

## Part 9: Decisions under the *Migration Act 1958* (Cth)

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## Opening

Framing: Character-based refusal/cancellation and revocation under ss 501/501CA are guided by Direction No. 110 (**s 499 direction**). Decision-makers exercising powers under s 501 and s 501CA must comply with the Direction.

Key set-up:

- Direction 110 commenced 21 June 2024 and revoked Direction 99 from that date.
- “Decision-maker” includes a delegate and a body such as the AAT/ART (upon its establishment).
- Mandatory cancellation under s 501(3A) and the revocation pathway under s 501CA are within scope.

## 1. The Direction’s Purpose & Principles

Purpose: Direction 110 guides decisions under ss 501 and 501CA.

Principles (the lens for every case):

- Australia’s sovereign right; entry/stay is a privilege; expectation of law-abiding conduct.
- Safety of the Australian community is the highest priority.
- Community expects refusal/cancellation where serious character concerns are raised — even regardless of measurable risk of physical harm.
- Lower tolerance for serious conduct by short-stay or short-residence non-citizens; potentially higher tolerance for those here most of their life/from a very young age.

Weighting rule you must anchor to:

- 8.1 (Protection of the community) is generally to be given greater weight than the other primary considerations; primary > other considerations; one primary can outweigh others.
- “Primary” considerations are generally given greater weight, but not always; “other considerations” are not inherently secondary in every case: Suleiman [23]
- Treating “other” considerations as always lesser (or using “secondary” as a fixed label)

misconstrues the Direction and fetters discretion: Suleiman [25]

## 2. The Five Primary Considerations

### 2.1 Protection of the Australian Community (8.1)

What it is: Protection is the Government's highest priority; assess (i) past conduct seriousness and (ii) future risk.

Seriousness examples (very serious/serious): violent/sexual crimes; crimes of a violent/sexual nature against women/children; acts of family violence (even without conviction); forced marriage involvement, etc. (as listed under 8.1.1).

Risk lens (8.1.2): As potential harm rises, the tolerance for any risk falls; consider nature of harm, likelihood, evidence of rehabilitation, and where relevant, duration/purpose of intended stay for applicants.

Practice pointers (aligned to the text):

- Put forward rehabilitation evidence (programs completed, time in the community since last offence).
- For visa applicants offshore, address short-stay / compassionate rationales where relevant.

### 2.2 Family Violence Committed by the Non-citizen (8.2)

Standalone primary factor: The Government has serious concerns about conferring the privilege of entry/stay on those who engage in family violence.

When it applies: Convictions/findings/charges proven; or reliable independent evidence indicating perpetration, with procedural fairness afforded.

Seriousness factors: frequency/trajectory, cumulative effect, rehabilitation (acceptance of responsibility, insight into impact — particularly on children — and addressing drivers), and warnings/re-offending after warnings.

Direction 90 (now Direction 110) allows the same family-violence facts to be weighed across different mandatory considerations (8.1, 8.2, 8.4); this is not illegitimate “double

counting” but applying distinct, required contexts: Ismail [36]-[41]

### 2.3 Strength, Nature and Duration of Ties to Australia (8.3)

What to cover:

- Immediate family impact on Australian citizens/PRs/people with indefinite stay.
- For cancellations/revocations, assess other community ties: length of residence (note less weight if offending soon after arrival; more weight for positive contributions), and the strength/duration/nature of family/social links.
- Criminal conduct may bear on the strength, nature, and duration of Australian ties (especially family-based ties), not only on primary considerations like protection/expectations: Ali [20]-[21]

### 2.4 Best Interests of Minor Children in Australia (8.4)

Applies where: Any affected child under 18 in Australia; consider each child individually. Factors (non-exhaustive): relationship nature/duration (less weight where non-parental or limited contact), likely future positive parental role, impact of prior/likely conduct on the child, effect of separation (including ability to maintain contact), alternative carers, child’s views, and evidence of exposure to family violence/trauma.

Where specific issues are raised (children’s diagnoses, physical care needs, available supports), the Tribunal must make findings on each material issue to inform the weight given: Guttridge [13], [55]

### 2.5 Expectations of the Australian Community (8.5)

Content & effect:

- The community expects refusal/cancellation as a norm where serious conduct has occurred or an unacceptable risk is present.
- Listed conduct triggering strong expectation: family violence; forced marriage involvement; serious crimes against women/children/vulnerable people (including fraud/extortion/financial abuse against the vulnerable); crimes against officials;

trafficking/people smuggling/serious international crimes; worker exploitation. These expectations apply regardless of measurable physical-harm risk. Decision-makers proceed on the Government's stated view, not their own independent assessment.

- Para 8.4(4) directs decision-makers to apply the Government-stated expectations (8.4(1)–(3)) without case-specific polling: Ismail [49]-[52]

### 3. Other Considerations (Sections 9–9.3)

#### 3.1 Legal Consequences of the Decision (9.1)

- Unlawful non-citizens are liable to removal as soon as reasonably practicable (s 198) and detention in the meantime (s 189); for s 198, it is irrelevant whether Australia owes non-refoulement obligations.
- Protection findings (s 197C): Where a protection finding exists, removal to that country is precluded (subject to limited exceptions), so the person cannot be removed to that country and must remain in the Australian community (i.e. BVR) unless another visa is granted or removal to a third country is possible: NZYQ
- Application bars: After adverse s 501/501CA decisions, a person is generally barred by s 501E from applying for any other visa except a Bridging R (Class WR), and s 48A bars a further protection visa in the migration zone (unless lifted).
- Handling non-refoulement claims in s 501/501CA: If a protection visa pathway is open, the decision-maker need not determine non-refoulement at s 501/501CA stage; protection claims can be assessed if and when a protection visa is lodged. Where obligations are identified outside the protection process, they are weighed against seriousness; alternatives include removal to another country, or Minister's personal discretions (e.g., s 195A visa; s 197AB residence determination).
- In exercising the discretion, the decision-maker must identify and rationally weigh the direct and immediate statutory consequences of non-revocation (continuing detention, liability to removal, permanent exclusion), and cannot treat them as "neutral" merely because Parliament prescribed them; deferring non-refoulement does not excuse this duty: Singh [39]-[43]

- When deciding revocation under s 501CA(4), a decision-maker may lawfully decline to determine whether non-refoulement obligations are owed and instead leave that assessment to the protection-visa process: Plaintiff M1-2021 [36]-[40]

### 3.2 Extent of Impediments if Removed (9.2)

Assess impediments to establishing/maintaining basic living standards in the destination country: age/health, language/cultural barriers, and available social/medical/economic support.

“Health” includes underlying or recurring conditions (e.g., substance addiction and relapse risk), managed/remission states, and how removal may exacerbate them; it is not confined to currently manifested symptoms: Holloway [12]

### 3.3 Impact on Australian Business Interests (9.3)

Consider impact on Australian business interests; employment links generally carry weight only where a s 501/s 501CA decision would significantly compromise a major project or important service.

Decision-makers must consider any impact on Australian business interests where relevant; the Direction is not confined to major projects or important services: Arachchi [68]

## 4. Using Annex A (Cases & character test context)

Why it matters: Annex A explains the character test and includes instructive judicial quotes integrated into the Direction.

- Wong: conduct may be criminal and/or general; they are not mutually exclusive. Use this to organise submissions when both limbs are in play.
- Godley: the notion of being “of good character” concerns enduring moral qualities and acknowledges the possibility of reform; useful when presenting rehabilitation evidence (as recognised in the Direction’s own Annex A text).

(Tip: When you deploy these, make clear you are citing Annex A to Direction 110, not external sources.)

## 5. Building a Winning Case Under Direction 110

### 5.1 Submission Architecture

Structure your brief under the Direction's headings, so the decision-maker can adopt your road-map:

- 8.1 Protection — Acknowledge past conduct; then prove low risk with objective materials (rehabilitation achieved, time in community since last offence).
- 8.2 Family Violence — If relevant, squarely address frequency/trajectory, acceptance of responsibility, insight into impact (esp. on children), and tangible steps taken.
- 8.3 Ties — Detail length of residence, positive contributions, and family/social links; be ready to meet the “less weight if early offending” point.
- 8.4 Children — Treat each child separately; cover relationship, future role, effect of separation, alternative carers, views, exposure to FV/trauma.
- 8.5 Expectations — If conduct is not among the listed paradigms, explain why the Government-articulated expectation does not cut decisively against your client in light of the other primary factors (remember 8.1 generally outweighs but any primary may outweigh another).

Then turn to Section 9:

- 9.1 Legal consequences — Spell out detention/removal mechanics and any application bars engaged.
- Non-refoulement handling — If a protection path is open, note it; if obligations were identified outside protection processing, show how you ask the decision-maker to balance them and consider s 195A / s 197AB options flagged in the Direction.
- 9.2 Impediments — Document age/health, language/culture, support landscape in destination.
- 9.3 Business interests — Only if truly engaged.

## 5.2 Evidence Checklist

- Independent/authoritative sources are to be given appropriate weight — make them easy to adopt (reports, official records, programs completed, employment).
- Rehabilitation: dates, programs, negative screens, stable life factors (housing/employment), time since last offence (the Direction invites giving weight to time in the community since the most recent offence).
- Children/Ties: birth certificates, court orders, school letters, carer statements; map to each 8.4 factor; set out positive contribution to community for 8.3.

## 5.3 Common Pitfalls

- Downplaying serious conduct (esp. family violence) — the Direction is explicit about gravity and community expectations.
- Ignoring legal consequences (detention/removal, bars) — these are mandatory other considerations.
- Omitting risk analysis under 8.1.2 (nature of harm, likelihood, rehabilitation).

## 6. Short “Case-in-the-Direction” Illustrations

(All drawn from Direction 110’s own text — no external cases.)

- Character may improve with time (Annex A, Godley): Use the “enduring moral qualities” articulation and the recognition that a person of ill repute may be reformed — helpful to support rehabilitation submissions within 8.1.2.
- Criminal vs general conduct (Annex A, Wong): Conduct can be both; organise materials under both limbs where relevant to the character test narrative (useful context for why s 501 was enlivened, even though your merits submission runs under ss 8–9).

## 7. Close

What wins under Direction 110: Cases that squarely engage the primary considerations,

minimise risk under 8.1.2, confront any family violence issues with credible evidence, prove deep ties and children’s interests, and map the legal consequences and impediments with specificity. Always organise submissions under the Direction’s own headings and cite back to them so the decision-maker can readily adopt your analysis.

## 8. Case Citations

<b>Case</b>	<b>Citation</b>
<b>Ali v Minister for Home Affairs</b>	[2018] FCA 1895
<b>Arachchi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs</b>	[2022] FCA 1311
<b>Guttridge v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs</b>	[2022] FCA 229
<b>Godley v Minister for Immigration and Multicultural and Indigenous Affairs</b>	(2004) 83 ALD 411
<b>Holloway v Minister for Immigration, Citizenship and Multicultural Affairs</b>	[2022] FCA 1126
<b>Ismail v Minister for Immigration, Citizenship and Multicultural Affairs</b>	(2024) 417 ALR 36
<b>NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs</b>	(2023) 280 CLR 137
<b>Plaintiff M1-2021 v Minister for Home Affairs</b>	[2022] HCA 17
<b>Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs</b>	[2024] FCA 1273
<b>Suleiman v Minister for Immigration and Border Protection</b>	[2018] FCA 594
<b>Wong v Minister for Minister Immigration and Multicultural Affairs</b>	[2002] FCAFC 440