Direction 99: A new era in fairness for non-citizens or much of the same?

By Jason Donnelly - Mar 10, 2023 8:40 am AEDT

Snapshot

- Direction 99, a ministerial direction made pursuant to s 499 of the *Migration Act 1958* (Cth), comes into effect on 3 March 2023.
- Direction 99 regulates character matters associated with non-citizens and provides greater focus on a non-citizen's links to Australia (unlike Direction 90).
- Although Direction 99 is a step in the right direction for greater fairness and tolerance of non-citizens with criminal records in Australia, it still has shortcomings related to the primary consideration of family violence and Australia's international law non-refoulement obligations.

On 23 January 2023, the Minister for Immigration, Citizenship and Multicultural Affairs (the Hon Andrew Giles MP) signed *Direction no. 99 – Visa refusal and cancellation under section 501*

and revocation of a mandatory cancellation of a visa under section 501CA (‘**Direction 99**’). The new ministerial direction was made pursuant to s 499 of the *Migration Act 1958* (Cth) (‘***Migration Act***’).

Direction 99 comes into effect on 3 March 2023. Given the significance of ministerial directions made under s 499 of the Act, this article seeks to provide an overview of Direction 99 and examine whether Direction 99 is a step in the right direction for greater fairness, justice and humane treatment of non-citizens in Australia.

The statutory regime

Part 9 of the *Migration Act* provides a suite of provisions that regulate bad character in relation to non-citizens. Section 501(1) gives the Minister a discretionary power to refuse to grant a visa to a non-citizen if the person does not satisfy the Minister that the person passes the character test.

Section 501(2) gives the Minister a discretionary power to cancel a visa that has been granted to a person if the Minister reasonably suspects that the person does not pass the character test. Section 501(3) gives the Minister a discretionary power to either refuse or cancel a visa if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the national interest.

Section 501(3A) of the Act mandates that the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass a limited version of the character test and the non-citizen is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

The mandatory cancellation regime has, by and far, had devastating consequences for non-citizens and their ties in Australia. Thankfully, a non-citizen whose visa has been cancelled under s 501(3A) can seek revocation of that decision under s 501CA(4) of the Act.

Deciding whether to revoke a mandatory cancellation decision might be the product of necessary fact finding, or the product of making predictions about the future, or it might be about assessments or characterisation of an applicant’s past offending (*Minister for*

Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane [2021] HCA 41 at [14]).

There is a suite of other provisions (ss 501A, 501B, 501BA and 501C of the *Migration Act*) that empower the Minister to set aside a decision of his or her delegate or the Administrative Appeals Tribunal ('**Tribunal**'). Generally, the Minister can only exercise these powers personally and must be satisfied that the refusal or cancellation of the relevant visa is in the national interest.

Generally, where one of the s 501 powers is exercised unfavourably to a non-citizen, that person has a right of review to the Tribunal under s 500 of the *Migration Act*. If the decision is made by the Minister personally, the only avenue for the non-citizen is the Federal Court of Australia under s 476A of the *Migration Act*. The non-citizen will need to demonstrate the decision is affected by jurisdictional error (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476).

The character test is reflected in ss 501(6)-(7) of the *Migration Act*. It is of wide import. By way of example, a non-citizen does not pass the character test if:

- the person has a substantial criminal record;
- the person has been convicted of an offence connected to immigration detention;
- the person is a member of, or associated with, a criminal organisation;
- the person has been convicted of certain offences (i.e. people smuggling, trafficking in persons etc);
- having regard to a person's past and present criminal / general conduct, there is a risk that the person would engage in criminal conduct in Australia;
- the person has a conviction for sex based offences involving a child; and
- the person has either being charged or indicted for international law crimes.

> *Section 501(1) gives the Minister a discretionary power to refuse to grant a visa to a non-citizen if the person does not satisfy the Minister that the person passes the character test.*

Direction 99

As a ministerial direction made under s 499 of the Act, delegates of the Minister and the Tribunal are bound to apply Direction 99. When considering a visa refusal, cancellation or

mandatory cancellation decision, delegates and the Tribunal must have regard to primary and other considerations in Direction 99.

The primary considerations are protection of the Australian community from criminal or other serious conduct, family violence, the strength, nature and duration of ties to Australia, the best interests of minor children in Australia and expectations of the Australian community. The other considerations are the legal consequences of the decision, extent of impediments if removed, impact on victims and the impact on Australian business interests.

Generally, primary considerations are given greater weight than the other considerations. However, the other considerations are not secondary considerations (*Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 at [23]-[24]).

The ultimate task of the decision-maker is to balance the positive considerations against the negative (*Gasper v Minister for Immigration and Border Protection* [2016] FCA 1166). Once that exercise has been undertaken, a determination is made as to whether the non-citizen poses an unacceptable risk of harm to the Australian community.

A missed opportunity?

Although Direction 99 is a step in the right direction for greater fairness and tolerance of non-citizens with criminal records in Australia, it is arguable that Direction 99 does not go far enough.

The greatest strength of Direction 99 is treating consideration of the strength, nature and duration of ties to Australia as a primary consideration. Under Direction 90, a non-citizen's links to the Australian community was not treated as a primary consideration.

Despite Direction 99 placing greater emphasis on a non-citizen's ties to the Australian community, Direction 99 is a missed opportunity for the Australian Labor Government.

First, paragraph 8.1.1(1)(iii) of Direction 99 requires a decision-maker to have regard to acts of family violence (regardless of whether there is a conviction for such an offence or a sentence imposed). That criterion forms part of having regard to the primary consideration of protection of the Australian community.

Having already considered the nature and seriousness of a non-citizen's acts of family violence under paragraph 8.1, that aspect of a non-citizen's adverse conduct has rightly been held against the person. However, the problem with Direction 99 (much like Direction 90), is an administrative decision-maker is required to reconsider a non-citizen's family violence under the separate primary consideration reflected at paragraph 8.2.

For example, paragraph 8.2(3) requires a decision-maker to consider the seriousness of a non-citizen's family violence. But that is precisely the function served under paragraph 8.1.1(a)(iii) of Direction 99.

The upshot of this analysis is that by requiring a decision-maker to consider a non-citizen's acts of family violence twice for the same purpose, the decision-maker is engaging unfairly in double counting (see Jason Donnelly, 'Double Counting Family Violence for the Same Purpose – Permissible Decision-making or Legal Unreasonableness?' (2023) 29 *Australian Journal of Administrative Law* 267).

Regrettably, double counting the same conduct for the same purpose is hardly consistent with the dictates of good administration, good government and indeed basic principles of fairness and justice. The family violence primary consideration should be removed (as it is already addressed in the primary consideration of the protection of the Australian community).

Secondly, paragraph 8.2(2)(b) of Direction 99 provides that the family violence primary consideration is relevant where there is information or evidence from independent and authoritative sources indicating that a non-citizen has been involved in the perpetration of family violence.

What is most troubling is the development of a line of jurisprudence that has determined, in effect, that police records produced are 'authoritative sources' for the purposes of paragraph 8.2(2)(b) (cf. *Pourabbas Aghbolagh and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 4269 at [161]-[162] ('***Aghbolagh 2021***'); *Aghbolagh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 43 at [35]-[36]; *Law and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1994 at [125]-[126]; *RTTW and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 4813 at [143]-[144]).

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For example, in *Aghbolagh 2021*, Senior Member Theodore Tavoularis concluded that police records reporting family violence were 'authoritative because it was made by a duly commissioned and appropriately qualified law enforcement officer' (at [157]). Merely because a law enforcement officer authored the report does not make the contents of the document authoritative. If that were so (as it seems to be), a non-citizen has no real prospect of challenging the impugned police reports.

The inclusion of paragraph 8.2(2)(b) in Direction 99, for the reasons given above, has led to non-citizens being subjected to a concerning level of unfairness. The case of *Aghbolagh 2021* is a good example. As happens in almost all of these cases before the Tribunal, despite the Minister relying upon impugned police records, the police officer who authored the report is not called to give evidence at the trial. As such, the non-citizen is not given the opportunity to cross-examine the police officer.

With the survival of paragraph 8.2(2)(b) in Direction 99, decision-makers will continue to determine that a non-citizen has engaged in conduct that constitutes a criminal offence as a step in the decision made under s 501 of the Act (cf. *Chiagozie v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 139 at [39]; *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352).

Such an approach is a most troubling indictment on the rule of law in Australia in circumstances where the rules of evidence and criminal procedure do not apply in the administrative law decision-making process. And yet, the implications for a non-citizen whose visa has been refused or cancelled under s 501 of the Act are extraordinary – the real prospect of permanent exclusion from Australia forever.

It is to be recalled, not that one needs reminding, that these non-citizens have often already been punished by the criminal law system before s 501 comes into the fray.

Thirdly, one of the greatest disappointments of Direction 99 is the consideration dealing with Australia's non-refoulement obligations. Given that Australia is a signatory to the *Convention Relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees*, it beggars belief that Australia's non-refoulement obligations are not treated as a primary

consideration in Direction 99. We are, after all, dealing with an extremely important area of international law (cf Jason Donnelly, 'Rethinking the character power as it relates to refugees and asylum seekers in Australia' (2019) 13 *UNSW Law Society Court of Conscience* 97).

Paragraph 9.1.2(2) of Direction 99 allows a decision-maker to defer consideration of a non-citizen's non-refoulement claims in the context of a case under s 501. That seems to give effect to the decision of *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 ('***Plaintiff M1/2021***').

Deferring consideration of a non-citizen's non-refoulement claims beyond the statutory process under s 501 is disappointing. It has the effect of prolonged immigration detention for non-citizens, leads to additional legal proceedings and means a non-citizen may lose a powerful consideration in their favour when considering the application of the s 501 power.

Both paragraph 9.1.2(2) and *Plaintiff M1/2021* are great examples of bad law.

Conclusion

Although Direction 99 is an improvement from its predecessor, non-citizens with criminal records in Australia still face an uphill battle. The policy is still skewed towards protection of the Australian community over other very important considerations (both individual considerations and Australia's international law obligations).

One must never forget that cases under s 501 and the question of the consequences of a failure to pass the character test not infrequently raise important questions about the exercise of Executive power. Among the reasons for this importance are the human consequences that removal from Australia can bring about (*Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [3]).

Dr Jason Donnelly is a barrister at Latham Chambers (www.jdbarrister.com.au). He is also a senior lecturer at Western Sydney University.

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