

Case	Citizenship	Main offending	Residency (at time of decision)	Family Violence	Non-fulfilment Obligations	Minor children	Immediate family in Australia	Other ties in Australia	Other factors	Delegate Decision under MDSB	Delegate views under MDSB
s. 22(1)(a)(ii)											
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s. 22(1)(a)(ii)											
1	New Zealand	On 12/4/2002 Ms E was sentenced to 12 months imprisonment. Long history of recurrent offending relating mostly to drugs, theft, violating and minor assaults.	Since 24 August 1978 (aged 22 days). Residence 44 years.	Nil	Nil	Australian citizen child (deaf unborn) - child protection order and living with paternal grandparents since 2009	Mother, grand parents, two siblings and two adult children, all Australian citizens (no letters bar one from mother)	No employment	Indigenous claims (and identified) and multiple health issues	Revoke 20/6/22	Revoke. This case would see the same revoke result under MDSB and MDSV, albeit somewhat stronger under MDSB because Ms E spent all of her formative years in Australia, from age 22 days to 18 and thereafter spent all of her adult years (some 40 years in total) in Australia. Ms E has immediate (and non-immediate) family ties to Australia in the form of mother, father, two adult children, one minor child, grandparents and two siblings - however these ties are diluted and not very strong because no supporting submissions have been received. She has a minor son who suffers from autism, but he has been in the care of his paternal grandparents since 2009 and Ms E sees him 'occasionally'. Again, no supporting submission is provided. She has no social networks. She has no employment links and has been on the disability pension as she is permanently incapacitated for work. She arrived in Australia in 1978 aged 22 days and has been employed for 44 years. Ms E still identifies as an indigenous Australian but does not meet the criteria set out concerning and it is arguable whether she would meet without further investigation and accordingly I have placed some weight on this matter. The principles do apply. Ms E has resided in Australia from a very young age, she has lived in the Australian community for most of her life, of which she spent all of her formative years, in particular age 12 to 18 and thereafter in Australia.
s. 22(1)(a)(ii)											
1	New Zealand	On 27/08/2015, Ms I was convicted of manslaughter and sentenced to five years and nine months imprisonment	Since 21 August 1991 (aged 12 years). Residence 30 years	Nil	Nil	If nephews and niece (the children of three siblings with whom she is close)	Four adult children and partner, as well as three siblings (all of whom provided submissions)	Large number of imbedded family, strong employment history, sporting achievements, and general community ties.	Ms I was engaged to a law worker, performing commercial kitchen work, which combined with initial levels of incapacity caused by the victim, triggered parietal arrhythmia. Physical and mental health issues and has	Revoke 05/09/2022	Revoke. This case would see the same revoke result under MDSB and MDSV, albeit somewhat stronger under MDSB because Ms I spent some of her formative years in Australia, from age 12 to 18 and thereafter spent all of her adult years (some 30 years in total) in Australia but her years children, Ms I has very strong immediate and non-immediate family ties in the form of a partner, four adult sons, three siblings and their families, 20 aunts/uncles, 65 cousins, an ex partner, ex parents in law, son's girlfriend and her family. She has no minor children, but is a close and supportive aunt to the eight minor children of her siblings. She has extensive social networks. She has strong employment links as a model, bar manager, night attendee and escort. She arrived in Australia in 1991 aged 12 and has been employed for 30 years. The principles do apply whilst Ms I has not resided in Australia from a very young age, she has lived in the Australian community for most of her life, of which some of that time was during her formative years, in particular age 12 to 18.

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Australian Government
Department of Home Affairs

Background Brief

For information

PDMS Number: MB22-001127

To: Minister for Immigration, Citizenship and Multicultural Affairs

Subject: Briefing on Ministerial Direction 99

Purpose

This brief has been prepared for you to personally brief Minister O'Neil on these matters ahead of the ^{s. 34(2)} [REDACTED]

^{s. 34(2)} [REDACTED].

Background

1. On 17 August 2022, you noted the draft Ministerial Direction 99 (**Attachment A**) that makes long-term residence in Australia a primary consideration in character-related visa decision-making (MS22-001434, **Attachment B** refers). You also agreed that the Department of Home Affairs (the Department) test the draft Direction through a desktop exercise involving a sample of cases.
 - The Department is continuing to refine the draft Ministerial Direction 99 in consultation with your office and the Department's legal division. For example, small changes to the 'principles' section of the new direction are currently being drafted to reflect the Government's intent.
2. Ministerial Direction 99 will mean that in character-related visa refusal, discretionary visa cancellation and revocation of mandatory visa cancellation decision-making, decision-makers would need to weigh in the non-citizen's favour, the length of ordinary residency in the Australian community, particularly in instances where the non-citizen spent their formative years in Australia.
3. Decision-makers would also need to consider the impact that the decision would have on dependent children who are Australian citizens, permanent residents or who have an indefinite right to remain in Australia.
4. These considerations would need to be balanced against other considerations including the seriousness of the conduct, recidivism and expectations of the Australian community.
5. A final version of the Direction will be provided for your signature following ^{s. 34(3)} [REDACTED] ^{s. 34(3)} [REDACTED], with a proposed commencement date of 1 December 2022.

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Key Issues

Case study exercise

6. Following your agreement, the Department conducted a desktop exercise to examine the impact Ministerial Direction 99 would have on character decision-making. To conduct this exercise, 10 cases that had been decided against the current Ministerial Direction 90 were chosen (eight were adverse decisions and two were favourable). These cases were selected to provide a cross-section of cancellation scenarios with varying characteristics, all of which include individuals who have been in Australia for a reasonable period of time to effectively show how the new primary consideration is balanced against current primary and other considerations.
7. The outcomes of the exercise were as follows:
 - of the eight adverse decisions, two (or 25 per cent) saw the decision changed from 'not revoked' (where the visa cancellation decision remains in place) to 'revoked' (where the visa cancellation decision no longer stands)
 - the two changed decisions both had relatively low sentence length (12 months and 18 months), had lived in Australia since they were children and did not involve family violence
 - the two favourable decisions remained unchanged, but it was noted that they became a relatively more straightforward decision to revoke the cancellation.
8. It was noted that the change in the Direction did not have a substantive effect on decision-making in cases that had serious offending or family violence, or where, despite the person having resided in Australia for a considerable period of time, they did not have significant ties or have a record of contribution to the Australian community.
9. Of the ten cases tested, delegates considered that the principles associated with long term residence applied to seven, with six having spent at least some part of their formative years in Australia. For the remaining three cases the delegates considered the principle of long term residence did not apply, as even though they had been in Australia for a considerable period of time (up to 18 years) the period did not constitute the majority of the person's life nor had it included any of the person's formative years.
10. Of the three cases where long term residence applied and an adverse outcome remained, two involved very serious offending (a child sex offence and murder) while the other involved long term recidivistic offending (some violent). It is important to note that none of those three cases had any family ties and only one had some employment history.
11. It should be noted that the sample size of this exercise was very small and targeted to cases where the revised Direction would impact the decision being made. While the outcome of the exercise showed a statistically significant change in decisions (25 per cent of adverse decisions were changed), given the complexity and variability of the caseload overall, it would not be expected that this level of change could be applied across the entire caseload.

Prioritisation of mandatory cancellation action

12.

s. 47C(1)



13. Mandatory cancellation under 501(3A) currently accounts for the majority of visa cancellation activity undertaken pursuant to section 501 of the Migration Act 1958 (the Migration Act). Triaging cases prior to mandatory cancellation will allow cases which present a lower risk to be de-prioritised for cancellation action.
14. In order to consider where an appropriate risk threshold would lie, the Department has been conducting analysis of historical mandatory cancellation outcomes to determine common characteristics of cases that resulted in revocation of the mandatory visa cancellation decision.

Preliminary Analysis

15. The Department has reviewed 794 mandatory cancellation cases made from 2018-2019 involving New Zealand citizens. Of these cases, 160 mandatory cancellation decisions had been revoked. Preliminary analysis of this *revocation* caseload has identified:

- 148 of those involved lower level offending (which excludes offending involving organised crime, serious violence, serious sexual assault etcetera), and
- a close correlation between the length of residence in Australia and revocation outcome, with 68 of the revocations being for non-citizens who had been resident in Australia for over 10 years.

16. The analysis identified five characteristics most closely aligned with revocation decisions:

- Criminality/type of offending
- Length of Residence in Australia
- Age on arrival
- International Non-refoulement obligations
- Gender.

17. These characteristics have formed the basis of an initial draft triage tool that can be used to identify cases that present with a combination of factors associated with a higher likelihood of revocation which would allow mandatory cancellation action to be re-prioritised.

18. The Department has tested the draft triage tool on the current mandatory cancellation pipeline of 60 cases. Applying the triage tool to these cases identified seven cases (12 per cent) which would be de-prioritised based on their characteristics. Of these, five are New Zealand citizens.

19. s. 47C(1)

20.

21. A revised Ministerial Direction, as well as the triaging of cases could have a reasonably significant impact overall on decision-making. While only a small sample size was used in the case study exercise to test the revised Direction, a 25 per cent change in decision-making is significant when considering the totality of the caseload. Although, as noted above, cases were chosen for this exercise based on having lived in Australia for a considerable period of time. Therefore, it would not be expected that the same level of change would be maintained across the entire caseload.

Consultation

22. Status Resolution and Visa Cancellation Division.

Client service implications

- 23. Through reducing the number of character related visa cancelations and refusals, and increasing the percentage of favourable revocation decisions, changes to the Ministerial Direction and related work is expected to result in a reduction in merits review applications made at the Administrative Appeals Tribunal (AAT) for character related visa decisions.
- 24. In the short-term, the introduction of Ministerial Direction 99 will require the current caseload of over 5,000 cases to be reviewed to identify affected cases. The Department anticipates around 2,800 cases will need to be renotified.

Sensitivities

- 25. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.
- 26. Amendments to character settings generally attract scrutiny from the international community, advocacy groups and human rights bodies.

Attachments

Attachment A: Draft Ministerial Direction 99 – changes tracked

Attachment B: MS22-001434 – New Ministerial Direction 99 on character-related visa decision-making – Minister signed

Authorising Officer	Contact Officer
Tara Cavanagh Frist Assistant Secretary Immigration Integrity, Assurance and Policy 24/09/2022 Ph: s. 22(1)(a)(ii)	David Gavin, A/g Assistant Secretary Compliance and Community Protection Policy Ph: s. 22(1)(a)(ii)

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