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Deportation & sentencing

Migration law 101 & how it is relevant in your criminal practice

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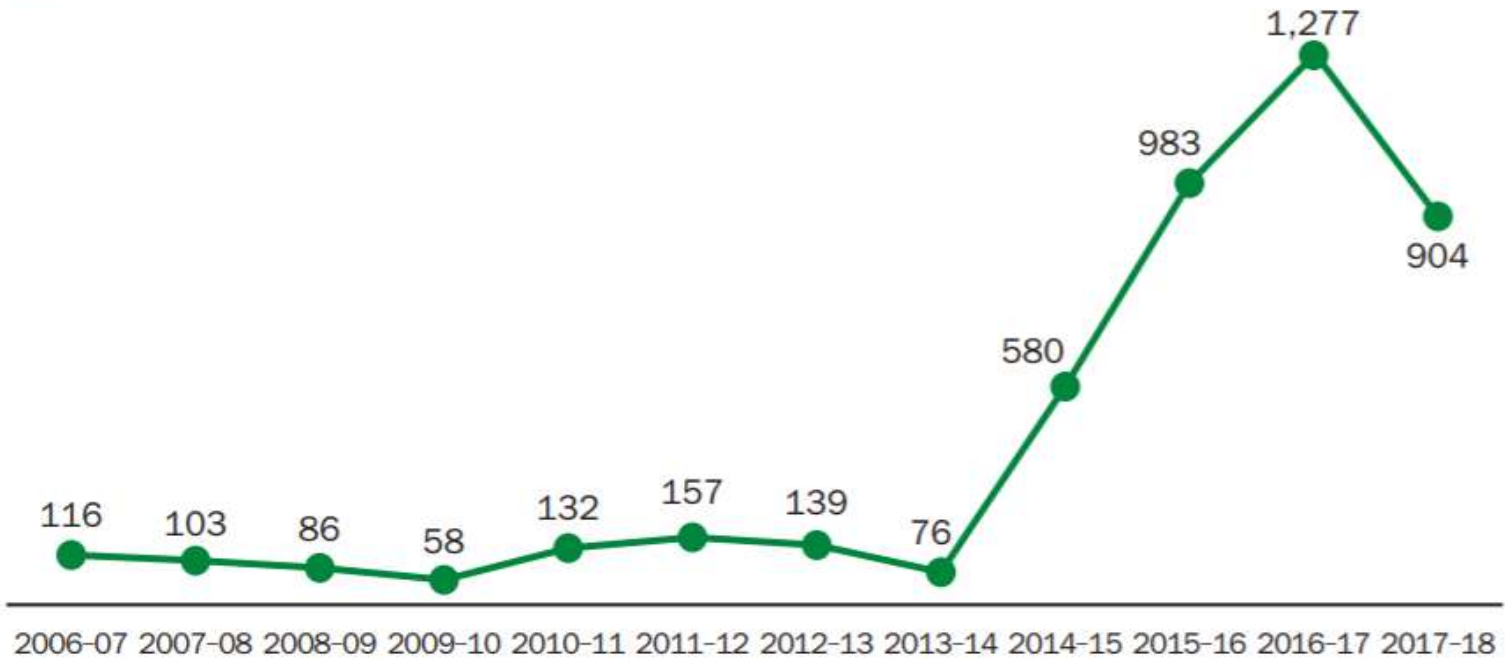
The operation of the *Migration Act* (Cth). When will a visa be cancelled?

Hugo Moodie

Figure 1: The number of section 501 visa cancellations, 2006–07 to 2017–18



When will a visa *definitely* be cancelled?

Section 501(3A) of the *Migration Act* is expressed in mandatory terms. It sets out that the Minister ***must*** cancel an offender's visa if:

The offender has a been sentenced to a term of imprisonment of 12 months or more; or

The offender is guilty of "sexually based offending involving a child";

AND the offender is serving a sentence of imprisonment.

“12 months of imprisonment or more” – be wary

The *Migration Act* defines “imprisonment” as “any form of punitive detention in a facility or institution.” This includes youth detention.

Concurrency is ignored in the *Migration Act*:

> *“For the purposes of the character test, if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.*
>
> *Example: A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.”*

NB: *Pearson* and the *Migration Amendment (Aggregate Sentences) Bill 2023*

- *Pearson v Minister for Home Affairs* [2022] FCAFC 203
  - Facts: Ms Pearson sentenced to an aggregate sentence of 4 years and 3 months of imprisonment for 10 offences
  - Held: Ms Pearson was not sentenced to imprisonment of 12 months for "an offence" as she received an aggregate sentence – her visa should not have been mandatorily cancelled

- As a result, the government has swiftly introduced the *Migration Amendment (Aggregate Sentences) Bill 2023* to include aggregate sentences

When does the Minister have the *discretion* to cancel a visa?

Very broad discretion

Section 501:

- The Minister may cancel a visa if the Minister "reasonably suspects" that a person fails the character test
- Can be based on past and present criminal conduct, or even "general conduct"
- Includes when a person has been acquitted of an offence on the grounds of unsoundness of mind or insanity
- Includes when the Minister reasonably *suspects* a person has *an association* with a group, organisation or person involved in criminal conduct

Section 116: The Minister can cancel a visa where *"the presence of its holder in Australia is or may be, or would or might be, a risk to… the health, safety or good order of the Australian community or a segment of the Australian community."*

How can a visa cancellation be contested? Direction No. 99, *Migration Act 1958*

Administrative review - Minister's delegate and the AAT apply Direction 79

Five primary considerations:

1. Protection of the Australian community from criminal or other serious conduct;
2. Whether the conduct engaged in constituted family violence
3. The strength, nature and duration of ties to Australia;
4. the best interests of minor children in Australia; and
5. the expectations of the Australian community.

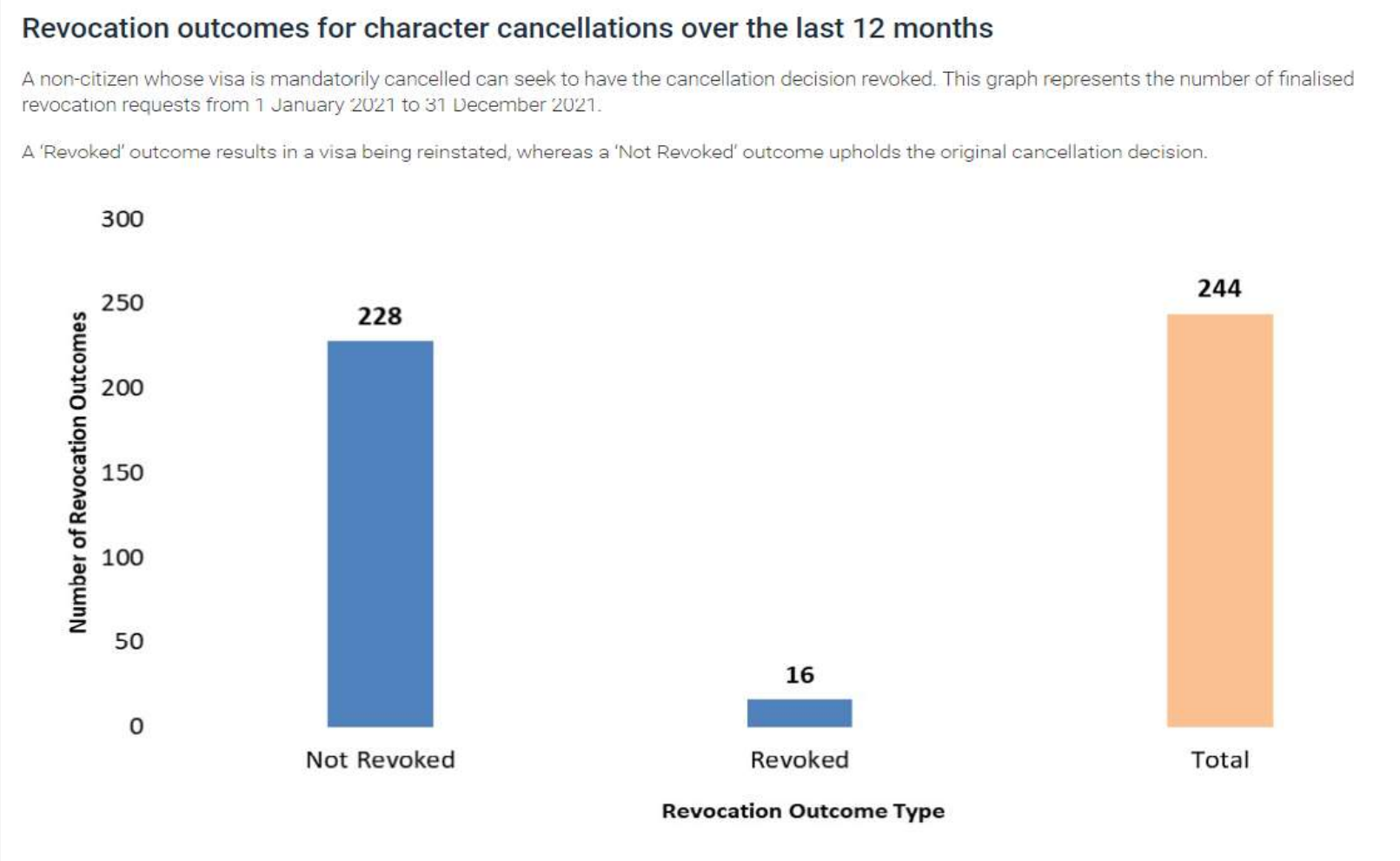
Secondary considerations include: international non-refoulement obligations (not sending refugees or asylum seekers to countries where they are at risk of persecution), and the extent of impediments to the offender if they are removed from Australia (such as substantial language barriers).

Relevant passages of Direction 99, *Migration Act 1958*

"Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia…"

"In some circumstances, the nature of the non citizen's conduct… may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa…In particular, the inherent nature of certain conduct such as family violence … is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community..."

Appealing a visa cancellation – it is hard



When will deportation mitigate sentence?

Tom Battersby

Deportation and sentencing – an unsettled area of law.

- Deportation has been held to be irrelevant to sentencing in NSW, WA, and the NT.
- In these jurisdictions, it has been held that:
    1. It is too hard to make any real assessment of an offender's prospects of deportation; and
    2. Whether or not a person is deported is an executive decision, subject to review within the constitutional structure, and is consequently irrelevant to sentencing.

The Victorian position: *Guden v The Queen* [2010] VSCA 196

- In our view, authority does not require, and there is no sentencing principle which would justify, a conclusion that the prospect of an offender's deportation is an irrelevant consideration in the sentencing process. As a matter of principle, the converse must be true. [25]

- Like so many other factors personal to an offender which conventionally fall for consideration, the prospect of deportation is *a factor* which may bear on the impact which a sentence of imprisonment will have on the offender, both during the currency of the incarceration and upon his/her release. [25]

- It follows that, subject always to the state of the evidence before the sentencing court, the prospect of deportation of the offender is a proper matter for consideration in determining an appropriate sentence. [26]

To mitigate sentence, the evidence must establish a risk of deportation

A court should only reduce a sentence based upon the prospect of deportation where there is sufficient evidence of both the risk, and the impact of that risk, under s 501(3A) of the *Migration Act*. – *Allouche v The Queen* [2018] VSCA 244 at [40].

- Must be a non-citizen;
- Did they have a visa?;
- Will visa be automatically cancelled?; or
- Has it already been cancelled?

Because the Court is contemplating a prospective outcome, there is a unresolved tension in establishing risk of deportation. But you must provide evidence of risk before mitigation is possible.

Deportation will not mitigate in some cases

- If client was unlawfully in Australia; or
- If there is no hardship in deportation.

[If the offender had a valid visa, the situation does] appear qualitatively different from that of an offender who is not lawfully resident in Australia, because his or her visa has expired. In the former circumstance, the cancellation of an existing visa could be said to be attended by a sense of real loss of the prospect of settling in Australia which the offender had previously secured. In the latter circumstance, the offender has not lost an existing right, but only the possibility of securing a visa. What may be said is that the offender's prospect of settling in Australia has been diminished.

– Nguyen v The Queen [2016] VSCA 198 at [35].

If there is a real risk of deportation, how can this mitigate sentence?

1. **The punitive effects of being deported: extra-curial punishment;**
2. **By making imprisonment more onerous;**
3. By reducing or removing the prospect of parole;
4. Time in custody may be more burdensome due to anxiety about their reduced prospects of parole.

Punitive effects of deportation: extra-curial punishment?

- Depends on the circumstances of the offender – what would the impact of deportation be?
- Would deportation be a hardship?

Example: *Magedi v The Queen*[2019] VSCA 102:

- *"He has no family in Afghanistan, having been aged three when he fled that country. If he were returned to Afghanistan, he would have no documentation, and would not be able to work. He would not be able to speak the local language."*

Deportation: imprisonment made more onerous

- *Guden: "[T]he fact that an offender will serve his/her term of imprisonment in expectation of being deported following release may well mean that the burden of imprisonment will be greater for that person than for someone who faces no such risk."*

For another example, see *Guode v The Queen* [2018] VSCA 205:

- *[I]t might be expected that the applicant will do her time 'hard', given that … she will likely spend her time incarcerated in the expectation that she will ultimately be deported (obliterating any hope of building a life in this country and forcing a separation from her surviving children).*

Parole and deportation; Recent developments

Steph Joosten

Note: time spent in immigration detention is akin to time in prison

- *Underwood* [2018] VSCA 87: immigration detention should be taken into account in sentencing in a "broad and practical way".
- You will need to make submissions about how immigration detention has affected the offender's liberty.
- In S*ahhitanandan* [2019] VSCA 115 the court stated that "the extent of the credit will depend on the circumstances of each case, including the nature and severity of the restrictions to which an offender has been subject …"

Case example – detention during Covid-19

- Client who has spent a considerable period in immigration detention awaiting trial
- Subpoena issued to Department of Home Affairs to confirm client was subjected to strict Covid-19 restrictions including:
  - no visits and no video-conferencing facilities provided;
  - cancelled programs and recreation,
  - lock-down;
  - limited food; and
  - restricted movement within the centre
- Evidence was able to be used to support submissions consistent with *Sahhitanandan* and *Underwood.*

Deportation and parole - a “vexed question”

- The Adult Parole Board appears to have changed its practice, and is now “less inclined” to grant parole to prisoner who will be immediately deported, and will “ordinarily avoid paroling” a prisoner who is contesting their Visa cancellation : see *Zhao* and the “Parole Manual”.
- Recent arguments have been raised in the VSCA that the cancellation of the offender’s visa means that they probably won’t get parole: *Zhao* [2018] VSCA 267 and *Wan* [2019] VSCA 81.
- In *Wan* the court indicated that it may take an offender’s anxiety at being refused parole into account, as this may make prison more burdensome than for another prisoner not similarly subject to deportation, and that this would not infringe s5(2AA)(a) of the *Sentencing Act.*

Recent developments

Hague v The Queen [2022] VSCA 17

Facts: Appeal against sentence, dangerous driving causing death, New Zealand citizen facing deportation with young family based in Australia

The Court of Appeal adopted principles in *Guden* by ultimately determining that the court is statutorily prohibited from having regard to the likelihood of an offender being granted parole – section 5(2AA)(a) *Sentencing Act 1991* *however* the sentencing court can given weight to:

a) The prospect or real chance of future deportation as an extra form of extra-curial punishment
b) Time in custody would be more burdensome than it is for others, due to anxiety about the prospect of future deportation

Recent developments

Hague v The Queen [2022] VSCA 17

Those two matters were considered 'significant' in the context of *Hague* therefore the Court of Appeal did not directly consider or determine whether:

- specific allowance ought to be given to any reduced prospects of being granted parole; or
- the applicant's perception of these reduced prospects.

The Court of Appeal considered that the former argument may be impermissible due to section 52AA(a) but that the latter question, in that case, was subsumed by the more prominent factors that add to the applicant's custodial burden.

See [31] – [32]

Practical tips and things to think about

- Is your client a citizen?
- If not, are they facing mandatory visa cancellation? Are they facing discretionary visa cancellation?
- How does this effect their incentives to plead guilty or contest?
- Should you refer them to a migration agent?
- Should you FOI their visa application?
- Should you subpoena or FOI the Department of Home Affairs about their conditions in detention?

Questions?

Useful Resources:

- *Deportation and Sentencing: An Emerging Area of Jurisprudence* – Sentencing Advisory Council, November 2019.
- Ministerial Direction 99
- Visa statistics: https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation
- National Judicial College – Chapter 'Deportation'
- Human Rights Commission

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