gerard Brennan, *Administrative Review Council Annual Report 1976–1977* (Report, 1977) foreword.

177 Chantal Bostock, 'The Effects of Ministerial Directions on Tribunal Independence' (2011) 66 *Australian Institute of Administrative Law Forum* 33; *Singh (Migration)* [2017] AATA 850 ('*Singh*').

178 *Paerau v Minister for Immigration and Border Protection* (2014) 219 FCR 504.

the rules'.[179] Any attempt to seek merits review of a decision of the delegate of the Minister is thus, from the outset, fraught with political overtones.

A first barrier to effective merits review is the procedural formalities that surround visa cancellation reviews. Individuals whose visas have been cancelled are subject to immediate mandatory detention and have difficulty accessing legal help. Detainees may make free local calls, but must pay for international or interstate calls.[180] In larger detention centres, 'mail can sometimes take up to three or five days to get from administration to the correct detainee'.[181] Detention thus practically affects the ability for individuals to obtain evidence.[182] Many litigants do not have a strong grasp of the English language[183] and have limited understanding of the immigration process.[184] These limitations must be viewed in light of the model the AAT has adopted from its inception, which is

> [i]n part the strength of legal culture, in part, the unwillingness to move from the known and well-established rules of evidence and in part, the fact that tribunals are sited in an adjudicative system the final tiers of which traditionally operate in an adversarial fashion.[185]

Detention equally affects the ability of litigants to access legal representation, which is necessary in a quasi-adversarial system. The inhibiting effect of failing to secure legal representation is best highlighted by a review of the Australian Law Reform Commission; applicants who gained legal representation succeeded in the AAT 53.5% of the time, compared to a 16.7% success rate if self-represented.[186] Taking into account that legal aid may have been more readily available to applicants with more meritorious claims, such a divide is still indicative of practical barriers to justice created by implementing a quasi-adversarial merits review system that has its roots in traditional legal fora.

The limited scope for effective review of a visa cancellation is put into perspective when, as noted above, only 13% of all visa cancellations on character grounds are

179 Bostock (n 177) 38.

180 Australian Human Rights Commission, *2011 Immigration Detention at Villawood* (Report No 12, 2011) [10.8].

181 Ibid.

182 For a good example, see *Rountree v Minister for Immigration and Citizenship* (2008) 100 ALD 251.

183 According to one review by Bostock (n 177), 19% of applicants used interpreters.

184 Commonwealth Ombudsman, *Administration of s 501 of the* Migration Act 1958 *as it Applies to Long-Term Residents* (n 151) 30.

185 Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (AIJA Inc, 2006) 66.

186 Australian Law Reform Commission, *Part One: Empirical Information about the Administrative Appeals Tribunal* (Report, 1999) [7.5].

eligible for merits review and 39% of these were overturned by the AAT in 2016.[187] That such a high rate of decisions are overturned is positive, but it is further reflective of the likelihood that a decision of the Minister, if subject to the same merits review as a delegate, would be overturned.

Despite the limited number of decisions subject to merits review, the Minister has the unique power to overturn AAT decisions[188] if found to be in the public interest.[189] The development of the power in 2014 was justified because

> the community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted from merits review. Therefore, it is appropriate that the Minister have the power to be the final decision-maker in the public interest.[190]

This reform has attracted considerable criticism, primarily that it is antithetical to the purpose of administrative law[191] and that it has had a negative impact on the independence of the AAT.[192] The power has only been used in 30 instances involving non-cancellation, and in eight instances to overrule the AAT's refusal to grant a visa.[193]

B *Judicial Review*

The state of judicial review with regards to s 501 has been the subject of recent scrutiny.[194] However, it is not a new topic; it has been remarked that 'in every age' the role of the judiciary in public law is subject to debate.[195]

Challenges from most AAT visa reviews on the merits will eventually fall to the Federal Court by way of judicial review.[196] Only approximately 12% of applicants from the AAT are successful in establishing jurisdictional error.[197] Equally, when

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187 Keith Moor, 'Tribunal Lets Fake Iranian Refugees Stay', *Herald Sun* (online, 22 November 2018) <https://www.heraldsun.com.au/news/tribunal-lets-fake-iranian-refugees-stay-in-australia/news-story/7f22e001f22c30ac94a12fb028c85126>.

188 *Migration Act* (n 11) ss 133A, 133C.

189 Ibid s 133A(1).

190 Explanatory Memorandum 2014 (n 22) sch 2, 27.

191 *Singh* (n 177).

192 Bostock (n 177).

193 Griffiths (n 139) 9.

194 Griffiths (n 139).

195 John McMillian, 'Judicial Restraint and Activism in Administrative Law' (2002) 30(2) *Federal Law Review* 335, 370.

196 *Migration Act* (n 11) s 477(1); *Judiciary Act 1901* (Cth) s 39B.

197 Administrative Appeals Tribunal, *Migration Review Tribunal and Refugee Review Tribunal Annual Report 2014–15* (Report, 2015).

decisions are made by either the Minister or Assistant Minister, they are subject only to judicial review in the Federal Court, assuming the Minister has been validly appointed.[198] Table 3 illustrates the volume of litigation with respect to judicial review.

Table 3: Judicial Review Lodgements for Delegate and Minister s 501 Decisions[199]

Financial Year	Delegate Decisions	Minister Decisions	Total
2009/2010	5	0	5
2010/2011	20	<5	22
2011/2012	33	10	43
2012/2013	37	5	42
2013/2014	34	17	51
2014/2015	18	33	51
2015/2016	17	65	82
2016/2017	44	125	169
2017/2018 (to 31 May 2018)	93	106	199
Total	**301**	**363**	**664**

Specific to the cancellation powers, the judiciary has expressed disquiet about the way in which the power is used.[200] The overall difficulty with judicial review of cancellation decisions is perhaps best summarised by the former Minister for Immigration and Citizenship, Christopher Evans:

> In a general sense I have formed the view that I have too much power. The [*Migration Act*] is unlike any Act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought

198 The legal issue of the possible invalidity of Peter Dutton's appointment was considered in *FQM18 v Minister for Home Affairs* [2019] FCA 1263, [28]–[32]. See also Janina Boughey, 'The Constitutional Crisis that Keeps on Giving: Could an Invalidly Appointed Minister's Decision be Challenged via Judicial Review?', *AUSPUBLAW* (Web Page, 31 August 2018) <https://auspublaw.org/2018/08/the-constitutional-crisis-that-keeps-on-giving/>.

199 Griffiths (n 139) 8.

200 *Tanielu* (n 89) 427–9 [7]–[19] (Mortimer J); *Cotterill v Minister for Immigration and Border Protection* (2016) 240 FCR 29, 53 [135] (Kenny and Perry JJ). See *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158 ('*Eden*'), where despite overturning the decision of Logan J at first instance, the Court held that the decision was not one 'that everyone would necessarily agree with': at 179 [99] (Griffiths J).

> was to be a power that was to be used in rare cases has become very much the norm.[201]

In 2017, Liberty Victoria found the Minister's discretion had expanded to 47 personal, national, or public interest powers.[202] This is compared to the Prime Minister's three, or the Minister for Defence's two.[203] As noted by the Senate Select Committee on Ministerial Discretion in Migration Matters, it is concerning 'that vesting a non-delegable, non-reviewable and non-compellable discretion with the immigration minister without an adequate accountability mechanism creates both the possibility and perception of corruption'.[204]

This position has been made more complicated since the implementation of mandatory visa cancellations in 2014. The 'mechanical' nature of mandatory decision-making combined with strict Ministerial Directions results in cancellations that are made 'without the checks and balances usually associated with administrative decisions'.[205] Of the 3,432 mandatory cancellations made between 2014 and 2018, over 77% resulted in an application for revocation, 31% of which were approved and the cancellation overturned.[206] This is demonstrative not only of the need for case-by-case merits review, but also of the extra workload placed on administrative decision-makers.

Traditionally, Australian courts have deferred to the executive when making administrative decisions, believing Ministers to be accountable to Parliament.[207] In 2001, Parliament attempted to exclude completely judicial review through the introduction of a privative clause in the *Migration Act*.[208] The High Court found that while the privative clause was constitutionally valid, it could not apply to instances of jurisdictional error. Accordingly, migration litigation has progressively widened the concept

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201 Commonwealth, *Parliamentary Debates*, Senate Standing Committee on Legal and Constitutional Affairs, 19 February 2008, 31 (Christopher Evans, Minister for Immigration and Citizenship).

202 Liberty Victoria (n 8) 9.

203 Ibid.

204 Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Inquiry into Ministerial Discretion in Migration Matters* (Report, 2004).

205 Amy Nethery, 'Partialism, Executive Control and the Deportation of Permanent Residents from Australia' (2012) 18(6) *Population, Space and Place* 722, 735.

206 Griffiths (n 139).

207 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 503 [334] (Kirby J); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCA 1, 23 [70] (Griffiths J) ('*Stretton*'). See generally Joel Townsend, 'Adequacy of Risk Assessment in the Exercise of the Character Cancellation Power under the Migration Act 1958' (2017) 28(2) *Public Law Review* 158.

208 Introduced by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). This is after having removed migration decisions from the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in 1994 through the *Migration Reform Act 1992* (Cth).

of jurisdictional error, for 'as each new decision pushes the boundaries further, [it] gives rise to a spate of litigation seeking to confine or extend its precedential worth'.[209] The High Court's decision has been hailed as neutralising 'the potentially devastating prohibition to access to judicial review'.[210]

Table 4: Judicial Review Outcomes for Minister Decisions[211]

Financial Year	Applicant Withdrawal	Department Loss	Department Win	Department Withdrawal
2009/2010	0	0	0	0
2010/2011	0	0	0	0
2011/2012	<5	<5	6	0
2012/2013	<5	<5	<5	<5
2013/2014	0	5	<5	<5
2014/2015	<5	4	18	<5
2015/2016	11	7	21	8
2016/2017	12	10	43	11
2017/2018 (to 31 May 2018)	15	13	19	13
Sub Total	**45**	**41**	**113**	**36**
Total	**235**			

Evidently, approximately one third of the review applications were successful.[212] This is 'higher than the outcome of judicial review challenges in the Federal Court in relation to other Commonwealth administrative action'.[213] The increased scrutiny by the judiciary has been noted by observers and may 'also partly result from a concern that decision-makers are simply rubber stamping draft statements of reasons'.[214]

In order to achieve a positive result for a person subject to visa cancellation, applicants for judicial review must demonstrate that the decision falls under one of the grounds of review. Practically, in the context of Ministerial decisions, applications for judicial review will aim to demonstrate that the decision of the Minister, or delegate, was unreasonable (thereby demonstrating that there has been some form of jurisdictional error).

209 Victor Kline, 'The Road Back from Kafka's Castle: Towards a Better System of Visa Application and Review in Australia' (2018) 43(3) *Alternative Law Journal* 216.

210 Nicholas Poynder, LexisNexis, *Australian Immigration Law* (online at 6 April 2019) [120,005].

211 Griffiths (n 139) 8.

212 Of the 235 total review applications made between 1 July 2009 and 31 May 2018, 77 were either lost or withdrawn by the Department.

213 Griffiths (n 139) 10.

214 Ibid 13.

Findings of legal unreasonableness are rare,[215] particularly where reasons are provided that demonstrate a justification for the exercise of power.[216] Where reasons for a decision are provided, they will provide the focal point for consideration of whether the decision is unreasonable.[217] Legal unreasonableness thus does not depend on a 'definitional formulae or one verbal description rather than another',[218] but requires demonstration of some flaw in the reasoning process, or that the decision was outcome-focused.

There are two different contexts in which the concept of unreasonableness can be employed: first, a conclusion after the identification of jurisdictional error for a recognised species of error;[219] and second, an 'outcome-focused' conclusion.[220] It would serve no purpose to outline a list of decisions which denote what has and has not amounted to jurisdictional error; suffice it to say only the most egregious of decisions by the Minister would be liable to be overturned.[221] One Federal Court judge noted:

> At some stage, courts may have to confront more squarely the increasing disparity of resources and capacities attending the way judicial review proceedings in the migration jurisdiction are conducted. They may have to confront what needs to be done to ensure that what occurs in Ch III courts does not appear to be but a veneer of fairness.[222]

The value of procedural fairness cannot be understated; it is the means through which the state may legitimise its administration by fostering the belief that 'government may not act against the governed in a clandestine or arbitrary manner'.[223] When arising from a mandatory cancellation, the principles of natural justice do not apply.[224] The civic and legal use and concept of the phrase 'natural justice' has developed over a long and disparate history.[225] As noted by Ormrod LJ,

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215 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377 [113] (Gageler J); *Stretton* (n 207) 3 [4]–[5], 19 [61] (Griffith J).

216 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 574 [84].

217 Ibid.

218 Ibid 567 [59]; *Stretton* (n 207) 3 [2].

219 See, eg, *Johnson v Minister for Home Affairs* [2018] FCA 1940.

220 *Eden* (n 200) 171 [60].

221 *Ogawa* (n 74). Administrative inconsistency as a basis for unreasonableness was raised: at [105] (Logan J).

222 *MZAIB v Minister for Immigration and Border Protection* (2015) 238 FCR 158, 186 [124] (Mortimer J).

223 Laurence Tribe, 'Developments in the Law: Zoning' (1977–8) 91(7) *Harvard Law Review* 1427, 1507–8.

224 *Migration Act* (n 11) s 501(5).

225 *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676, 681.

> the phrase 'the requirements of natural justice' seems to be mesmerising people at the moment. This must, I think, be due to the apposition of the words 'natural' and 'justice'. It has been pointed out many times that the word 'natural' adds nothing except perhaps a hint of nostalgia for the good old days when nasty things did not happen.[226]

The removal of the principles of natural justice in mandatory visa cancellation decisions was justified on the basis that 'natural justice will have already been provided to the non-citizen through the revocation process'.[227] A fundamental flaw in this reasoning is the observation that affording natural justice is not a simple common law right subject to legislative amendment, but a 'condition governing the exercise of statutory power'.[228] The position is best summarised by the former Chief Justice of the High Court, Robert French:

> A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker, who may thereby be led into factual or other error.[229]

In *Roach*,[230] Perry J, while finding s 501(6)(b) of the *Migration Act* to be a deeming provision,[231] overturned the Minister's decision on the basis that, inter alia, he denied the applicant natural justice.[232] This implied requirement is a contestable step in the decision, considering the express revocation in the legislation of the entitlement to natural justice. Subsequently, Charlesworth J has held a contrary view to Perry J, arguing that '[t]he s 501(3) discretion would, in my view, be validly exercised if the Minister gave no thought to what realistic opportunity would arise for the particular visa-holder under s 501C(4)'.[233]

I agree with those stakeholders that submitted that due to the mandatory nature of detention in Australia the seriousness of a visa cancellation necessitates the need for procedural fairness.[234] Considering the drastic consequences of removal, the system

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226 *Norwest Holst Ltd v Secretary of State for Trade* [1978] Ch 201, 226.

227 Explanatory Memorandum 2014 (n 22) 15.

228 *Kioa v West* (1985) 159 CLR 550, 617 (Brennan J).

229 Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law: Concepts and Context* (Cambridge University Press, 2014) 24, 47.

230 *Roach* (n 118).

231 Ibid [142] (Perry J).

232 Ibid [115] (Perry J).

233 *Stevens v Minister for Immigration and Border Protection* [2016] FCA 1280, [79].

234 Australian National University, Submission No 59 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014* (2017) 22.

as it stands would seem to provide little relief for those caught in limbo.[235] Indeed, the cumulative effect is immunisation of visa cancellations against effective review.

VI Solutions

Multiple solutions over three decades have been offered with respect to the character test; it has been the subject of two Commonwealth Ombudsman reports[236] and a Senate Select Committee in 2004[237] and 2019.[238] In 2004, the Senate Select Committee found that there was 'a pressing need for reform'.[239] To date, the Minister has been reluctant to implement any recommendations.

With the high volume of litigation in the past two years, and the number of judicial review applications being listed currently for 2021,[240] there have been calls for either more judicial officers[241] or the establishment of a new Migration Court of Australia.[242] I argue that although possible, the establishment of a new court is reactive and superficial. Such a court would not address the underlying issues that impact on the review of Ministerial decisions made pursuant to the *Migration Act*. I therefore suggest six reforms that strike closer to the heart of the problem.

A *Repeal Mandatory Cancellation Powers*

Of primary concern is the current mandatory visa cancellation power. Mandatory cancellations suffer innate weaknesses and can lead to unfair consequences. This is highlighted perhaps best in instances where Australian citizens were mistaken for being non-citizens and detained. Equally, there have been reported instances of at

235 Which provided the basis for allowing an appeal in *MSS v Belgium & Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

236 Commonwealth Ombudsman, *The Administration of Section 501 of the* Migration Act 1958 (n 71); Commonwealth Ombudsman, *Administration of s 501 of the* Migration Act 1958 *as it Applies to Long-Term Residents* (n 151).

237 Senate Select Committee on Ministerial Discretion in Migration Matters (n 204).

238 Joint Standing Committee on Migration, Parliament of Australia, *The Report of the Inquiry into Review Processes Associated with Cancellations Made on Criminal Grounds* (Report, February 2019).

239 Senate Select Committee on Ministerial Discretion in Migration Matters (n 204) 165.

240 Nicola Berkovic, 'Blow out in Court Cases for Migrants', *The Australian* (online, 25 October 2018) <https://myaccount.news.com.au/sites/theaustralian/subscribe.html?sourceCode=TAWEB_WRE170_a_GGL&mode=premium&dest=https://www.theaustralian.com.au/business/legal-affairs/blowout-in-court-cases-for-migrants/news-story/41ebb3b8c176fcd23bd6c3e334025fd3&memtype=anonymous>.

241 Aaron Patrick, 'Justice Delayed: Federal Court Judgments Can Take Years to Write', *Financial Review* (online, 26 October 2018) <https://www.afr.com/business/legal/justice-delayed-federal-court-judgments-can-take-years-to-write-20181026-h174tj>.

242 Kline (n 209).

least one Australian citizen being deported.[243] In 2013, a mandatory cancellation provision with respect to student visas was repealed after the government acknowledged the amendment would allow the Minister 'the discretion to consider the circumstances of the student and to decide if cancellation is warranted based on the merits of the case put forward'.[244]

An obvious amendment is to remove the mandatory cancellation power entirely. Given the current threshold of 12 months' imprisonment, a majority of cases that are directly concerned with community safety could adequately be dealt with under the remaining cancellation powers.[245]

B *Redefine Serious Criminal Offences*

A second important amendment to the current legislation is to modify the criteria on which an individual is found to be a serious criminal. One modification could be to reflect the nature of the offence, not the time imprisoned. This would see the exclusion clause become aligned with the one true autonomous meaning of art 33(2) of the *Refugee Convention*. Such a model is not without precedent — the United Kingdom has adopted a 'nature of the offence' approach since 2002.[246] Equally, if an offence-based model is adopted, it should not be geographically linked to Australia. To do so would be inconsistent with a policy of community safety.[247]

Further, the 12-month imprisonment threshold on which the Minister is mandated to revoke a visa could be raised to 24 months, reflecting the previous definition of serious criminal offence in 2014. For an individual who has been sentenced to 12 months' imprisonment to be effectively banished from Australia is disproportionate to the potential level of criminality, inconsistent with the principles of the criminal justice system in being purely punitive, and amounts to a secondary punishment for an individual by virtue of failing to hold citizenship. Calculating sentencing time as aggregate would also appear to be unfounded. I recommend that s 501(7A) be repealed.

C *Immigration Detention Centre Offences*

The current provisions relating to offences in an immigration detention centre are illogical and inconsistent with both the purpose of the *Migration Act* and the level of criminality required to trigger it. While safety in immigration detention centres

243 Doherty (n 165).

244 Explanatory Statement, *Migration Legislation Amendment Regulation 2013 (No 1)* (Cth) 21 ('Explanatory Statement').

245 *Migration Act* (n 11) ss 501(2)–501(3).

246 *Nationality Immigration and Asylum Act 2002* (UK) s 72.

247 This notion of geographic disconnect to a level of criminality is being promoted by the proposed Migration Amendment (Strengthening the Character Test) Bill 2019.

is a laudable policy objective, it can be achieved by imposing the same criminality threshold for offences that occur in civil society.[248]

D *Specify the Meaning of Association*

Finally, a short-term solution is clarification of 'association'.[249] This can either be through legislative amendment, Ministerial Directions, or the common law. As it stands, the notion of association goes above and beyond the concept of consorting and fails to have any of the checks and balances. While the desire to cancel individual visas on the basis of a dangerous criminal organisation is understandable, the breadth and scope of the power is unreasonable and is compounded by the inability to have an effective review mechanism.

E *Memorandum between NCCC and Government*

As promoted by the 2016 Commonwealth Ombudsman report, the Minister and Department can reduce the time spent by individuals in immigration detention centres through the adoption of a standard national operation procedure aimed at identifying convicted individuals liable for mandatory visa cancellation.[250] The solution could develop on the current, sporadic practice which includes limited access to internal data including sentencing remarks, the conviction, family information and migration history.[251]

Ensuring a streamlined process would help to reduce the time non-citizens spend in immigration detention, and further serve as a check and balance against the possible deportation of Australian citizens. Considering the current 12-month threshold, if the NCCC began the process from the moment of incarceration, it is possible that upon release the individual could be returned to their country of origin. This in turn would reduce the economic and administrative strain on immigration detention centres. It is noted, however, that this approach allows those detained limited opportunity to participate in programs whilst detained as part of demonstrating rehabilitation.

F *Removing Ministerial Override Power of the AAT*

The unique power of the Minister to overturn a merits review decision is antithetical to the purpose of independence in administrative decision-making and review. This is especially so where the Minister will inevitably be involved in cases that are political.[252]

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248 That being the nature of the offence, 12 months or 24 months.

249 *Migration Act* (n 11) s 501(6)(b)(i).

250 Commonwealth Ombudsman, *The Administration of Section 501 of the* Migration Act 1958 (n 71) Part 6.

251 Ibid.

252 *Anaki v Minister for Immigration and Border Protection* [2018] FCAFC 195.

Since at least 1985, there have been submissions that decisions by the Minister should be subject to some form of external review.[253] That is, in effect, to open Ministerial decisions with respect to visa decisions to merits review. It is telling that as of current merits review statistics, 30% of migration cases subject to merits review are overturned.[254] Considering the difference between the individual making a decision is purely titular (in that the Minister does not require special qualifications nor expertise to make visa cancellation decisions) it is an easy process to imagine these statistics would be the same, if not higher, if Ministerial decisions were also subject to merits review.

Currently, the Minister is neither personally nor politically accountable when overturning a merits review decision. The provision should be amended so that the Minister must advise Parliament at every instance of exercising personal power, as they are required to do under other provisions of the *Migration Act*.[255]

VII Conclusion

The tension between national and community security and the humanitarian principles underlying the *Refugee Convention* would appear global and persistent.[256] States will, and should, retain the power to determine who enters, and resides, within their borders.[257] In Australia, this tension has been the subject of continuous public debate for at least the past 25 years. Despite criticisms, the favouring of security over humanitarian principles has been the result of conscious, explicit policy choices by successive Australian governments — both Labor and Liberal — as supported by the Australian public.

This is not to accept, however, that the model the Australian government has adopted currently, with respect to visa holders, should be sacrosanct and above commentary. There are obvious, fundamental flaws in the God-like powers granted to the Minister. This position is best summarised by the UN Special Rapporteur on the Human Rights

253 Australian Human Rights Commission, *Human Rights and the Migration Act 1958* (Report No 13, April 1985).

254 Administrative Appeals Tribunal, *Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial Year to 31 March 2020* (Report, April 2020) 4.

255 *Migration Act* (n 11) ss 351, 417.

256 An example is the United States' response to the migrant caravan: Jonathan Blitzer, 'Donald Trump, The Migrant Caravan, and a Manufactured Crisis at the US Border', *The New Yorker* (online, 14 November 2018) <https://www.newyorker.com/news/news-desk/donald-trump-the-migrant-caravan-and-a-manufactured-crisis-at-the-us-border>.

257 As was accepted by the majority in *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 where the Minister's ability to hold an individual in detention was not deemed a punishment, but rather a part of the Minister's prerogative powers to control who can, and cannot, enter or exit Australia.

of Migrants, François Crépeau, who noted with respect to s 501 of the *Migration Act* that 'the lack of clarity of the provisions could also risk a politicized and biased use of controls, and be in violation of the principles of legality' as the Minister's powers are not matched with 'the appropriate level of oversight to the country's judiciary'.[258]

As the *Migration Act* currently stands, the ability to cancel visas would appear disproportionate and arbitrary: there is no clear limitation on who is liable to be affected by the association limb; the aggregate sentencing requirements distort the notion of a 'serious crime'; and the consequences of visa cancellations are not matched with a robust system of effective review.

While the aforementioned solutions are all viable, some are more urgently required than others. The mandatory cancellation powers should be repealed for the same reason that other mandatory cancellations under the *Migration Act* have historically been: to allow the Minister to assess the merit of each case.[259] Legislative reform should abolish the AAT override power of the Minister on the basis that such a power is antithetical to the principles of administrative law and has no foundation for its existence. Finally, the time individuals spend in detention is aggravated by improper and ineffective administration that can be reduced through the adoption of standardised communications between the NCCC and various state and territory facilities.

On 4 July 2019, the Migration Amendment (Strengthening the Character Test) Bill 2019 was re-introduced to Parliament, after its initial lapse at the dissolution of the 45th Commonwealth Parliament. The Bill seeks to add additional grounds by which an individual will fail the character test. Primarily, the Bill aims to introduce an additional criterion where an individual is convicted of a 'designated offence'[260] regardless of geographic location or whether certain ancillary offences have been committed. The Bill is particularly concerned with capturing

> not only those non-citizens that commit designated offences, as specified … [but also those] who, without committing the physical elements … have a level of involvement in the commission of a designated offence that gives rise to an offence in and of itself.[261]

Accordingly, the character test will begin to capture a wider sector of non-citizens, exacerbating the issues outlined above without providing any remedies. As it stands, it would appear that the God-like powers of the Minister are only expanding.

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258 François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru*, UN Doc A/HRC/35/2/Add.3 (24 April 2017) 10.

259 Explanatory Statement (n 244) 21.

260 Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth) 4.

261 Ibid 7.