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# Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door

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*Section 501(2) of the Migration Act 1958 (Cth) provides the Minister for Immigration and Border Protection with a wide-ranging power to cancel a visa of a non-citizen who fails a carefully defined character test. This article argues that the decision of Minister for Immigration and Multicultural and Indigenous Affairs v Huynh should be overruled. Two central arguments are advanced. First, on its proper construction, the “national interest” concept is an irrelevant consideration for the purposes of s 501(2). Such a construction favours a narrow approach to s 501(2). The court in Huynh adopted a broad interpretation, holding that the national interest concept may be a relevant consideration when applying s 501(2). Secondly, it is contended that individual factors specific to a non-citizen are a mandatory relevant consideration under s 501(2). For the majority in Huynh, this latter construction was not open given the broad approach adopted in relation to s 501(2) of the Act.*

## INTRODUCTION

The decision of *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh*<sup>1</sup> is arguably one of the most important decisions ever decided on s 501(2) of the *Migration Act 1958* (the Act). In that case, the majority (Kiefel and Bennett JJ) found that although not expressly reflected in s 501(2), that section implicitly permitted a decision-maker to have regard to the criterion of the “national interest.”<sup>2</sup> Such an approach can be viewed as a “broad” construction of the section, given the inherently wide-ranging nature of matters that may be relevant to the national interest criterion.<sup>3</sup>

For the majority in *Huynh*, adoption of the broad approach to s 501(2) meant that specific individual factors personal to a non-citizen could not be implicitly treated as a mandatory relevant consideration.<sup>4</sup> In dissent, although appearing to favour the broad construction of s 501(2) adopted by the majority,<sup>5</sup> Wilcox J was of the view that once a decision-maker selected a particular matter for consideration, he or she was bound to consider that issue properly.<sup>6</sup> However, Wilcox J did not expressly engage with the “national interest” concept.

Since *Huynh* was decided in 2004, a number of cases appear to have followed the majority judgment of Kiefel and Bennett JJ in finding that specific factors, personal to a non-citizen, cannot be treated as a mandatory relevant consideration under s 501(2).<sup>7</sup> Accordingly, these cases appear to have accepted the broad construction to s 501(2) favoured by Kiefel and Bennett JJ in *Huynh*.

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<sup>1</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256.

<sup>2</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>3</sup> *Durani v Minister for Immigration and Border Protection* (2014) 314 ALR 130; [2014] FCAFC 79, [61] (Besanko, Barker and Robertson JJ); *Jione v Minister for Immigration and Border Protection* (2015) 232 FCR 120; [2015] FCA 144, [44] (Buchanan J).

<sup>4</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>5</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [43].

<sup>6</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh*; 139 FCR 505; [2004] FCAFC 256, [46].

<sup>7</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; [2006] HCA 50, [127]–[129] (Heydon and Crennan JJ); *Sales v Minister for Immigration and Citizenship* (2007) 99 ALD 253; [2007] FCA 2094, [15] (Flick J); *Roesner v Minister for Immigration and Border Protection* [2015] FCA 68, [20]–[21] (Tracey J); *Gbojueh v Minister for Immigration and Border Protection* (2014) 229 FCR 265; [2014] FCA 883, [23], [31] (Tracey J); *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288, [49]–[50] (Bromberg J); *Ngaronoa v Minister*

Conversely, various Australian cases have doubted the correctness of the broad approach adopted in *Huynh*. These cases have either expressly or implicitly mandated that in a particular case, the relevant decision-maker is required to have regard to specific factors, personal to the visa holder.<sup>8</sup> However, interestingly, the great number of these latter cases have had nothing to say about the relationship between the national interest criterion and s 501(2) of the Act.

In light of the preceding, two essential arguments are advanced throughout. First, on its proper statutory construction, the “national interest” criterion should be treated as an irrelevant consideration under s 501(2). On this approach, the statutory ambit of s 501(2) is much narrower than that favoured by the majority in *Huynh*. It follows, consistent with a narrow construction of s 501(2), a decision-maker is prohibited from considering a broad range of matters under the banner of the “national interest” concept. Secondly, it is argued that specific factors, personal to the visa holder, must be considered by a decision-maker when applying the discretionary aspect of s 501(2).

## CHARACTER GROUNDS TEST

Before turning to examine the decision of *Huynh* more closely, it is appropriate to set out, in summary, the character test provisions set out in s 501. Importantly, it is only after outlining the effect of the character test provisions, can *Huynh* be properly understood in its statutory context.

Sections 501(1)–(3A) of the Act grants the Minister for Immigration and Border Protection (“the Minister”) with some statutory powers to cancel or refuse a visa of a non-citizen who fails a clearly defined character test. Section 501(6) extensively defines what is meant by the “character test.” For example, a non-citizen is taken to fail the character test if he or she has a substantial criminal record<sup>9</sup> or has been convicted of an offence while in immigration detention.<sup>10</sup>

Under s 501(1), the Minister may *refuse* to grant a visa to a non-citizen who fails the character test.<sup>11</sup> Similarly, under s 501(2) of the Act, the Minister may *cancel* a visa held by a non-citizen if that person fails to satisfy the Minister that they pass the character test:<sup>12</sup>

- (2) The Minister may cancel a visa that has been granted to a person if:
  - (a) the Minister reasonably suspects that the person does not pass the character test; and
  - (b) the person does not satisfy the Minister that the person passes the character test.

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*for Immigration and Citizenship* [2007] FCA 1565, [51]–[52] (Jacobson J); *Tewao v Minister for Immigration and Citizenship* (2011) 125 ALD 57; [2011] FCA 1515, [32] (Katzmann J); *MZAGK v Minister for Immigration and Border Protection* (2014) 226 FCR 311; [2014] FCA 1190, [31], [34] (Tracey J); *Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367; [2015] FCAFC 54, [73] (Rangiah J); *Leiautau v Minister for Immigration and Citizenship* (2012) 208 FCR 448; [2012] FCA 1427, [22] (Jessup J).

<sup>8</sup> *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; [2014] FCAFC 38, [9], [25]–[27] (Allsop CJ and Katzmann J), [153], [207] (Buchanan J); *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [123]–[124], [127] (Mortimer J); *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 90 ALJR 197; [2015] HCA 15, [71] (Gageler J); *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 775; [2014] HCA 27, [7] (French CJ); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70], [75] (Griffiths J); *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414; [2007] FCAFC 203, [48] (Black CJ, French and Weinberg JJ); *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513; [2015] FCAFC 83, [36] (Flick, Griffiths and Perry JJ); *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44; [2014] FCAFC 39, [2], [6] (Allsop CJ and Katzmann J), [111], [113], [121], [141]–[142] (Buchanan J); *Mrayhej v Minister for Immigration and Border Protection (No 2)* (2015) 147 ALD 434; [2015] FCA 691, [69] (Foster J); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164; [2010] HCA 48, [26]–[27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Stretton v Minister for Immigration and Border Protection (No 2)* (2015) 231 FCR 36; [2015] FCA 559, [19] (Logan J); *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346; [2004] FCAFC 340, [54]–[55] (Sackville J); *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288, [58] (Bromberg J); *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580; [2004] FCAFC 327, [102] (Ryan, Lander and Crennan JJ).

<sup>9</sup> *Migration Act 1958* (Cth) s 501(6)(a).

<sup>10</sup> *Migration Act 1958* (Cth) s 501(6)(aa)(i).

<sup>11</sup> *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1; [2012] HCA 46, [397] (Crennan J).

<sup>12</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

It is clear that ss 501(1)–(2) are discretionary powers.<sup>13</sup> That is, if the non-citizen fails the character test, the Minister “may” exercise his or her discretion to refuse or otherwise cancel a visa held by a non-citizen.<sup>14</sup> Sections 501(1)–(2) provide no express guidance on relevant considerations the Minister may have regard to when exercising his or her discretion.<sup>15</sup> When the Minister is exercising his or her statutory power under ss 501(1)–(2), the rules of procedural fairness apply.<sup>16</sup>

It follows that the “national interest” criterion is not expressly outlined in ss 501(1)–(2) of the Act.<sup>17</sup> Unlike ss 501(1)–(2), s 501(3) mandates that the Minister may refuse or otherwise cancel a visa held by a non-citizen who both fails the character test and the Minister is satisfied that the exercise of the power is in the “national interest”:

- (3) The Minister may:
- (a) refuse to grant a visa to a person; or
  - (b) cancel a visa that has been granted to a person;
- if:
- (c) the Minister reasonably suspects that the person does not pass the character test; and
  - (d) the Minister is satisfied that the refusal or cancellation is in the national interest.

As a result, s 501(3) is the *only provision* in s 501 of the Act that expressly mandates the application of a “national interest” test. Given the “national interest” criterion in s 501(3), Parliament has clearly outlined that the rules of procedural fairness do not apply to the application of that section by the Minister.<sup>18</sup>

Further, unlike ss 501(1)–(2), under s 501(3), the legislative power must be exercised only by the Minister, acting personally.<sup>19</sup> This latter limitation is to ensure that the “national interest” test is not considered and applied by a delegate of the Minister, acting under the delegated power in s 496(1) of the Act.<sup>20</sup>

When a delegate of the Minister exercises his or her discretion under ss 501(1)–(2), the delegate is bound to follow any directions given by the Minister.<sup>21</sup> Currently, delegates applying ss 501(1)–(2) of the Act are bound by Direction no 65 (“Direction 65”).

Direction 65 is an example of high-level government policy, setting out a number of considerations which delegates must consider in exercising their discretionary powers under ss 501(1)–(2). Notably, the national interest criterion is not outlined as a relevant consideration under Direction 65. Unlike delegates, the Minister is not bound by Direction 65.<sup>22</sup>

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<sup>13</sup> *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667; [2001] FCA 514, [10], [24] (Dowsett J).

<sup>14</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [41] (Wilcox J).

<sup>15</sup> *Djalil v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292; [2004] FCAFC 151, [67] (Tamberlin, Sackville and Stone JJ).

<sup>16</sup> *Migration Act 1958* (Cth) s 501(5).

<sup>17</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [144] (Mortimer J).

<sup>18</sup> *Migration Act 1958* (Cth) s 501(5).

<sup>19</sup> *Migration Act 1958* (Cth) s 501(4).

<sup>20</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; [2001] HCA 51, [323], [325] (Kirby J).

<sup>21</sup> *Migration Act 1958* (Cth) ss 496(1A), 499.

<sup>22</sup> *Tewao v Minister for Immigration and Citizenship* (2012) 126 ALD 185; [2012] FCAFC 39, [36] (Cowdroy, Reeves and Jagot JJ).

## BACKGROUND FACTS

In November 2000, a Vietnamese citizen was sentenced to two years' incarceration with a non-parole period of 16 months in Australia for the offence of supplying a prohibited drug in an indictable quantity.<sup>23</sup> The applicant appealed against the severity of her sentence, which was reduced to 12 months by the New South Wales Court of Criminal Appeal (CCA) by various special circumstances.<sup>24</sup>

In August 2002, the non-citizen was notified by the Minister for Immigration and Multicultural and Indigenous Affairs ("Minister for Immigration") that her permanent residency visa might be liable for cancellation under s 501 of the Act.<sup>25</sup> In that context, an Issues Paper was prepared for the Minister for Immigration by officers of the Department for considering cancellation of the non-citizen's visa.<sup>26</sup> Attached to the Issues Paper was the sentencing remarks of the trial judge, but not the published remarks on sentence of the CCA.<sup>27</sup> Consequently, the Minister for Immigration concluded that the non-citizen did not pass the character test (by reference to the drug supply offence) and that he should exercise his discretion under s 501(2) to cancel the non-citizen's visa.<sup>28</sup>

The non-citizen appealed against the decision of the Minister for Immigration, which was successful at first instance.<sup>29</sup> Justice Madgwick held that the Minister failed to have regard to a relevant consideration required under s 501(2) of the Act, namely, the judgment of the CCA.<sup>30</sup>

The Minister for Immigration successfully appealed against the decision of Madgwick J, with Kiefel and Bennett JJ (by majority) holding that there is no obligation under s 501(2) for the Minister for Immigration, in exercising his discretion, to take into account the level of involvement of the non-citizen in the relevant criminality or what courts had to say about the matter.<sup>31</sup>

It appears the central reasoning of the majority approach was based on a broad interpretation of s 501(2), permitting the Minister for Immigration to have regard to the wide-ranging criterion of the "national interest" when considering his discretion under that section:

The object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens: s 4(1). To advance that object provision is made for the removal or deportation from Australia of non-citizens whose presence is not permitted by the Act: s 4(4). If the minister were able, consistent with the object of the Act, to consider a matter as broad as the national interest, in determining whether a person ought to be permitted to remain in Australia, it does not seem possible to imply some obligation on the minister's part to consider specific factors, personal to the visa holder, such as the circumstances surrounding the offences they have committed. By way of illustration, the Minister may consider that the national interest requires that the commission of a particular type of offence will inevitably result in the cancellation of a visa, where there has been a sentence to imprisonment for the requisite term. To construe the section as requiring the minister to consider factors

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<sup>23</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [65] (Kiefel and Bennett JJ).

<sup>24</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [69].

<sup>25</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [12].

<sup>26</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [14].

<sup>27</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [17]–[18].

<sup>28</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [19].

<sup>29</sup> *Huynh v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 436; [2003] FCA 1270, [40] (Madgwick J).

<sup>30</sup> *Huynh v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 436; [2003] FCA 1270, [37]–[38].

<sup>31</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [71].

such as the level of involvement of the visa holder in the offences would cut across that broad discretion. It follows in our view that the obligation of which his Honour the primary judge spoke cannot be read into s 501.<sup>32</sup>

Importantly, for reasons that will follow shortly, this broad construction to s 501(2) adopted in *Huynh* should be overruled. A much narrower interpretation of s 501(2) should be preferred. On this latter approach, the national interest criterion should be characterised as an irrelevant consideration under s 501(2) of the Act.

Adoption of the narrow construction to s 501(2) will allow specific factors, personal to the non-citizen, to potentially be treated as a mandatory relevant consideration. On this approach, the national interest criterion can no longer be used as a basis to “trump” or “displace” the relevance of individual rights and interests, specific to the non-citizen, at the discretionary stage of applying s 501(2).

In dissent, Wilcox J held, consistent with the view expressed by Kiefel and Bennett JJ, that there was no obligation generally under s 501(2) to take into account the non-citizen’s level of involvement in the impugned offences or the remarks on sentence of the relevant sentencing court.<sup>33</sup>

However, unlike the majority judgment, for Wilcox J, “as a matter of principle,” once a decision-maker selects a particular issue for consideration, he or she is bound to consider it properly:<sup>34</sup>

[T]he minister here chose to consider the facts to a particular level of detail and to be guided in that task by the court record, including the remarks made by the sentencing judge. Having made that choice, it seems to me he was bound to consider all aspects of the court record that might bear upon his assessment of the respondent’s degree of criminality and, in particular, any material that corrected or elucidated the sentencing judge’s remarks.<sup>35</sup>

For Wilcox J, the failure of the Department to put the sentencing remarks of the CCA before the Minister for Immigration had the effect of causing the Minister for Immigration to fail properly to give consideration to an issue that he had determined to be relevant in making the decision under s 501(2) of the Act.<sup>36</sup>

As the preceding demonstrates, the majority judgment of Kiefel and Bennett JJ relied in large part on importing the national interest concept into s 501(2) of the Act as a matter of statutory construction.<sup>37</sup> Although not expressly rejecting this approach, in the minority, Wilcox J did not provide any real analysis of the legislative interaction between the national interest concept and s 501(2).<sup>38</sup>

## PURPORTED ADVANCEMENT OF NATIONAL INTEREST PURPOSE

Where a statute does not expressly or exhaustively define the matters that are relevant in exercising a legislative power, this does not mean the decision-maker’s discretion is “arbitrary and unlimited.”<sup>39</sup> The limits of discretion and, subsequently, the considerations that may legitimately be taken into account, are inferred from the subject matter, scope and purpose of the legislation, the nature of the power to be exercised, and the nature of the office held by the decision-maker.<sup>40</sup>

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<sup>32</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>33</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [43].

<sup>34</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [46].

<sup>35</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [50].

<sup>36</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [52].

<sup>37</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>38</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [37].

<sup>39</sup> *Shrimpton v Commonwealth* (1945) 69 CLR 613, 619–620 (Latham CJ); *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J).

<sup>40</sup> *Ex parte SF Bowser & Co; Re Randwick Municipal Council* (1927) 27 SR (NSW) 209; *Vangedal-Nielsen v Smith* (1980) 49 FLR 44; *Zi Pei Shi v Minister for Immigration and Citizenship* (2011) 123 ALD 46; [2011] FCA 935, [10] (Perram J).



In light of the preceding, it is necessary to examine the statutory purpose of the Act more broadly, the object of s 501 specifically, and consider carefully the statutory context of the character test provisions. As will be demonstrated, the legislative purpose of s 501(2) is not directly concerned with the regulation of the national interest.<sup>41</sup> Further, although one of the broad objects of the Act is to regulate the presence of non-citizens in Australia in the “national interest,”<sup>42</sup> it does not follow that this broad object then becomes a potentially relevant consideration under s 501(2).

As previously noted, s 501(2) provides that the Minister may cancel a visa that has been granted to a person if the Minister reasonably suspects that the non-citizen does not pass the character test,<sup>43</sup> and the person does not satisfy the Minister that they pass the character test.<sup>44</sup>

Use of the word “may” in s 501(2) provides the Minister with a statutory discretion as to whether he or she will cancel a visa of a non-citizen who the Minister reasonably suspects does not pass the character test.<sup>45</sup> Plainly enough, s 501(2) of the Act does not outline the relevant statutory considerations which the Minister “may” have regard to when considering the discretionary power mandated by the section.

Given the lack of clarity as to the discretionary factors which the Minister may have regard when acting under s 501(2), it is appropriate to have regard to the statutory purpose of the Act.<sup>46</sup> Indeed, that is precisely the approach taken by the majority in *Huynh*, where, after citing the object of the Act, Kiefel and Bennett JJ held that the “national interest” was a matter open to consideration by the Minister under s 501(2).<sup>47</sup>

The object of the Act is to regulate, “in the national interest, the coming into, and presence in, Australia of non-citizens.”<sup>48</sup> Given the apparent broad statutory purpose of the Act, the majority erroneously assumed that the “national interest” term in the objects section could be imported as a legal consideration in s 501(2). That assumption is, with respect, misplaced.

First, in *Carr v Western Australia (Carr)*, Gleeson CJ held:

That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.<sup>49</sup>

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<sup>41</sup> *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414; [2007] FCAFC 203, [48] (Black CJ, French and Weinberg JJ).

<sup>42</sup> *Migration Act 1958* (Cth) s 4(1).

<sup>43</sup> *Migration Act 1958* (Cth) s 501(2)(a).

<sup>44</sup> *Migration Act 1958* (Cth) s 501(2)(a).

<sup>45</sup> The character test is expressly defined in *Migration Act 1958* (Cth) s 501(6).

<sup>46</sup> *Acts Interpretation Act 1901* (Cth) s 15AA.

<sup>47</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>48</sup> *Migration Act 1958* (Cth) s 4(1).

<sup>49</sup> *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47, [5] (Gleeson CJ).

It appears that the majority judgment in *Huynh* ignored the effect of what Gleeson CJ outlined in *Carr*. It is clear that s 501(2) of the Act seeks to strike a balance between competing interests, namely the protection of the Australian community<sup>50</sup> and the effect of deportation on the non-citizen and his or her family in Australia.<sup>51</sup>

Given the competing interests that are relevant when considering the statutory discretion in s 501(2), there is uncertainty as to how far the section goes in seeking to advance or achieve the underlying purpose of s 4(1). As Gleeson CJ made plain in *Carr*, stating the purpose of the Act is unlikely to solve the problem. However, that is exactly what the majority in *Huynh* did when it transported the national interest concept in the purpose section of the Act to a particular consideration in s 501(2).

A fair reading of the majority judgment in *Huynh* seems to have construed s 501(2) in such a manner as though it pursued the purpose of the “national interest” to the fullest possible extent. This conclusion seems inescapable, when after referring to the objects section of the Act, the majority outlined it did “not seem possible to imply some obligation” on the Minister’s part to consider specific factors personal to a non-citizen under s 501(2).<sup>52</sup>

Consistent with the approach indicated by Gleeson CJ in *Carr*, the majority approach in *Huynh* is likely to be contrary to the manifest intention of the Act and a purported exercise of judicial power for a legislative purpose. The Act does not pursue the “national interest” purpose at all costs.<sup>53</sup>

Secondly, the comments made by Gleeson CJ in *Carr* were more recently adopted by Mortimer J in *Tanielu v Minister for Immigration and Border Protection (Tanielu)*. There, Mortimer J outlined:

That observation can be applied to the recitation and reliance on the statement of general purposes set out in s 4(1) of the Migration Act. The issue here is the doubt about the extent to which the cancellation and refusal powers in s 501 are unfettered in pursuing the general objects and purposes of the Migration Act, in circumstances where there are competing and conflicting interests as between an individual who may be excluded from Australia and the interests of the Australian community. Restating the general objects does not assist in resolving that tension.<sup>54</sup>

Thirdly, the statutory objects of legislation may be ascertained by reference to extrinsic materials such as Second Reading Speeches and Explanatory Memorandum, which may throw light on the purpose of a statute and even in some cases the meaning of its words.<sup>55</sup>

Despite considering the object of the Act in s 4(1), *Huynh* failed to consider any extrinsic materials that could assist in ascertaining the legislative purpose of s 501(2). More particularly, Kiefel and Bennett JJ failed to examine the Second Reading Speech (SRS) and Explanatory Memorandum (EM) of the Act that, as they related to s 501(2).

Two important points flow from an examination of the SRS and EM of the character test provisions.

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<sup>50</sup> *Djalil v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292; [2004] FCAFC 151, [73] (Tamberlin, Sackville and Stone JJ); *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 65, [104].

<sup>51</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [75] (Griffiths J); *Misiura v Minister for Immigration and Multicultural Affairs* [2001] FCA 133, [18] (Madgwick J).

<sup>52</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74] (Kiefel and Bennett JJ).

<sup>53</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

<sup>54</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [127].

<sup>55</sup> *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414; [2007] FCAFC 203, [105] (Black CJ, French and Weinberg JJ).

Neither the EM<sup>56</sup> nor SRS<sup>57</sup> reconciles the “national interest” concept as a purpose or consideration relevant to s 501(2).<sup>58</sup> Rather, the object of s 501(2) is to prevent the entry and stay in Australia of non-citizens who have a criminal background or have criminal associations.<sup>59</sup> Notably, the EM clearly mandates that the “national interest” term is *only relevant* to s 501(3), and not ss 501(1)–(2).<sup>60</sup>

The SRS reveals that when decision-makers apply the discretionary power under s 501(2), they “will need to take into account” a range of matters (including, for example, the non-citizen’s links to Australia, nature of crimes committed and any international law obligations).<sup>61</sup> This latter approach was rejected by Kiefel and Bennett JJ in *Huynh*, in reliance upon the “broad construction” of s 501(2).<sup>62</sup>

The broad construction to s 501(2) favoured by the majority in *Huynh* placed too much emphasis on the far-reaching statutory object of the Act in s 4(1). As will be demonstrated, of greater assistance in charting the metes and bounds of s 501(2) is an analysis of the role of the “character test” in s 501, and examining the text and context used to delineate this role.<sup>63</sup>

### STATUTORY CONTEXT OF SECTION 501

As Mortimer J made plain in *Tanielu*, when considering the statutory meaning of s 501, instead of focusing on the legislative object of the Act in s 4 (as adopted in *Huynh*), more assistance could be gleaned from the statutory context and language of s 501 directly:

Of more aid is an examination of the role of the “character test” in s 501, and the text and context used to delineate this role. Unless a person fails to satisfy the Minister that she or he passes the character test, the cancellation and refusal powers are not enlivened. In that sense, it is the content of the character test which gives the best contextual indication of considerations which the statute makes relevant to the exercise of the power.<sup>64</sup>

In *Project Blue Sky Inc v Australian Broadcasting Authority*, McHugh, Gummow, Kirby and Hayne JJ said that the meaning of a provision must be determined by reference to the language of the legislation viewed as a whole, and the process of statutory interpretation must always begin by examining the context of the provision to be construed.<sup>65</sup>

Further, various cases in recent years have cited that in matters of statutory interpretation, the statutory text of a provision and its context are important issues for consideration in the construction process.<sup>66</sup> For example, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*, Hayne, Heydon, Crennan and Kiefel JJ said:

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<sup>56</sup> Explanatory Memorandum, *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997* (Cth) 2.

<sup>57</sup> Commonwealth, *Parliamentary Debates*, Senate, 11 November 1998, 59–62 (Rod Kemp).

<sup>58</sup> See further *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [25], [30].

<sup>59</sup> Commonwealth, n 57, 59.

<sup>60</sup> Explanatory Memorandum, n 56, 13.

<sup>61</sup> Commonwealth, n 57, 60.

<sup>62</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>63</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [128].

<sup>64</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [128] (Mortimer J).

<sup>65</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, [69]. See also *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56, [24] (French CJ and Hayne J).

<sup>66</sup> *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55, [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Australian Maritime Officers’ Union v Assistant Minister for Immigration and Border Protection* (2015) 230 FCR 523; [2015] FCAFC 45, [31] (Gordon, Katzmann and Griffiths JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12, [22]–[23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).



This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical factors and extrinsic materials cannot be relied on to displace the apparent meaning of the text. The language which has been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.<sup>67</sup>

A review of the language of the Act and the statutory context of s 501(2) reveals that there are significant difficulties with the “broad construction” of that section adopted by the majority in *Huynh*.<sup>68</sup> For the reasons that follow, a much narrower interpretation to s 501(2) is justified.

First, and perhaps the most prominent, s 501(2) is silent on mandating any express consideration of matters relevant to the “national interest”. Conversely, various other character test provisions in the Act expressly mandate that the Minister have regard to “national interest” matters when determining whether a non-citizen should effectively be deported from Australia.<sup>69</sup>

Given the apparent importance of the national interest notion, it is highly questionable whether Parliament would have intended that the national interest concept be treated as a possible consideration under s 501(2) by “mere implication”. That conclusion appears further fortified by the fact that elsewhere in the Act, as observed, Parliament has expressly outlined various character test provisions to which the “national interest” term applies.

In *Minister for Immigration and Citizenship v Haneef*<sup>70</sup> (*Haneef*), Black CJ, French and Weinberg JJ held that “the national interest criterion” does not apply to cancellation decisions under s 501(2) of the Act. Plainly, the conclusion in *Haneef* appears squarely inconsistent with the majority approach in *Huynh*, which suggested the “national interest criterion” can apply to s 501(2).<sup>71</sup>

Despite the apparent discrepancy between *Haneef* and *Huynh* regarding the role of the national interest criterion in s 501(2), the Full Court of the Federal Court of Australia (FCA) in *Haneef* did not consider *Huynh* at all. As such, *Haneef* cannot be taken to have expressly found that *Huynh* was wrongly decided.

Shortly after *Huynh* was decided,<sup>72</sup> in *Howells v Minister for Immigration and Multicultural and Indigenous Affairs*, Ryan, Lander and Crennan JJ held that “unlike subsections (1) and (2)”,<sup>73</sup> s 501(3) empowers the Minister to refuse or cancel a visa to a non-citizen where the Minister is satisfied that the refusal or cancellation is in the national interest.<sup>74</sup> Further, in *Re Minister for Immigration and Multicultural Affairs*, Gummow J held that “s 501(3) is differently cast to s 501(2)”<sup>75</sup> in the Act.

Again, like *Haneef*, *Howells* did not expressly consider *Huynh*. However, what these decisions reveal is that there is at least some jurisprudential support for the view that s 501(2) of the Act does not encapsulate the national interest criterion as a possible relevant consideration under that section.

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<sup>67</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41, [47] (citations omitted).

<sup>68</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>69</sup> *Migration Act 1958* (Cth) ss 501(3)(d), 501A(2)(e), (3)(d), 501B(2)(e), 501BA(2)(b).

<sup>70</sup> *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 203; [2007] FCAFC 203, [48].

<sup>71</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>72</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256 was decided on 17 September 2004; *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580; [2004] FCAFC 327 was decided on 16 December 2004.

<sup>73</sup> *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580; [2004] FCAFC 327, [102].

<sup>74</sup> A similar conclusion was implicitly advanced by Kirby J in *Re Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 216 CLR 212; [2003] HCA 56, [99].

<sup>75</sup> *Re Minister for Immigration and Multicultural Affairs* (2002) 212 CLR 162; [2002] HCA 48, [131].

Second, looking further to the statutory text and language of the Act reveals another shortcoming of the majority approach in *Huynh*. Most of the provisions that provide a national interest criterion (involving the character test requirements) in the Act abrogate the rules of procedural fairness.<sup>76</sup>

It makes little sense that the Minister would have to afford a non-citizen procedural fairness under s 501(2) when invoking national interest considerations, but for reasons that are not altogether clear, the Minister otherwise is not required to afford procedural fairness under other character test provisions where a national interest criterion applies, for example, s 501(3).

Third, if the effect of the judgment in *Huynh* is accepted, oddly enough, there is little room for clear differentiation in the operation of sub-ss 501(2) and (3). That is, both statutory powers are concerned with the cancellation of a visa of a non-citizen who fails the character test. Equally, adopting the broad construction in *Huynh*, both sub-ss 501(2) and (3) are concerned with a consideration of national interest matters.

The essential difference between sub-ss 501(2) and (3) is that sub-s (3) expressly provides the Minister *must* have regard to the national interest criterion, whereas the same criterion is treated as *discretionary* under sub-s (2).<sup>77</sup> Further, unlike sub-s (2), sub-s (3) mandates that the rules of procedural fairness do not apply.<sup>78</sup>

As the preceding has demonstrated, the broad construction to s 501(2) adopted in *Huynh* creates an odd anomaly; namely, the national interest criterion is a *mandatory consideration* under s 501(3) but is otherwise treated as a *discretionary consideration* under s 501(2) of the Act. That surely was not the intention of Parliament in enacting s 501(2).

Fourth, s 501(2) of the Act is mostly concerned with the *protection of the Australian community* from risk of harm posed by the continued presence in Australia of non-citizens who fail the character test.<sup>79</sup> If the non-citizen's continued presence in Australia is considered to pose an unacceptable risk of harm to the Australian community, plainly enough, the non-citizen may be deported.

However, if the Minister decided to exercise his or her discretion to deport a non-citizen from Australia by reference to national interest considerations (unconnected with the non-citizen posing an unacceptable risk of harm to the Australian community) under s 501(2), such an analysis would betray a proper understanding of the statutory purpose and context of the character test provisions of the Act.<sup>80</sup>

As Mortimer J outlined in *Tanielu*:

[I]t is sufficient to reject the Minister's supplementary submission that reliance on an unexplained label such as "national interest", divorced from any notions of protection of the Australian community, could provide an example of a necessarily lawful exercise of the s 501(2) discretion, as the statute is currently expressed.<sup>81</sup>

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<sup>76</sup> *Migration Act 1958* (Cth) ss 501(3), 501A(3)(d), 501BA(2)(b).

<sup>77</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74] (Kiefel and Bennett JJ).

<sup>78</sup> *Migration Act 1958* (Cth) s 501(3)(d).

<sup>79</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [88], [121] (Mortimer J); *Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367; [2015] FCAFC 54, [48], [58] (Rangiah J, North J agreeing); *Te Puke v Minister for Immigration and Border Protection* (2015) 230 FCR 499; [2015] FCA 398, [45] (Wigney J).

<sup>80</sup> See further *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [121], [124] (Mortimer J).

<sup>81</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [152].

Fifth, Kiefel and Bennett JJ in *Huynh* provided no consideration of the extent to which the Minister could consider national interest matters in applying s 501(2).<sup>82</sup> As Mortimer J observed in *Tanielu*, the construction of s 501(2) must “operate consistently as between exercises of power by delegates, by the Tribunal and by the Minister”.<sup>83</sup>

If the broad construction to s 501(2) favoured by the majority in *Huynh* is accepted, delegates, the Administrative Appeals Tribunal (AAT) and the Minister may consider national interest considerations when applying the discretion in s 501(2).<sup>84</sup> The net result is the lack of consistency in the operation of s 501(2) since different decision-makers will inevitably (in relevant instances) adopt different constructions of matters related to the national interest under that section.

Sixth, the majority judgment in *Huynh* can be viewed as adopting a “broad construction” of s 501(2), by finding that national interest matters were potentially relevant to the operation of that section.<sup>85</sup> As previously noted, the concept of “national interest” is necessarily broad.<sup>86</sup>

Like the approach adopted by Kiefel and Bennett JJ in *Huynh*, in *Minister for Immigration and Border Protection v Stretton* (*Stretton*), Griffiths J also found that the exercise of the discretionary power in s 501(2) was broad:

The indicators which suggest that the authority to decide whether or not to cancel a person’s visa under s 501(2) is broad include the following ... the statement of the object of the legislation in s 4 of the Migration Act is “to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens” ... The concept of the “national interest” ... is a notion which implicitly informs many of the individual provisions of the Migration Act. It permeates the legislation as a whole and is not confined to s 501(3).<sup>87</sup>

Very shortly after *Stretton* was decided, Allsop CJ, Griffiths and Wigney JJ in *Minister for Immigration and Border Protection v Eden* (*Eden*) more recently adopted a broad construction of s 501(2):

Fourth, some indicators suggest that the Minister’s discretion under s 501(2) is, and is intended to be, broad ... The indicators include, but are not necessarily limited to, the following: the absence of an express list of considerations to be taken into account; the broad statement of the object of the Act in s 4(1) as being to “regulate, in the national interest, the coming into and presence in, Australia of non-citizens”; the fact that the discretion is conferred upon the Minister who holds political office and is accountable to Parliament; the fact that a decision under s 501(2) which is made by the Minister personally is not subject to merits review; and the fact that the Minister is obliged by s 501G(1)(e) of the Act to provide a written statement of reasons.<sup>88</sup>

Despite the apparent force in several FCA decisions finding that s 501(2) of the Act is “broad”, it is suggested a “narrower” construction of the section should be preferred. The majority in *Huynh*, the view of Griffiths J in *Stretton* and the unanimous judgment in *Eden* all found that s 501(2) was “broad” (in part) given the vast nature of the national interest object in s 4(1) of the Act.

However, as earlier explored, construction of s 501(2) by reference to s 4(1) of the Act is unlikely to prove helpful – given the former section seeks to strike a balance between competing interests<sup>89</sup> –

<sup>82</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74] (Kiefel and Bennett JJ). See further *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [144], [151].

<sup>83</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [138].

<sup>84</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74] (Kiefel and Bennett JJ).

<sup>85</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>86</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

<sup>87</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70].

<sup>88</sup> *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158; [2016] FCAFC 28, [19].

<sup>89</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

and the problem of interpretation is that there is uncertainty as to how far s 501(2) goes in seeking to achieve the underlying purpose or object in 4(1).<sup>90</sup>

Other considerations outlined in *Eden* said to favour a broad construction of s 501(2) is the fact that the discretion conferred upon the Minister (who holds political office) is accountable to Parliament, decisions made personally by the Minister are not subject to merits review, and the statutory obligation to provide reasons for the decision.<sup>91</sup>

There are, with respect, some difficulties with the reasoning in *Eden*. Delegates of the Minister can (and often do) make decisions under s 501(2) of the Act. Plainly enough, delegates of the Department are not accountable to Parliament in the same way as the Minister. Furthermore, s 501(2) can hardly be described as a “substantial” accountability provision.

For example, unlike other provisions of the Act,<sup>92</sup> if the Minister makes a decision under s 501(2), the Minister is not required to cause notice of the making of the decision to be laid before each House of the Parliament within a prescribed number of sitting days after the making of the decision.

Although it is true that a decision made by the Minister under s 501(2) excludes merits review, a decision made under the same section by a delegate is subject to merits review. Further, it is not clear how the obligation to provide reasons has any logical connection with supporting a broad construction of s 501(2).

Moreover, as Burchett and Lee JJ held in *Minister for Immigration and Ethnic Affairs v Sciascia*<sup>93</sup> (*Sciascia*), non-citizens whose “liberties are protected by the common law, who live in” the Australian community, are entitled to have bad character/deportation provisions read with “scrupulous care, and in their narrowest, rather than in some wider, sense”.<sup>94</sup> As Burchett and Lee JJ outlined in *Sciascia*:

That is because s 20 deprives those caught by it of one of their most precious rights, their right of community ... The making of a deportation order is the plainest infringement of liberty ... Both retrospectivity and curtailment of liberty, when found in any statute, are strong pointers towards a construction strictly confining its operation.<sup>95</sup>

When construing s 501(2) “broadly,” partly by reference to the purported import of national interest matters influencing the section, *Huynh*, *Stretton* and *Eden* seem to have ignored the effect of *Sciascia*. There is no doubt that s 501(2) is an example of a “bad character” provision, which, if applied unfavourably to a non-citizen, will inevitably lead to their deportation from Australia.

The “broad” construction of s 501(2) favoured in *Huynh*, *Stretton* and *Eden* should be doubted (especially since the issues of statutory construction raised in *Sciascia* seem to have been given no treatment in those cases). There is no doubt that the statutory construction of s 501(2) is complicated and challenging, but what remains is an uncomfortable sense of disquiet about accepting the purported legislative interaction between ss 4(1) and 501(2) of the Act.

Finally, in August 2016, the High Court of Australia in the *Maritime Union of Australia v Minister for Immigration and Border Protection*<sup>96</sup> (*Maritime Union of Australia*) case demonstrated how the purported exercise of a broad-ranging discretionary power vested in the Minister could be

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<sup>90</sup> See *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47, [5] (Gleeson CJ).

<sup>91</sup> *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158; [2016] FCAFC 28, [19] (Allsop CJ, Griffiths and Wigney JJ).

<sup>92</sup> See, eg, *Migration Act 1958* (Cth) s 502(3).

<sup>93</sup> *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 103 ALR 307, 315.

<sup>94</sup> A similar approach was adopted in *Rani v Minister for Immigration and Multicultural Affairs* (1997) 80 FCR 379, 401 (Sackville J).

<sup>95</sup> *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364, 372. See further *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *Bropho v State of Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>96</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34.

exceeded beyond the limits of its statutory power.<sup>97</sup> In 2013, the *Migration Act 1958* was amended with the effect that non-citizens participating in or supporting an activity or operation within the legislative definition of “offshore resources activity” became deemed to be within the migration zone and therefore subject to specified visa requirements.<sup>98</sup>

The legislative amendments conferred power on the Minister to make a determination under s 9A(6) of the Act excepting an operation or activity from the statutory definition of “offshore resources activity”<sup>99</sup> In 2015, the Minister made a determination excepting from that definition all operations and activities to the extent that they use any vessel or structure that was not an Australian resources installation.<sup>100</sup>

Against that background, various plaintiffs challenged the validity of the determination.<sup>101</sup> The Minister argued that he should be left “entirely free” to apply the broad discretionary exempting power under s 9A(6) to determine the extent to which the visa regime should apply to non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity.<sup>102</sup>

The Minister’s argument was supported by the fact that the power conferred by s 9A(6) is expressed in relatively broad terms, in as much as it does not specify any preconditions to its exercise.<sup>103</sup> On that basis, the High Court accepted that s 9A(6) entitled the Minister to take into account a wide range of factors.<sup>104</sup>

However, notwithstanding the broad nature of the discretionary power in s 9A(6), a unanimous High Court found the purported determination by the Minister invalid.<sup>105</sup> For the High Court, there were several reasons why such a broad-ranging determination exceeded the limited terms of the power conferred on the Minister by s 9A(6).<sup>106</sup>

The Minister’s decision did not accord with ordinary conceptions of power to provide for exceptions.<sup>107</sup> The determination purported in effect to deprive s 9A(1) of all content and so entirely to negate the operation of the general rule.<sup>108</sup> By completely negating the extension of the visa regime to non-citizens on vessels or unmoored structures which were in an area to participate in or support an offshore resources activity, the determination purported to repeal the operation of s 9A(1) and thereby to thwart that legislative purpose.<sup>109</sup>

In the context of *Huynh*, the *Maritime Union of Australia* case is important for at least three reasons.

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<sup>97</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [20] (French CJ, Bell, Gageler, Keane and Nettle JJ).

<sup>98</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [1].

<sup>99</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [1].

<sup>100</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [19].

<sup>101</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [1].

<sup>102</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [26].

<sup>103</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [24]; *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 756–758 (Dixon J).

<sup>104</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [24]. See *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 1, [61], [102] (Gleeson CJ and Gummow J), [187] (Hayne J), [247] (Callinan J).

<sup>105</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [35].

<sup>106</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [20].

<sup>107</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [22].

<sup>108</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [23].

<sup>109</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [25].



First, as the *Maritime Union of Australia* case demonstrates, the text and temporal context of the enactment of a statutory provision inform and define its content.<sup>110</sup> The “broad construction” of s 501(2) adopted by the majority in *Huynh* seems to have sidelined the text and temporal context of s 501 in construing that section. Rather, Kiefel and Bennett JJ in *Huynh* placed great emphasis on construing s 501(2) in light of the broad “national interest” statutory purpose of the Act in s 4(1).

Second, the effect of the *Maritime Union of Australia* case is clear – the Minister “is not free” to determine for himself or herself the extent to which a broad discretionary legislative power under the Act can be exercised. Rather, as the *Maritime Union of Australia* case confirmed, the limits of a broad discretionary power can be delineated by the text, context, and purpose of the relevant statutory provision.<sup>111</sup>

If the “broad approach” to s 501(2) adopted by the majority in *Huynh* is accepted, contrary to the approach taken in *Maritime Union of Australia*, the Minister would have an almost unconfined legislative discretionary power; since Australian courts have repeatedly held a determination of what is in the “national interest” is for the Minister, and not for the courts to resolve.<sup>112</sup>

However, as previously explored, the text and purpose of s 501(2) do not lend support to the view that the broad discretionary nature of the section permits the Minister to consider a matter as wide as the “national interest.” The almost unconfined “broad construction” of s 501(2) adopted by the majority in *Huynh* betray a proper understanding of the statutory context and purpose of the section.

Third, the *Maritime Union of Australia* case implicitly confirms that where a Minister is granted a broad discretionary legislative power under the Act, it does not follow that the nature of such a power permits the Minister to have regard to the wide-ranging “national interest” criterion. If that were so, it might be supposed that the High Court would have said as much. After all, as *Huynh* makes clear, the object of the Act is to regulate in the “national interest” the entry and presence of non-citizens in Australia.<sup>113</sup>

### **SPECIFIC FACTORS PERSONAL TO NON-CITIZEN**

The question of whether or not a matter is a mandatory consideration is typically one of statutory construction.<sup>114</sup> An obligation to consider a particular issue may be either express, implied, or both.<sup>115</sup> The factors that the decision-maker is bound to take into account must be determined by implication from the subject matter, scope, and purpose of the relevant Act.<sup>116</sup>

In *Huynh*, Kiefel and Bennett JJ held that when the Minister was exercising his or her discretionary power under s 501(2), the Minister was *not obliged* to consider “specific factors personal to the non-citizen”.<sup>117</sup> For the majority in *Huynh*, to do so would “cut across that broad discretion” mandated by s 501(2), which accommodated national interest considerations.<sup>118</sup>

Contrary to the approach taken in *Huynh*, it is argued here that where the Minister exercises his or her discretionary power under s 501(2), the Minister is *bound* to consider the following specific factors personal to the non-citizen:

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<sup>110</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [23].

<sup>111</sup> *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004; [2016] HCA 34, [34].

<sup>112</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; [2001] HCA 51, [331] (Kirby J); *Maurangi v Honourable Chris Bowen MP, Minister for Immigration and Citizenship* (2012) 200 FCR 191; [2012] FCA 15, [70] (Lander J); *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 220 (Spender J).

<sup>113</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>114</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39 (Mason J); *Enichem Anic Srl v Anti-Dumping Authority* (1993) 39 FCR 458, 467 (Hill J).

<sup>115</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J).

<sup>116</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [37] (Wilcox J).

<sup>117</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>118</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

- The implications of possible indefinite detention in Australia of the non-citizen pending removal;<sup>119</sup>
- Rights and interests of the non-citizen;<sup>120</sup>
- Rights and interests of the non-citizen's family and associates;<sup>121</sup>
- The extent to which the non-citizen has been rehabilitated;<sup>122</sup>
- An assessment of the prospects of the non-citizen reoffending in Australia;<sup>123</sup> and
- A proper appreciation and understanding of the non-citizen's criminality, which includes a consideration of the remarks on sentence of the court.<sup>124</sup>

Since *Huynh* was decided in 2004, a series of Australian cases have held that s 501(2) requires the Minister to have regard to a number of specific factors, personal to the non-citizen. These cases have had close regard to the statutory context and purpose of s 501 and considered the statutory framework of the Act more broadly.

First, in *NBMZ v Minister for Immigration and Border Protection (NBMZ)*, Allsop CJ and Katzmann J expressly found that in exercising the statutory power in s 501(1) of the Act, the Minister was bound to take into account the legal consequences of the decision – indefinite detention for the non-citizen pending removal.<sup>125</sup>

As Allsop CJ and Katzmann J explained in *NBMZ*:

[A]cceptance of this approach may require a reconsideration of the views of the majority in *Huynh* ... and whether the views of Wilcox J in dissent ... are not preferable.<sup>126</sup>

In a similar fashion, Buchanan J in *NBMZ* found that it would always be necessary when considering s 501(1) of the Act to proceed upon a “proper understanding of the statutory scheme” and the “legal consequences for the applicant” of the decision to be made about the visa application.<sup>127</sup>

Equally, on the same day *NBMZ* was published, *NBNB v Minister for Immigration and Border Protection*<sup>128</sup> (*NBNB*) was decided. In *NBMZ*, Allsop CJ and Katzmann J also found that the prospect of indefinite detention for a non-citizen (as a result of a decision) made under s 501(1) was a mandatory consideration the Minister was bound to consider.<sup>129</sup>

Consequently, the finding in *NBMZ* and *NBNB* is plainly at odds with the majority approach in *Huynh* – since *NBMZ* and *NBNB* plainly mandated that specific factors personal to the non-citizen (ie, prospect of indefinite detention) was a mandatory consideration the Minister had to consider under s 501.

Secondly, there are a series of decisions in the FCA (at first instance and before the Full Bench) that mandate the Minister “must” have regard to “specific factors personal to the non-citizen” when considering the exercise of discretion under s 501. In *Gbojueh v Minister for Immigration and*

<sup>119</sup> *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; [2014] FCAFC 38; *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44; [2014] FCAFC 39.

<sup>120</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

<sup>121</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

<sup>122</sup> *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288, [46] (Bromberg J).

<sup>123</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [110] (Mortimer J).

<sup>124</sup> *Huynh v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 436; [2003] FCA 1270, [28] (Madgwick J).

<sup>125</sup> *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; [2014] FCAFC 38, [6], [9].

<sup>126</sup> *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; [2014] FCAFC 38, [27].

<sup>127</sup> *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; [2014] FCAFC 38, [153], [207].

<sup>128</sup> *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44; [2014] FCAFC 39.

<sup>129</sup> *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44; [2014] FCAFC 39, [2] (Allsop CJ and Katzmann J).

*Citizenship (Gbojueh)*, Bromberg J found that in the application of s 501A(2) of the Act, the Minister was bound to consider the “potential for harm to the Australian community” if the non-citizen were permitted to remain in Australia.<sup>130</sup>

It followed, according to Bromberg J in *Gbojueh*, that the seriousness of the past conduct of the non-citizen and extent to which the non-citizen (convicted of criminal conduct) was rehabilitated was “germane to the potential for harm to the Australian community”.<sup>131</sup>

*Gbojueh* undermines the majority in *Huynh* since *Gbojueh* mandates that particular individual circumstances relevant to the non-citizen guide the application of s 501A(2) of the Act. It’s hard to see how “specific factors personal to the non-citizen” is not a mandatory consideration under s 501, given that that section is primarily concerned with whether the continued “individual” presence of the non-citizen in Australia poses an unacceptable risk of harm to members of the Australian community.<sup>132</sup>

Consistent with the approach in *Gbojueh*, Mortimer J in *Tanielu*<sup>133</sup> held that without assessment of risk of harm being an integral aspect of the exercise of the power in s 501(2), it is difficult to see how the power would otherwise stay within statutory limits and advance the purposes and objects of the Act in general, and of the cancellation provisions in particular.<sup>134</sup>

In light of the preceding, Mortimer J in *Tanielu* held that:

[A] risk of harm posed by an individual can only be ascertained by evaluating the seriousness of any future harm which might be caused and the likelihood of that harm occurring.<sup>135</sup>

Consequently, in order to make a rational assessment of the “seriousness of any future harm” the non-citizen may commit, and the likelihood of that person engaging in further undesirable or criminal conduct in Australia, a decision-maker is required to look closely at “individual factors” personal to the non-citizen under s 501(2).

For example, as Mortimer J further outlined in *Tanielu*:

If the Minister had addressed the likelihood of the applicant reoffending, it is to be expected that one of the first sources he might turn to would be the remarks of the sentencing judge. That is because inherent in the sentencing process are assessments of the likelihood of reoffending.<sup>136</sup>

Further, it’s hard to see how a decision-maker could make a rational assessment of the “seriousness of any future harm” possibly posed by a non-citizen without looking closely at that person’s past criminality. An examination of past undesirable conduct of a non-citizen may be a good indicator of the type of future adverse behaviour of that person.

It follows that a proper appreciation of the non-citizen’s past criminality can only be rationalised when regard is had to the circumstances of the offence. Evidently, the remarks on sentence of the sentencing judge is a primary source to examine. That is because the sentencing court makes express findings as to the nature and extent of the criminality, and, just as important, outlines the relevance of any mitigating factors favourable to the non-citizen.

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<sup>130</sup> *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288, [45].

<sup>131</sup> *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288, [46].

<sup>132</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [121] (Mortimer J).

<sup>133</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673.

<sup>134</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [123].

<sup>135</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [155]. See further *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359; [2013] VSCA 213, [111] (Redlich, Osborn and Priest JA).

<sup>136</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [116].

As Madgwick J pointed out in *Hunyh v Minister for Immigration and Multicultural and Indigenous Affairs*, the extent and degree to which the non-citizen falls short of statutory good character is a central matter for the Minister to take into account in considering the discretion under s 501(2) of the Act.<sup>137</sup>

In *Huynh*, it was the possibility of national interest considerations applying to s 501(2) that led the majority to reject the Minister had a requirement to consider “specific factors personal to a non-citizen.”<sup>138</sup> Ironically, in *Stretton*, Griffiths J remarked that the “concept of the national interest” included considerations that “relate to the rights and interests of the individual” non-citizen.<sup>139</sup>

It is problematic to find that “specific factors personal to a non-citizen” are not mandatory considerations under s 501(2),<sup>140</sup> when, as Griffiths J found in *Stretton*, s 501(2) also serves the purpose of “giving effect in an appropriate case to the personal circumstances of the visa-holder and his or her family and associates”.<sup>141</sup>

Put differently, if the majority approach in *Huynh* is accepted, the relevant Minister would be ignoring an important purpose of s 501(2) – giving consideration to the personal circumstances of a non-citizen and his or her family in a particular case – or, better still – not balancing individual circumstances of the non-citizen against protection of the Australian community from risk of future harm.

As Madgwick J explained in *Misiura v Minister for Immigration and Multicultural Affairs (Misiura)*:

Such a decision cannot be made without a consideration of relevant factors ... Among the pre-eminent, plainly relevant factors, binding direction or no, is the extent of hardship for the visa-holder and for members of his or her family.<sup>142</sup>

Thirdly, in *obiter*, Kiefel and Bennett JJ in *Huynh* postulated that the Minister may consider that the national interest dictates that the commission of a particular crime, without consideration otherwise, could result in the cancellation of a non-citizen’s visa under s 501(2):

By way of illustration, the minister may consider that the national interest requires that the commission of a particular type of offence will inevitably result in the cancellation of a visa, where there has been a sentence to imprisonment for the requisite term.<sup>143</sup>

In dissent, Wilcox J seems to have expressed general agreement with this *obiter* comment made by Kiefel and Bennett JJ in *Huynh* (but without considering the national interest concept expressly):

If the minister had decided to deal with the matter on the basis simply of the respondent’s recorded criminal history, no other material being placed before him by either the department or the respondent, that decision would not have led to invalidity of his decision.<sup>144</sup>

In *Khan v Minister for Immigration and Ethnic Affairs (Khan)*, Gummow J considered that an improper exercise of power included an “exercise of a discretionary power in accordance with a rule

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<sup>137</sup> *Hunyh v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1270, [28].

<sup>138</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74] (Kiefel and Bennett JJ).

<sup>139</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

<sup>140</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74] (Kiefel and Bennett JJ).

<sup>141</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [75]. Justice Madgwick adopted the same approach in *Hunyh v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 436; [2003] FCA 1270, [30].

<sup>142</sup> *Misiura v Minister for Immigration and Multicultural Affairs* [2001] FCA 133, [18]. Support for this approach can also be found in the decision of *Stretton v Minister for Immigration and Border Protection (No 2)* (2015) FCR 36; [2015] FCA 559, [19] (Logan J).

<sup>143</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74].

<sup>144</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [50].

or policy, without regard to the merits of a particular case”.<sup>145</sup> Further, Gummow J emphasised that in considering relevant material placed before the decision-maker, he or she must “give proper, genuine and realistic consideration to the merits of the case and be ready in an appropriate case to depart from any applicable policy”.<sup>146</sup>

The *obiter* comments of Kiefel and Bennett JJ in *Huynh* arguably are an example of an improper exercise of power under s 501(2). By mandating that a particular offence by a non-citizen will result in visa cancellation under s 501(2), purportedly on “national interest” grounds alone, would be to act under a “rule or policy, without regard to the merits” of a non-citizen’s case.

Furthermore, adoption of the *obiter* example postulated by the majority in *Huynh*, would, with respect, arguably fail to give a “proper, genuine and realistic consideration” of the merits of a non-citizen’s case. In truth, the *obiter* example outlined by the majority in *Huynh* fails to appreciate a readiness, in a proper case, to depart from any applicable policy adopted regarding the content of national interest considerations.<sup>147</sup>

As Buchanan J outlined in *NBMZ*:

Whatever place a general policy may have in establishing guidelines for the assessment of individual cases, the policy cannot be substituted completely for individual attention to the application which requires a decision...<sup>148</sup>

Fourth, in *NBMZ*, Allsop CJ and Katzmann J found that in considering the discretion mandated by s 501(1), an evaluation of the objective seriousness of an applicant’s conduct or criminality was central to the Minister’s decision.<sup>149</sup> Adopting the position taken in *NBMZ*, Mortimer J in *Tanielu* found that the “seriousness of prior offending conduct” conditioned the discretion in s 501.<sup>150</sup>

Chief Justice Allsop and Katzmann J in *NBMZ* and Mortimer J in *Tanielu* seem to have adopted, in part, the powerful minority judgment in *Huynh*, where Wilcox J held:<sup>151</sup>

It is plainly within the subject matter, scope and purpose of the Act that, in determining how to exercise the discretion conferred by s 501(2), the minister should have regard to the nature of the person’s offence. This is an essential step in assessing the degree of criminality involved in the offence and, therefore, its significance as an indicator of the person’s character and the desirability or otherwise of excluding the person from Australia.<sup>152</sup>

Further, in *Gbojueh*, Bromberg J found that when the Minister exercises his or her discretion under s 501A(2) of the Act, the Minister is obliged to consider the “circumstances in which the offending occurred” and “those circumstances are relevant to the assessment of risk.”<sup>153</sup>

Indeed, Bromberg J appears to have accepted that his view was at odds with the majority approach in *Huynh*.<sup>154</sup> Justice Bromberg went further in *Gbojueh*, finding that the extent of the

<sup>145</sup> *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 294.

<sup>146</sup> *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 295. The decision of *Khan* has been subsequently applied in various cases, including, for example, *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; [2014] FCAFC 38, [25]–[26] (Allsop CJ and Katzmann J), [153] (Buchanan J); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164; [2010] HCA 48, [26], [29] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44; [2014] FCAFC 39, [122] (Buchanan J).

<sup>147</sup> See further *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 90 ALJR 197; [2015] HCA 50, [71] (Gageler J).

<sup>148</sup> *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; [2014] FCAFC 38, [208] (Buchanan J).

<sup>149</sup> *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; [2014] FCAFC 38, [32].

<sup>150</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [137].

<sup>151</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256.

<sup>152</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [43].

<sup>153</sup> *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288, [58].

<sup>154</sup> *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288, [58].



applicant's rehabilitation was a consideration the Minister was bound to take into account in considering the risk to the Australian community of allowing the applicant to remain.<sup>155</sup>

In *Lu v Minister for Immigration and Multicultural and Indigenous Affairs (Lu)*, Sackville J held (Black CJ agreeing) that the Minister had committed a jurisdictional error by failing to take into account an accurate statement of the non-citizen's criminal record when exercising the residual discretion in s 501A(2).<sup>156</sup>

Justice Sackville in *Lu* sought to distinguish the majority approach in *Huynh* on the basis that *Lu* involved a misdescription of the sentences imposed on the non-citizen and not the circumstances in which the offence was committed (as was in the case in *Huynh*).<sup>157</sup>

The decision of *Lu* plainly undermines the effect of *Huynh*, because any consideration of a misdescription of sentences imposed on a non-citizen relates to "specific factors personal to a non-citizen". As Bromberg J observed in *Gbojueh*, the proposed distinguishing of the majority approach in *Huynh* by Sackville J in *Lu* is misplaced:

That distinction, with respect, seems somewhat illusory given that, inevitably, the length of a sentence will be determined by and therefore be reflective of the circumstances in which the offence was committed, including circumstances personal to the visa-holder ... Black CJ (at [28]) and Sackville J (at [60]) were concerned with the misleading impression left with the Minister by the misinformation, that the visa holder had been involved with hard rather than soft drugs. That was a matter which raised the circumstances in which the offending occurred and personal circumstances including, as Black CJ observed at [29], the risk of recidivism by the visa holder. Therein, it seems to me, lies the tension between the reasoning in *Huynh* and that in *Lu*.<sup>158</sup>

The decisions of *Gbojueh*, *Lu*, *NBMZ* and *Tanielu* all plainly demonstrate that when considering the discretionary power mandated by s 501, the Minister was required to have regard to "specific factors personal to a non-citizen." In that respect, those decisions in the FCA are at odds with the majority approach in *Huynh*, which emphasised that particular factors personal to a visa holder may not necessarily be relevant in the exercise of discretion under s 501.

Fifth, given that the provisions in s 501 of the Act are predicated on determining whether the non-citizen has failed the "character test", the statutory context and purpose of the character provisions are plainly designed to protect the Australian community (from the prospect of the non-citizen posing a risk of harm to the community by their continued presence in Australia).<sup>159</sup>

As Wilcox J made plain in dissent in *Huynh*:<sup>160</sup>

The exclusion from Australia of non-citizens who may reasonably be regarded as undesirable residents, some of whom may be people convicted of crime, may be considered an integral part of such regulation.<sup>161</sup>

It's hard to appreciate properly whether a non-citizen represents a "risk of future harm to the Australian community" or is an "undesirable resident", unless a comprehensive evaluation is undertaken of the non-citizen's criminality in the past and a finding made as to their prospects of re-offending in the future.

By characterising the objective seriousness of the offence(s) committed by a non-citizen (under s 501 of the Act), the Minister can make a determination of the *level of harm* possibly faced by the Australian community should the non-citizen repeat the same or similar offending in the future. This analysis appears consistent with the approach adopted by Allsop CJ and Katzmann J in *NBMZ*, Mortimer J in *Tanielu* and Bromberg J in *Gbojueh*.

<sup>155</sup> *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288, [65].

<sup>156</sup> *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346; [2004] FCAFC 340, [61].

<sup>157</sup> *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346; [2004] FCAFC 340, [54].

<sup>158</sup> *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288, [56].

<sup>159</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [88], [121] (Mortimer J).

<sup>160</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256.

<sup>161</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [42].

The real difficulty with the majority approach in *Huynh* is that it provides a superficial and inadequate evaluation of whether a non-citizen's continued presence in Australia will pose a risk of future harm to the Australian community. If the Minister is not required to have regard to "specific factors personal to a non-citizen", it's hard to see how an evaluation could be made of the likelihood of the non-citizen committing further adverse or criminal conduct in the future (since prospects of re-offending and rehabilitation usually require reference to the circumstances of an individual).

Further, close consideration of the role played by a non-citizen in the criminality allows a proper finding to be made of the possible risk and extent of future harm should the non-citizen commit further offences in Australia. Plainly, inconsistent with the majority approach in *Huynh*, the remarks on sentence of the sentencing judge provide a good starting point to address those significant questions.

Finally, even if the Minister is permitted to have regard to the "national interest" criterion under s 501(2),<sup>162</sup> it does not follow that particular individual factors of the non-citizen (as previously outlined) are excluded. Indeed, that seems to have been the approach adopted in *Gbojueh*, *Lu*, *NBMZ*, and *Tanielu*.

As explained by Griffiths J in *Stretton*, the Minister is required to undertake:

[A]n evaluative judgment on a wide range of potentially relevant matters. Some of those considerations will relate to the rights and interests of the individual visa-holder and his or her family and associates, while other considerations will relate to broader community and policy interests.<sup>163</sup>

Although it is clear that *Stretton* found that the national interest criterion may be a relevant consideration under s 501(2),<sup>164</sup> *Stretton* should not be read as fully supporting the majority in *Huynh*. *Stretton* demonstrated that the national interest consideration under s 501(2) needed to be "balanced" against individual circumstances related to a non-citizen.<sup>165</sup>

Conversely, for s 501(2), the majority in *Huynh* seem to have rejected a "balancing exercise" between national interest considerations and individual personal factors related to a non-citizen.<sup>166</sup> For Kiefel and Bennett JJ in *Huynh*, the former consideration trumped the latter.

## CONCLUSION

By finding that the national interest criterion may form part of the discretionary limb in s 501(2), Kiefel and Bennett JJ in *Huynh* adopted a "broad construction" of that section. As the preceding has sought to demonstrate, the national interest criterion should be treated as an irrelevant consideration under s 501(2). Such a construction of s 501(2), evidently, is significantly "narrower" than that espoused by the majority in *Huynh*.

Although it is clear that the broad object of the Act is to regulate the entry and presence in Australia of non-citizens in the national interest, the cancellation and refusal powers in s 501 advance that objective in a particular way.<sup>167</sup> Accordingly, it does not follow that the broad statutory purpose of the Act can be imported as a possible relevant consideration under s 501(2).

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<sup>162</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74] (Kiefel and Bennett JJ).

<sup>163</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

<sup>164</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J). Similarly, in *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, Mortimer J outlined that the "national interest" criterion may well be a permissible consideration in the exercise of the s 501(2) discretion: *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [144].

<sup>165</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

<sup>166</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256, [74] (Kiefel and Bennett JJ).

<sup>167</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [124].

An essential legislative purpose of s 501 is concerned with the protection of the Australian community from risk of future harm by a non-citizen. As Mortimer J outlined in *Tanielu*, each of the statutory criteria set out in s 501(6) which may cause a person to fail the character test involve the protection of the Australian community.<sup>168</sup>

Consideration of the vague national interest criterion<sup>169</sup> under the discretionary limb in s 501(2) detracts from advancing the “protective statutory object” of that section. Rather, as examined earlier, the discretionary limb under s 501(2) is primarily concerned with whether the non-citizen’s continued presence is Australia poses an unacceptable risk of harm to the Australian community.

An assessment of whether the presence of a non-citizen in Australia poses an unacceptable risk of harm will primarily be made in light of the nature of the harm posed, and the likelihood of that harm eventuating. Those matters require a close consideration of not only the objective seriousness of the offending but mitigating factors favourable to the non-citizen (such as remorse and rehabilitation).

Further, as Mortimer J otherwise observed in *Tanielu*, the adoption of a statutory approach to s 501(2) that relies upon giving effect to the broad object of the Act in s 4(1) “does not assist” in resolving the tension and competing conflicts “as between an individual who may be excluded from Australia and the interests of the Australian community”.<sup>170</sup>

The broad construction of s 501(2) favoured by the majority in *Huynh* also appears in conflict with the statutory text of s 501. As previously observed, sub-ss 501(1) and (2) make no reference to the “national interest criterion.” Only s 501(3) makes express reference to the “national interest” criterion. It may be supposed that if Parliament sought for the “national interest” criterion to be a potential relevant matter under s 501(2), the legislature would have made this expressly plain in the Act.

Given the broad construction of s 501(2) adopted by the majority in *Huynh*, Kiefel and Bennett JJ found it did not seem possible to imply that the Minister was bound to consider specific factors personal to a non-citizen. Since 2004, however, a great deal of Australian authority has either been in direct conflict or questioned this latter approach adopted in *Huynh*.

Cases such as *NBNB* and *NBMZ* demonstrated that when considering the discretionary limb of s 501, the Minister was bound to consider the possibility of the indefinite detention of a non-citizen pending deportation. Clearly, that is a “specific factor” personal to the non-citizen.

Other cases such as *Tanielu*, *Lu* and *Gbojueh* made clear that a risk of harm to the Australian community was a mandatory consideration under s 501(2). In that context, as these cases outline, the relevant decision-maker is required to have regard to the nature of the offence and the likelihood of the non-citizen reoffending. Plainly, to make logical and rational assessments of these matters, the decision-maker would be required to consider carefully specific factors personal to a non-citizen (such as the remarks on sentence of a court as they relate to the non-citizen’s past criminality).

Importantly, even if the narrow construction of s 501(2) advanced in this article is rejected, it does not follow that the identified specific factors (personal to a non-citizen) lose the effect of remaining mandatory considerations. As Griffiths J outlined in *Stretton*, the concept of the national interest encapsulates considerations relating to the rights and interests of a non-citizen, their family, and associates.<sup>171</sup>

Given that the focus of s 501(2) is squarely concerned with the non-citizen’s continued “individual” presence in Australia, it appears illogical that the Minister would be able to ignore matters peculiar to the “non-citizen” when exercising his or her discretion under that section.

In light of the preceding, the construction of s 501(2) adopted by the majority in *Huynh* should be overruled. Two conclusions follow. First, the national interest concept is an irrelevant consideration

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<sup>168</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [129].

<sup>169</sup> See *Pape v Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23, [479], [508], [544] (Heydon J).

<sup>170</sup> *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [127].

<sup>171</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J).

under s 501(2). The implication of this argument, if accepted, is that a much narrower interpretation of the section will arise (since the wide-ranging nature of the national interest criterion will no longer be relevant). Secondly, when a decision-maker is considering the discretionary limb of s 501(2), he or she is bound to consider a number of specific factors, personal to a non-citizen. Nothing in that latter statutory construction is in conflict with the purpose of that section, since the object of s 501(2) requires a balancing exercise between matters related to protection of the Australian community *against* considerations personal to the non-citizen.<sup>172</sup>

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<sup>172</sup> *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [70] (Griffiths J); *Misiura v Minister for Immigration and Multicultural Affairs* [2001] FCA 133, [18] (Madgwick J).