

From: s. 22(1)(a)(ii)
To: s.22(1)(a)(ii) ; s. 47F(1) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii)
Cc: s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii) ; s.22(1)(a)(ii)
Subject: MD99 Natural Justice process [SEC=OFFICIAL]
Date: Wednesday, 1 March 2023 4:50:33 PM
Attachments: [Ministerial Direction 99.pdf](#)

OFFICIAL

Hi Team,

MD99 commences from this Friday 3rd March, meaning any Delegate decisions made under MD90, must be finalised by COB this Thursday 2nd of March.

A new MD99 submission template was provided for Legal Opinion in October 2022 and we are yet to receive a cleared version. It currently sits with Special Counsel Ian Deane and we are hopeful to have it back this week. Once received, Legal Assurance will make appropriate changes to all other submission templates, get them legally cleared, and then distribute (and update Sharepoint) for use.

s.22(1)(a)(ii) has been assigned the task of updating all documents/templates, including natural justice letters, NOICC/R's, email templates, attachment bundles etc. If there are any documents used, that refer to MD90/99 and are NOT in Sharepoint, please forward to s.22(1)(a)(ii) to update and upload to Sharepoint.

VACCU will commence issuing MD99 – Natural Justice letters from this Friday 3rd March. All allocated cases with case officers that have had a NOICR issued will need to be issued MD99- Natural Justice letter prior to decision (both Character Delegate and Ministerial cases will need MD99 – Natural Justice letters issued – if you have a Ministerial case you believe may be an exception, please speak to your manager/LA).

Below are some detailed instructions for case officers/managers:

- From this Friday 3rd March, case officers are responsible for issuing MD99– Natural Justice letters to their allocated cases.
- All MD99 NJ must be allow 28 days for a response.
- TRIM the NJ letter to the VACCU file.
- Once NJ is issued, you must:
 - 1) Enter a note within ICSE, stating: *Ministerial Direction 99 issued under natural justice – see 'TRIM REF'*.
 - 2) Enter a client note within CCMD stating: NJ - MD99 issued 'date'... & Due 'date'.

During the 28-day NJ period, case officers may be allocated VAPA's and/or Sponsor of Concern cases which are not affected by the new MD99

Case Management at each IDC will be notified to expect an increase in NJ letters to deliver.

PLEASE NOTE – if your client has an authorised recipient, please send MD99 NJ only to that recipient, there is no need for duplicate copies to be sent to clients at IDCs as well (this will limit the effort required by case management).

If you have any questions feel free to contact any of the management team.

Kind regards,

s.22(1)(a)(ii)

Assistant Manager

Character and Cancellation Branch

Status Resolution and Visa Cancellation Division

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Ministerial Direction 99. Ministerial Direction under s499 of the Migration Act 1958

April 2024

What is a Ministerial Direction?

Section 499 of the Migration Act 1958 enables the Minister to give written directions to a person or body regarding the performance of functions, or the exercise of powers, under the Act.

Directions are not law, they are instructions that Ministers issue to guide delegated decision makers. It reflects the Minister's priorities. And is to assist with consistency in decision making.

Directions help ensure that:

- all decision-makers consistently weigh or take into account relevant matters that the Government believes to be important when exercising a discretion; and/or
- specified procedures are followed consistently by decision-makers

A section 499 direction is binding at both primary and merits review decision level and must be complied with, within the context of exercising a legislative discretion.

Previous Directions

Direction	Validity	Minister
90	22 March 2021- 2 March 2023	Minister Hawke
79	28 February 2019 - 21 March 2021	Minister Coleman
65	23 December 2014 - 27 February 2019	Minister Morrison
55	1 Sept 2012 - 22 December 2014	Minister Bowen
41	15 June 2009 - 31 August 2012	Minister Evans
21	23 August 2001 - 14 June 2009	Minister Ruddock
17	21 June 1999 - 22 August 2001	Minister Ruddock

Direction 99

What is new (from Direction 90)

- Member of the family unit is now defined for the purposes of family violence.
- The strength, nature and duration of ties to Australia criterion has been made a primary consideration.
- Nature and seriousness of conduct now includes an assessment of whether foreign offending or conduct is classified as an offence in Australia.
- In the Other Considerations, International Non-refoulement Obligations is now Legal Consequences of decision under s501 or s501CA.
- Impact on Australian business interests is a stand alone consideration.

Direction 99

Part 1

Preliminary

- Interpretations
- Preamble – Objective and Principles

Part 2

Making a decision

- Relevant considerations
- Primary and other considerations

Annex A

Application of character test

- Overview of character test
- Application of the character test

Preamble – 5.1 Objectives

The Preamble to the direction identifies the objectives of the Direction:

- Regulate in the national interest the coming into and remaining in Australia of non-citizens. Non-citizens who do not pass the character test are liable for visa refusal or visa cancellation.
- Refusal under s501(1) may be made if the person does not satisfy the decision maker they pass the character test. Visas may be cancelled under s501(2) if the decision maker reasonably suspects the person does not pass the character test. The specific circumstances of the person must be considered in refusals or cancellations.
- Under s501(3A) a decision maker must cancel a visa if satisfied the non-citizen does not pass the character test (based on specific limbs of the character test) and the non-citizen is serving a sentence of imprisonment on a full time basis for an offence against a law of the Commonwealth, state or territories. A non-citizen who has had their visa mandatorily cancelled may request revocation of the cancellation under s501CA. The decision maker must consider whether the person passes the character test and whether there is another reason to revoke the cancellation given the circumstances of the case.

5.2 Principles

- 5.2(1) Australia has a sovereign right to decide whether non-citizens of character concern are allowed to enter or remain in Australia.
- 5.2(2) non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to or forfeit the privilege of staying in Australia.
- 5.2(3) the Australian community expects the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct in Australia or elsewhere, that raises serious character concerns.
- 5.2(4) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding limited stay visas, or by other non-citizens who have been participating in, and contributing to, the Australian community for only a short period of time.
- 5.2(5) With respect to decisions to refuse, cancel and revoke cancellation of a visa, Australia will generally afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.
- 5.2(6) decision makers must take into account the primary and other considerations relevant to the individual case. Inherent nature of certain conduct such as family violence and the other types of conduct is so serious that even strong countervailing considerations may be insufficient in some circumstances.

Part 2 –Making a decision

Informed by the principles in paragraph 5.2 a decision maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.

This directs the decision maker to the considerations which must be included in the character decision.

- 7(1) in applying the considerations, information and evidence from independent and authoritative sources should be given appropriate weight.
- 7(2) primary considerations should generally be given greater weight than the other considerations.
- 7(3) one or more primary considerations may outweigh other primary considerations.

Primary and other considerations

Primary Considerations:

- 8.1 protection of the Australian community from criminal and other serious conduct.
 - 8.1.1 the nature and seriousness of the conduct
 - 8.1.2 the risk to the Australian community should the non-citizen commit further offences or engage in serious conduct
- 8.2 Family violence committed by the non-citizen
- 8.3 The strength, nature and duration of ties to Australia
- 8.4 Best interests of minor children in Australia affected by the decision
- 8.5 Expectations of the Australian community

Other considerations

- 9.1 Legal consequences of decisions under s501 or s501CA;
 - 9.1.1 Non-citizens covered by a protection finding
 - 9.1.2 Non-citizens not covered by a protection finding
- 9.2 Extent of impediments if removed
- 9.3 Impact on victims
- 9.4 Impact on Australian business interests



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Primary Consideration: 8.1 Protection of the Australian community

8.1.1 The nature and seriousness of the conduct

April 2024

Protection of the Australian community

There are two limbs to this consideration:

First limb – Nature and Seriousness of offending

Backward looking – consideration of the offences, the nature of the conduct and objective seriousness of the conduct.

Second limb - Likelihood of reoffending*

Forward looking. The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

*risk of reoffending for Minister cases

First limb - Nature and seriousness of offending

D99 provides guidance on the types of crimes or conduct that are viewed very seriously and seriously.

Very serious offending:

- ❖ Violent and/or sexual offences
- ❖ Violent crimes against women or children regardless of sentence imposed
- ❖ Acts of family violence regardless of whether there is a conviction or sentence imposed
- ❖ Other offences may be viewed very seriously

Serious offending:

- ❖ Causing a person to enter into or being a party (not victim) to a forced marriage regardless of conviction or a sentence imposed
- ❖ Committed against vulnerable members of the community and officials
- ❖ Conduct forming the basis for a subjective failure of the CT
- ❖ Immigration detention escape

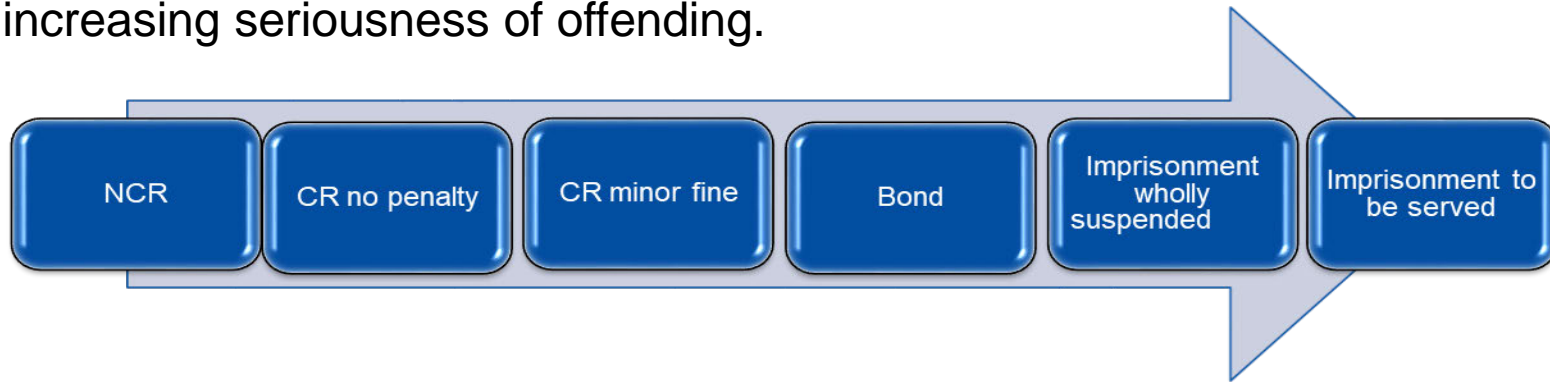
Aggravating factors

The Direction indicates aggravating factors to be considered in assessing the seriousness of the offending include:

- Vulnerable victims
- Circumstances of the offending:
 - In detention
 - On parole/bond
 - Consider breaches of orders also in the RISK section/ false or misleading information or non disclosure.
 - Warnings – do not increase the seriousness of the offence rather they are risk indicators.
- Loss or damage resulting from offending
- Racial hatred
- Planning / pre-meditation
- Breach of trust
- Conduct to cover up offence
- Not assisting police to detect further offenders
- Dangerous driving causing death
- trying to escape police

Frequency and increasing seriousness

The Direction specifies that seriousness can include an assessment of the frequency of the non-citizens offending and or whether there is a trend of increasing seriousness of offending.



If the offending is considered to be frequent and increasing in seriousness, the offending can be considered to be serious.



Provision of misleading information and prior warnings

- The Direction instructs that whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending in visa applications or incoming passenger cards, should also be taken into consideration when assessing the severity of the criminal or other conduct.
- Where the non-citizen has re-offended since being formally warned or made aware, in writing, regarding the consequences of further offending in relation to the person's migration status – note the absence of a warning should not be considered in the persons' favour. This should also be included in the assessment of the severity of the non-citizens' criminal or other conduct.

Both of these factors, if relevant in the particular case, are considered to raise the offending to the level of serious

Offending conduct in another country

Offending overseas is to be considered where that offence or conduct is classified as an offence in Australia when assessing the seriousness of the non-citizens whole conduct.

An assessment must be undertaken regarding offences or conduct that occurred in another country

- is that offence or conduct considered an offence in Australia?
- is the penalty commensurate with what the person would receive if the offending occurred in Australia?

Although the last question is not in the Direction, it is part of the assessment of criminality or poor conduct of the non-citizens.

Determining seriousness

- Evaluate the seriousness of person's offending
- Discuss neutrally - not emotively
- Useful resources include sentencing remarks, criminal history, parole board comments, police fact sheets
- the Direction instructs that the sentence imposed by the Court for the crime or crimes should be taken into consideration when assessing the seriousness of the offending*
- Include non-citizen's submissions on seriousness
- If there are no Sentencing remarks for most recent or serious offences – state not available to the Department.

Where to start

- Develop a reverse chronology of the client's criminal conduct and a general understanding of the client's criminality.
- Ensure you follow convictions through the appeals process. Do not double count offending that has been subject to an appeal – it will still only be one offence and one sentence
- Second time, read actively, highlighting more serious crimes and annotating crime types (violent, sexual, involving minors etc.).
- Mark anything to follow up / query.
- Mark convictions where sentencing remarks may be useful.
- Compare the history to corroborative documents (if available) to ensure it is accurate.

Setting out the criminal history

- Extract relevant facts into the criminal history (concurrent, cumulative, aggregate sentencing, form 1, parole period).
- Where sentencing remarks are available, extract from judicial commentary the circumstances of the offending and judge's view of seriousness, aggravating factors, and note harm caused to victim/s. Use caution where the Judge has cited counsel.
- Marry up offences to offending circumstances, where available.
- Do not include 'maximum penalty of offence, etc.' or 'discount for pleading guilty'.
- If non-citizen provides details of offending, exercise caution re decision-maker 'accepting', as may be self-serving and contradict SRs (if available).
- Include non-citizen's comments or submissions on seriousness (if any).

Best practice

Recent offences (last 5 years) – more detail – example:

On 7 November 2018 Mr X was convicted in the District Court of Queensland of the following offences for which he was sentenced to a head sentence of five years, three months and 10 days imprisonment (Attachment A);

- Persistent Sexual Exploitation of a Child, for which he was sentenced to a term of imprisonment for three years and six months;
- Harbour Or Conceal A Child Unlawfully Absent From State Care, two counts of Unlawful Sexual Intercourse with Person Under 16 Years and Fail to Comply with Bail Agreement for which he was sentenced to a term of imprisonment of 21 months imprisonment; and
- Breach of Bond (regarding offence 29 October 2014) was found proved and he was sentenced to 10 days imprisonment.

If offences are minor and historic – less detail - example:

Mr X has a number of other minor offences from 2014 to 2016 comprising of drive under disqualification or suspension, fail to comply with breath analysis and fail to give personal details to officer on request. He received a number of fines, and had his driver's licence disqualified for these offences (Attachment A).

Summarising a finding of serious offending - example

The information shows that Mr/s NAME's offending has continued from when s/he was a young adult through into adulthood up until the most recent offending. In considering overall the frequency of the offending, the nature of it, and the various sentences imposed, including those involving terms of imprisonment to be served, I find that his/her offending is very serious / serious.

Common errors

Commonly seen errors that can lead to Court losses:

- Formalities - Date of offence v date of conviction v date of sentencing; offence names; lump sum offending
- Call-ups – offences not to be recounted/repeated
- Appeals and re-sentencing
- Criminal history interpretation
- *RUATITA* case law – counting (example: Since 2001 Mr NAME has over 50 offences for violent, property, dishonesty, drug, and driving offences.)
- Use of word ‘including’ in listing all offences
- Detail of suspended sentences or part thereof



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Protection of the Australian community

8.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

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Risk to the community

8.1.2(2) of the Direction stipulates in assessing the risk posed to the Australian community, decision makers must have regard to cumulatively:

- Nature of the harm (mandatory) if NC reoffends
- Risk (Minister cases) / Likelihood of reoffending (best practice)

For visa applicants whether the risk may be affected by the duration and purpose of the visa and if there are strong and compassionate reasons for grant of short stay visa

Both aspects must be addressed.

Nature of harm – Element 1

Nature of harm to individuals or the Australian community should the non-citizen engage in further criminal or serious conduct;

If X reoffends what harm to individuals or the community may result?

- violent offending – physical and/or psychological harm.
- commercial drug offending – harm to individual drug abusers (offend to support drug habit)
- child abuse material offending – contributes to the market and proliferation of child exploitation material; case law in *Dunn*

Harm to the community for all offending: cost to the community through required use of resources such as: law enforcement, justice system, health services.

Nature of Harm – Element 1

Material

- Sentencing remarks may be used to indicate the nature of harm of the person's prior offending. For example, the judge may note the damage to the community caused by illicit drugs being circulated within it, and the harm to individuals caused by the supply of the drugs.
- Victim impact statements

Finding

- I find that should X reoffend in a manner involving violence it may result in physical and/or psychological and/or financial harm to member/s of the community, as well as a cost to the community through required use of ...

Risk to the Community – Element 2

Likelihood [Risk]

The likelihood of non-citizen engaging in further criminal conduct or other serious conduct taking into account:

- i. information and evidence on the risk of the non-citizen reoffending; **and**
- ii. evidence of rehabilitation achieved by time of decision, giving weight to time spent in community since the most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken *Bui*)

Risk to the Community – VACCU only

Risk of harm may be affected by visa type

where consideration is being given to whether to refuse to grant a visa to the non-citizen – whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

This boils down to:

- Whether the risk of harm may be affected by the duration and purpose of the intended stay;
- The type of visa applied for;
- Are there strong and compassionate reasons for granting a short stay visa?

Risk analysis – lower likelihood

Acknowledge any factors that contribute to the client's offending history:

- Substance abuse
- Psychological issues, anger management issues
- Financial circumstances

Objective Discussion of Remorse:

- Judge's SR including guilty pleas
- Co-operation with police
- Person accepts responsibility

Objective Discussion of Rehabilitation

- SR -Judge's views on prospects of rehabilitation
- Courses completed
Counselling/medication
- Claimed abstinence (i.e. prison drug tests negative)
- Positive behaviour in prison
- First period of incarceration had a salutary effect
- Positive behaviour in detention

Objective Discussion of Protective Factors:

- Family support
- Accommodation, employment offers
- Community support
- Time in the community and has not reoffended (if applicable)

Risk analysis – increased likelihood

Objective Discussion of Remorse:

- Judge's sentencing remarks
- Denial of culpability and/or seriousness and /or excuses
- Minimisation of role/responsibility in offending
- Historical remorse – always sorry but continues to offend

Objective Discussion of Protective Factors:

- No family support
- No accommodation
- No employment offers

No time in the community? – rehabilitative efforts not yet tested in the community.

Objective Discussion of Rehabilitation:

- Judge's sentencing remarks
- Previous rehabilitation with relapse – didn't learn much
- Offending after prior claimed rehabilitation
- Previous court leniency: fines, bonds, suspended sentences, etc have failed to deter X from reoffending.

Objective Discussion of Conditional Liberty: showing disregard for Australian laws

- Breaches of bail, parole or other orders
- Breaches of DV or protection orders
- Breaches of suspended sentences
- Previous s501 warnings /counselling letters subsequent offending (NB notification issues such as did they get the warning – at least did they get the NOICC/NOICR)
- Incoming Passenger Cards and did not declare convictions.

Table summarising risk of reoffending considerations

Drivers of Offending	Rehabilitation	Remorse, Insight, Reform	Protective factors	Conditional liberty
<ul style="list-style-type: none"> • Drugs/alcohol abuse • Mental health • Low IQ • Acquired brain injury • Poverty / debts • Gambling addiction • Trauma • Relationship breakdown • Youth 	<p><u>Evidence of measures taken to address column one factors</u></p> <ul style="list-style-type: none"> • Claimed abstinence • Courses completed • Counselling/psych help • Medication • Behaviour in prison/ immigration detention <p><u>Counter-factors:</u></p> <ul style="list-style-type: none"> • Previous rehabilitation with relapse • Offending after claimed rehabilitation factors • Offending outside of key driver, eg where drug use commenced halfway through criminal history • Tested for a short time in the community • Untested in community 	<p>Evidence includes:</p> <ul style="list-style-type: none"> • Guilty pleas • Credible denials ('I'm not a violent offender') • Co-operating with police/ naming co-offenders • NJ response that addresses responsibility • Acknowledgement of column one influence • Goals if revoked, eg build relationship with child <p><u>Counter-factors:</u> Historical remorse prior to reoffending Lack of remorse, denial of culpability and/or seriousness Victim blaming (I was provoked)</p>	<ul style="list-style-type: none"> • Family support • Steady, clean accommodation • Employment offers • Community support <p><u>Counter-factors:</u> Above factor/s existed when the last offended</p>	<ul style="list-style-type: none"> • Breaches of bail, probation, suspended sentences? • Warnings? • Sex offender registered <p><u>Counter-factors:</u> Above factor/s existed when the last offended</p>
<p>Finding example:</p> <p>'I find that NAME's offending has been the result of his ongoing substance addiction'</p>	<p>Finding examples:</p> <p>'I accept that NAME has made progress in addressing the drug addiction that has driven his offending. However...'</p> <p>Or</p> <p>'NAME has made no representations as to rehabilitative efforts. I find that the risk of him continuing to engage in substance abuse increases the risk of his reoffending.'</p>	<p>Finding example:</p> <p>'I acknowledge NAME's remorse and accept that his insight into his offending lessens the risk that he will reoffend. However...'</p>	<p>Finding example:</p> <p>'I note the offer of accommodation for NAME from his mother. I find that steady accommodation in a crime and drug free environment will assist NAME in refraining from reoffending.'</p>	<p>Finding example:</p> <p>'I note with concern that NAME has a number of convictions for breaches of conditional liberty. This demonstrates a disregard for the law that I find indicative of NAME's propensity to reoffend.'</p>

Sources of information

Discussion/analysis of the **nature of harm and likelihood** will draw on a wide range of sources:

- Sentencing remarks
- Prison reports, parole reports
- Statement of facts (provided not disputed)
- Criminal record (especially breaches of orders)
- Offshore Penal certificates (i.e. New Zealand)
- Incoming passenger cards (convictions declared?)
- Previous Department warnings
- Letters from family / other support, employment prospects
- Professional reports (is psychologists, psychiatrists)
- Any submissions the non-citizen has made regarding the nature and harm and likelihood of the offending

Materials utilized

- Collate material, highlight relevant and probative material, analyse
- DO NOT state all positive factors and then conclude the person is a 'risk of reoffending'. There must be analysis leading to a logical conclusion. Positive and negative factors must be included and the material engaged with to lead to a logical conclusion. Analysis is a must, bare statement of all the factors then an unsupported conclusion is insufficient. We have lost in the courts many times on a failure to engage with the material.
- Organisation of the material is important. It is best if it is logically arranged – usually in date order after all the character evidence eg NCCHC, Sentencing Remarks then NoC/NOICC/NOICR then the response then any NJ and responses with the direction last.
- Ensure that all material is accounted for – anything sent to the client for comment must be included and anything the non-citizen sent should be included. Anything adverse to the non-citizen used in the decision must be sent to the non-citizen for comment.

Questions?



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Ministerial Direction 99

Primary consideration:

Family violence committed by the non-citizen.

April 2024

Rationale behind Family Violence (FV) concerns

The Family violence consideration was first introduced in D90 and is one of the five primary considerations in D99.

8.2(1)

The Government has serious concerns about conferring the privilege of entering or remaining in Australia on non-citizens who engage in family violence.

The concerns are proportionate to the seriousness of the family violence engaged in by the non-citizen.

When is the FV consideration relevant?

This is a threshold test – if neither of the below considerations are met, it is not necessary to consider the seriousness of family violence criterion.

Firstly has there been family violence?

This consideration is relevant in circumstances where:

- a) The non-citizen has been found guilty of an offence, convicted of an offence or had charges proven that involve family violence and/or
- b) There is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been involved in perpetrating family violence and the non-citizen has been afforded procedural fairness with regard to that information or evidence

Definition of Family Violence

At section 4(1) Direction 99 (D99) has a definition of family violence:

family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:

- a) an assault; or
- b) a sexual assault or other sexually abusive behaviour; or
- c) stalking; or
- d) repeated derogatory taunts; or
- e) intentionally damaging or destroying property; or
- f) intentionally causing death or injury to an animal; or
- g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

Definition of Family Member

- Direction 99 defines a member of the person's family at 4(1) as:

Member of the person's family, for the purposes of the definition of *family violence*, includes a person who has or has had, an intimate personal relationship with the relevant person.
- This is new in Direction 99 and aims to give more clarity to who is a family member for our family violence provisions.
- This definition would then preclude people such as siblings of ex-spouses as family members for the family violence provisions.

Definition of Family Member

MOFU is defined in the Migration Regulations at Reg 1.12:

- (2) A person is a member of the family unit of another person (the **family head**) if the person:
- a) is a [spouse](#) or [de facto partner](#) of the family head; or
 - b) is a [child](#) or step-child of the family head or of a [spouse](#) or [de facto partner](#) of the family head (other than a [child](#) or step-child who is engaged to be married or has a [spouse](#) or [de facto partner](#))

Under the FLA, '*member of the family*' is defined in s4(1AB).

- (a) a father, mother, grandfather, grandmother, step-father or step-mother of the person; or
- (b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or
- (c) a brother, sister, half-brother, half-sister, step-brother or step-sister of the person; or
- (d) an uncle or aunt of the person; or
- (e) a nephew or niece of the person; or
- (f) a cousin of the person; or
- (g) if the person is or was married--in addition to [paragraphs](#) (a) to (f), a person who is or was a [relative](#) of the kind described in any of those [paragraphs](#), of the person's [spouse](#); or
- (h) if the person is or was in a de facto relationship with another person--in addition to [paragraphs](#) (a) to (f), a person who would be a [relative](#) of a kind described in any of those [paragraphs](#) if the persons in that de facto relationship were or had been married to each other.

Who is a family member?

The AAT decision of *Leua* interpreted ‘family’ narrowly. There have been many AAT decisions and they mostly construe the meaning of family narrowly.

Yet in the FCA decision of *Ador Deng*, the court indicated that ‘family’ should **not** be construed narrowly and the judge found that a girlfriend (despite not being a de facto partner) could be ‘family’ in some circumstances.

Therefore, not only is a family member a question in law (i.e. within the definition), it may also be one of fact and degree.

Look at the evidence and determine the extent/nature of the relationship.

Does the relationship fit within the definition at section 4(1)?

Domestic Violence Orders

- Types of orders – *interim* or *final*. Each state/territory has different legislation and terminology for DVOs.
- How an order is obtained – evidence presented for an order to be granted. Usually evidence is only presented where the granting of the order is contested. If not contested or if the person is absent from the Court, the evidence is not challenged and is accepted by the Court.
- There are mandatory orders, then additional orders this can vary state by state.
- An example from NSW ADVO's is - Mandatory: the defendant must not do any of the following to the protected person/people, or anyone the protected person/people have a domestic relationship with:
 - a) Assault or threaten him or her
 - b) Stalk, harass or intimidate him, her or them and
 - c) Deliberately or recklessly destroy or damage anything that belongs to the protected person or people
- Additional orders can be sought depending on the circumstances. Additional restrictions can include but are not limited to:
 - a) No longer allowed to reside at family home,
 - b) Not allowed to contact the protected person except through a lawyer
 - c) Not allowed within a certain distance from the protected person's residence, work, or school
 - d) Not allowed to be in the company of the protected person for at least 12 hours after consuming alcohol or drugs
 - e) Not allowed to possess any firearms or prohibited weapons

Domestic Violence Orders

State/ Territory	Order	Legislative framework
ACT	Family Violence Orders (FVOs)	Family Violence Act 2016 (ACT)
NSW	Apprehended Domestic Violence Orders (ADVO's)	Crimes (Domestic and Personal Violence) Act 2007 (NSW)
NT	Domestic Violence Orders (DVO's)	Domestic and Family Violence Act 2007 (NT)
Qld	Domestic Violence Orders (DVO's)	Domestic and Family Violence Prevention Act 2012 (QLD)
SA	Intervention Orders (IVOs)	Intervention Orders (Prevention of Abuse) Act 2009 (SA)
Tas	Family Violence Orders or Police Family Violence Orders or Restraint Orders for non family members	Family Violence Act 2004 (Tas)
Vic	Family Violence Intervention Orders (FVIO)	Family Violence Protection Act 2008 (Vic)
WA	Family Violence Restraining Orders (FVROs)	Restraining Orders Act 1997 (WA)

Who can apply for a DVO?

- The person in need of protection can lodge an application for an interim order in the appropriate Court in their state.
- The Police can apply for a interim order to protect someone and their children. It may not be up to the protected person whether the order is made.
- If a person is charged with a criminal offence, such as assault, they may also have a Domestic Violence Order made against them as well as the criminal charge.

Can Domestic Violence Orders be used as evidence of family violence in Character considerations?

- The short answer is that they should not be used as evidence of family violence – the process of obtaining an interim order means that the evidence regarding the person's behaviour has not been tested in court and so is not reliable. Therefore to use a DVO as proof of family violence will amount to a legal error.
- Even a final order may not be fully tested in court if it has not been contested or has been heard in the absence of the non-citizen.
- The test for making an order is that the Court must be satisfied on the balance of probabilities that a person has reasonable subjective grounds to fear and in fact fears:
 1. The commission of a domestic violence offence against the person, or
 2. The engagement of another person in conduct in which the other person:
 - a) Intimidates the person or
 - b) Stalks the person

Being conduct that, in the opinion of the Court is sufficient to warrant the making of the order.

Determining the seriousness of the FV

In considering the seriousness of the family violence engaged in, the following factors must be considered where relevant:

- a) Frequency and any trend of increasing seriousness in the conduct
 - b) Cumulative effects of repeated acts of family violence
 - c) Rehabilitation achieved at time of decision since the last known act of family violence including:
 - i. Extent of acceptance of responsibility for the family violence conduct
 - ii. Extent they understand the impact of the behaviour on victim and any witnesses (especially children)
 - iii. Efforts to address contributing factors to their conduct
- Whether the non-citizen has offended since being formally warned, or otherwise made aware by a Court, law enforcement or other authority about the consequences of further acts of family violence
 - The absence of a warning should not be considered to be in the non-citizen's favour
 - This includes warnings about the non-citizen's migration status should they engage in further acts of family violence
 - Where the FV primary consideration is relevant, a finding about the seriousness of the FV must be made by the decision maker

When to address FV/DV

Where evidence is available to indicate whether the conduct was *coercive* or *controlling* or *caused the family member to be fearful*, this must be discussed and a finding made accordingly.

Where evidence in this regard is not available, but the conduct involved *direct assault* against a family member, the decision-maker could find that the conduct '**would have**'* caused the family member to be fearful, provided that:

- there is no evidence to suggest that the family member was *not* in fact fearful; and
- the circumstances were not such that the family member was unlikely to be fearful

* *Note this is a new approach and is yet untested before the courts*

Questions?



Australian Government

Department of Home Affairs

Ministerial Direction 99 Primary Consideration:

The strength, nature and duration of ties to Australia

April 2024

Content and structure

Generally going to be a positive section for the non-citizen. Use the natural structure of the Direction (and the template) to assist.

- 8.3(1) the effect of the decision on immediate family members in Australia.
- 8.3(2) more weight to be given to a non-citizen's ties to children who have a right to remain in Australia, ie citizens, permanent residents.
- 8.3(3) strength, duration and nature of any family or social links.
- 8.3(4)(a) length of residence – how long has the person resided in Australia, including arrival as a young child (cf. adult) noting that;
 - 8.3(4)(a)(i) considerable weight to be given to the fact the non-citizen has been ordinarily resident in Australia during and since their formative years, regardless of when the offending commenced and the level of the offending
 - 8.3(4)(a)(ii) more weight given to time spent contributing positively to the community
 - 8.3(4)(a)(iii) less weight given to length of time in Australia if offending commenced soon after arriving in Australia and where not ordinarily in Australia for formative years

Content and structure

Organise your evidence

- particularly in long form docs, the structure of this section often poorly done. Be organised – consider subheadings to assist drafting (can always be deleted later)
- select evidence judiciously. If quoting, think what the quote adds to the narrative. If determined to use the quote ask where in the submission it belongs
- construct a chronology. It is very useful for cases that are complicated by multiple movements, long residential period, large volume of docs and multiple prison sentences etc.

Example – Separate paragraphs

- X arrived in Australia on DATE
- X resided in Australia for Y YEARS
- X arrived aged X, as a/n child/adult
- X was convicted of first/most serious offence aged Y, X years after arrival to Australia
- X has contributed positively to community – X attended SCHOOL, X has been employed at Coles, X is a CFA volunteer, X plays rugby. (Personal Details Form, SR, letters of support)
- FAMILY X has a spouse, NAME DOB AGE. X and spouse state in their letters XXX. Spouse will suffer emotional hardship and practical hardship in raising 2 kids. Spouse has HEALTH ISSUE and his/her health will deteriorate. Repeat for parents, siblings, aunts/uncles/cousins where this information is known. X has a social network consisting of ...

Common issues

Factual errors

Errors of fact will not always give rise to legal error but are unacceptable.

It depends on whether the error was “harmless”, ie the mistake did not prejudice the outcome for the non-citizen. In other words the mistake did not have the potential to change the outcome of the decision.

Potential errors:

- Time of first offence relative to taking up residence (example: If you stated that the person’s first offence was soon after arrival when the facts clearly indicate otherwise (what’s soon after arrival?))
- Missing family members (example: Do not assume they are deceased or that they are permanently missing)

Undue weight or balance

- Keep it factual. For example – travel overseas can be easily recorded factually from interrogation of Movement Records.
- Consider whether the person represents an unacceptable risk and that the protection of the community outweighs strong and significant countervailing considerations. A mountain of references will not outweigh a serious criminal record – this is a matter of weight in the SOR

Common issues

Irrelevant considerations

- Not a section for at length discussion of offending history or risk
- Think about when the person started to offend as opposed to first conviction
- Minor children to be dealt with under Best Interests of the Child for children in Australia
- Family overseas – relevant to impediments section not this one.

Prejudice or negative influences

- “Mr Z has lived in Australia for a period of 12 years *but has spent much of that time in prison*”
- “Mr Z spent an *unknown period of time* in detention as a juvenile”
- “Notwithstanding Mr Z’s statement that he has a close relationship with his mother, *Mr Z has not provided a letter of support from her*”

Failure to consider

- Must discuss impact on immediate family members at a minimum
- Describe nature of impact – emotional hardship/practical/financial/disappointment/ sadness/business
- Always use full names and relationship. Ms/Mr/Master/Miss NAME (DOB - AGE) and relationship Father/Step Father consistently
- Don't overlook social links – employment, social, sporting, education, volunteer, church, taxes
- Need to demonstrate consideration of impact on family members, including any differentiation between them
- The aim is to be judicially sound by demonstrating the Minister has turned his mind to the question and evaluated the evidence

Finding and Any Questions?

Ensure an appropriately weighted finding is made for this primary consideration

Are there any questions regarding this new primary consideration?



Australian Government

Department of Home Affairs

Ministerial Direction 99

Primary consideration

Best interests of minor children in Australia affected by the decision

April 2024

Introductory concepts

The source of best interests is NOT the legislation itself:

International Law	CROC - Article 3 of CROC 'in all actions concerning children ... the best interests of the child shall be a primary consideration.'
Common Law:	The High Court's 1995 judgment in Teoh held that Australia's ratification of the CROC gave a father facing deportation a 'legitimate expectation' that the decision-maker would treat the best interests of his children as a 'primary consideration'. Hence The HC introduced CROC obligations into Australian domestic law as a legitimate expectation.
Direction 99:	Para 8.4 identifies the best interests of minor children <u>in Australia</u> as a primary consideration (rather than an "other" consideration). It <u>doesn't</u> mean that the presence of minor children is fatal to a cancellation, refusal or non-revocation decision, but in terms of weight Teoh elevated best interests of children in the s501 space that is now reflected the Direction, which states that primary considerations should "generally" be given greater weight than the "other" considerations.

Whose best interests?

- The best interests are those of the child and not the non-citizen
- A child may decide at any time that they wish to have a relationship with the non-citizen
- “Implied children” not specifically identified but hinted at
- There is no need for the relationship to be ‘parental’ – biological, step, adopted, siblings, nephew/niece, grand children, customary
- But a non parental relationship may be able to be given less weight – ask whether there is evidence that the child is reliant on the non-citizen for care and responsibility
- Minor children only – under 18 at the time of the decision, must be born at the time of the decision pregnancies can be dealt with under ties to the Australian community

Evidence of children and relationship

- Must be discussed even if not clearly identified in the material.
- Probe the existence of children carefully.
- Best practice to seek further information from the non-citizen where possible
- non-citizen gets benefit of the doubt – do not dispute material unless objective evidence is available to you
- Name, DOB, age, parents of child, relationship, best interests
- No need for the relationship to be parental (this is relevant to weight not interests of the child).
- Must engage with the materials to show that they have been fully considered.

Structure and approach

- 8.4(3) Address children individually where possible, and where appropriate make a separate finding – especially between the NC's child and other minor relatives.
- 8.4(4) Enumerates factors that must be included if relevant:
- Past and present relationship nature and duration of relationship weigh regarding non-parental, no existing relationship, long periods of absence
 - Future relationship – likely to play a positive parental role up to 18 yo include Court orders relating to access and care arrangements
 - impact of non-citizen's prior conduct and future conduct and will it have negative impact on the child.
 - likely effect separation would have on the child taking into account other ways for contact
 - are there other persons who fulfil parental role
 - any known views of the child
 - evidence the child has been or is at risk of being subject to, or exposed to family violence or has been abused or neglected by the non-citizen in any way whether physically, mentally or sexually
 - evidence that the child has experienced trauma arising from the non-citizen's conduct

Weighing factors

- Remember the principle – there must be a definitive finding
- Note a definitive finding is still subject to qualification – address extent of harm – harm is reduced
- Look for mitigating factors (limiting best interests):
 - Age of the child (17 close to 18)
 - Limited residence rights in Australia (temp visa)
 - Relationship (limited contact/interstate)
 - Parental alternatives (niece – X does not exercise daily care or control)
 - Family court orders

Summary

- Identify all minor children – sources include personal details form, written submissions, sentencing remarks
- Determine whether children need individual or group context
- Determine whether the views of the child are known
- Identify any weighting factors both for and against
- “Reluctant” finding? No don’t use this.

Questions?



Australian Government
Department of Home Affairs

Ministerial Direction 99

Primary Consideration: Expectations of the Australian community

April 2024

Expectations of the Australian community

- 8.5(1) of the Direction identifies the expectations of the Australian community
- 8.5(2) of the Direction states that visa cancellation, refusal or non-revocation may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa
- 8.5(3) provides that above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.
- 8.5(4) This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.

Serious character concerns

The direction provides examples of serious character concerns at 8.5(2)

8.5(2) The nature of the character concerns should be linked to the expectations of the community. These are articulated in 8.5(2)(a) to 8.5(2)(f)

- **8.5(2)(a)** – family violence
- **8.5(2)(b)** – causing a person to enter into a forced marriage
- **8.5(2)(c)** – serious crimes against women, children and vulnerable community members ie elderly, disabled includes violence, fraud, extortion, financial abuse, exploitation or neglect
- **8.5(2)(d)** – crimes against govt representatives due to their positions or in the performance of their duties
- **8.5(2)(e)** – involvement or reasonable suspicion of involvement in human trafficking or people smuggling or serious international crimes ie war crimes, slavery, crimes against humanity
- **8.5(2)(f)** – worker exploitation

Nature of the concerns

For example consider:

- child abuse material
- internet grooming of minor/s
- Other offences involving a child/ren
- murder, manslaughter
- rape, and other sexual offences especially so if vulnerable victim; domestic violence
- serious offences involving violence & armed robbery

Addressing representations

- Community expectations have been determined by the executive government through the Minister in the Direction on behalf of the community
- the expectations consideration mostly involves a finding that the community would expect that the person should not hold a visa

Does this mean that arguments advanced by a person or their representative can be ignored?

- Despite the way that community values have been made in the Direction, this does not mean that the non-citizen's submissions can be ignored. They must be addressed and neutralized as per the wording in the template.
- The final point in the SoR is that notwithstanding 'representation x' the Australian community expects that non-citizens obey Australian laws

A word about Minister cases

Ministerial:

Unless the non-citizen makes representations as to the expectations of the Australian community – do not include this section

Delegate:

Remains bound by the Direction and must consider

AAT:

Remains bound by the Direction and must consider

Any questions?

Follow the template and make sure that any submissions made are included in the discussion of this consideration.



Australian Government

Department of Home Affairs

Ministerial Direction 99

Other Considerations: Legal consequences of the decision under section 501 or 501CA

April 2024

Legal consequences of decision under s501 or s501CA

Direction 99 section 9 lists legal consequences of the decision as an 'other' consideration. 9.1 of the consideration is further broken down into two categories

- 9.1(1) sets the background with the effects of s198 where a person is liable for removal from Australia as soon as reasonably practicable and detention under s189 until removal, with the effect of s197C(1) being that it is irrelevant whether Australia has non-refoulement obligations in respect of the person.
- 9.1(2) provides a definition of a non-refoulement obligation under the Refugees Convention and Protocol, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights and its second optional protocol. The concept of 'protection obligations' in the Migration Act 1958 (the Act) reflects Australia's interpretation of NRO and the scope of the obligations that Australia is committed to implementing.
- 9.1(3) INRO's will generally not be relevant where the person has not raised such obligations for consideration and the circumstances do not suggest an INRO claim
 - 9.1.1 Non-citizens covered by a protection finding
 - 9.1.2 Non-citizens not covered by a protection finding

Section 198 and section 197C

9.1(1) of the Direction states:

Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen.

Section 197C

Section 197C of the Act provides that for the purposes of the removal powers in s198 (which require an officer to remove an unlawful non-citizen from Australia as soon as reasonably practicable in various circumstances), it is irrelevant whether Australia has *non-refoulement* obligations in respect of the non-citizen

Section 197C(3) – new provisions inserted by the CIOR Act 2021 a person is not able to be removed if they have a Protection Finding was in conflict with Direction 90, but was amended in Direction 99

Non-refoulement obligations (NRO) - definition

9.1(2) provides a definition of what a non-refoulement obligation is. It specifically states that a non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm.

The definition also includes reference to the international instruments that Australia is a signatory of, the Refugees Convention, CAT and the ICCPR that are relevant to any NRO claims a person may make.

This criterion also acknowledges that the concept of 'protection obligations' reflects Australia's interpretation and the scope of the obligations Australia is committed to implementing. Section 36 of the Act relating to protection visas puts the relevant parts of the Refugee's Convention into domestic law.

Relevance of NRO's

9.1(3) specifies that international NRO's will generally not be relevant where the person has not raised such obligations for consideration and the circumstances do not suggest an NRO claim.

However it is best to err on the side of caution here – if the person has had a PV in the past or was a refugee or humanitarian visa holder they may have unarticulated claims. The Full Federal Court loss in the matter of CKT20 shows that failure to consider a NRO claim that clearly emerged from the materials despite not being articulated as failure to identify and deal with an NRO claim will lead to an error of law and the decision will need to be remade.

Non-citizens covered by a protection finding – what is a protection finding?

- **9.1.1** this section covers persons who are covered by a ‘protection finding’.
- **9.1.1(1)** defines what a ‘protection finding’ is. A ‘protection finding’ relates to the definition in s197C of the Act. It specifies that the finding must be made in the course of considering a PV application for the person and indicates that non-refoulement obligations are engaged in relation to the non-citizen.
- A protection finding is specific to the onshore PV process – a person can be refused a PV but still have a valid protection finding.

Non-citizens covered by a protection finding – removal and indefinite detention

- **9.1.1(2)** explains that s197C(3) provides unless an exception in s197C(3)(c) applies, s198 does not require or authorise removal of the non-citizen to a country in respect of which the non-citizen has a protection finding. The section goes on to explain the non-citizen cannot be removed in breach of non-refoulement obligations.

As the person cannot be removed and they remain an unlawful non-citizen they must remain in immigration detention under s189 unless they can be removed to another country or are granted another visa. This means the non-citizen may be detained for an indefinite period.

Non-citizens covered by a protection finding – not able to make an application for another visa

- **9.1.1(3)** provides information regarding the inability of the non-citizen to apply for a further PV due to the effect of s48A of the Act without further Ministerial determination under s48B. This also provides information regarding the non-citizen's inability to apply for any other visa other than a Bridging R (Class WR) (return pending bridging visa) due to the character cancellation, refusal or non-revocation decision.

Non-citizens *not* covered by a protection finding

- **9.1.2(1)** any claims raised where a non-citizen is not subject to a protection finding *must be* considered.
- **9.1.2(2)** gives details of the level these claims are to be assessed at:

This specifies that it is not necessary at the s501 assessment stage to consider NRO issues at the same level of detail as is considered in a PV application. The PV application process is specifically designed to consider NRO's so where a non-citizen can apply, the s501 decision maker is not required to determine whether NRO are engaged. The decision maker must consider any representations and may choose to proceed on the basis that a PV application will assess any protection claims they have before consideration is given to any character or security concerns.

Non-refoulement obligations identified, not protection obligations

- **9.1.2(3)** non-refoulement obligations identified through a process other than the PV application process, such as an International Treaties Obligations Assessment (ITOA) do not engage s197C(3), so when making a s501 decision, the decision maker should carefully weigh any NRO's against the seriousness of the non-citizen's conduct. A negative decision can be made under s501 as the decision will not necessarily result in the removal of the non-citizen, consideration can be given to removal to another country, the Minister may make a personal decision under s195A to grant another visa or consider alternate places of detention under s197AB. If the non-citizen lodges a valid PV application they will not be removed while the PV decision is being determined.

Discussing non-refoulement

- Need to engage with the merits of the claims – but not required to go to the lengths required through the PV process
- Use neutral language, avoid casting doubt on the client's representations
- Need to make a finding on each claim, even if that finding is 'cannot make a finding because of lack of information'
- Don't ignore the claims! Get an ITOA if needed. Seek assistance from Onshore Protection through your Manager if unsure

Sample 1

- John s. 47F(1) is from New Zealand and moved to Australia when he was only 2 years old with his family. He hasn't returned to NZ, and has no family over there.
- He is the holder of a Subclass 444 visa.
- John was convicted of serious drug offences and sentenced to 5 years imprisonment.
- John's visa was recently cancelled under s501(3A).
- In his representations, John raises concerns about possible social isolation in NZ due to the absence of a family network, and the inability to find work. He fears destitution, and homelessness.

Sample 2

- Taki s. 47F(1) (John's brother) moved with his family, including John, to Australia when he was 10 years of age. He was the holder of a Subclass 444 visa.
- Taki's visa was cancelled recently under s501(3A) after he was sentenced to 12 months imprisonment for drink driving.
- Taki has travelled to New Zealand on frequent occasions, having stayed for prolonged periods.
- Whilst in NZ, Taki was a fully patched member of the Mango Mob and engaged in serious criminal activity.
- Taki recently found God, and decided to cleanse his sins by leaving the Mob and becoming an informant for the NZ police.
- In his representations, Taki claims that the Mango Mob will kill him if he returns to NZ because he betrayed the Mob, and the NZ police will not protect him.

Sample 2(b)

Tony is a Pakistani national who first arrived in Australia in 2005 as the holder of a Visitor (subclass 600) visa. He was granted a Protection (subclass 886) visa in February 2010. He has since departed Australia on a number of occasions, most recently arriving in August 2016 as the holder of a Resident Return (subclass 155) visa.

Tony's visa was cancelled under s501(2) in January 2018 because of a substantial criminal record. In response to a NOICC, Tony claims that he will be harmed in Pakistan because of his conversion to Christianity. He claims that members of his family and extremist groups will target him for apostasy, and that the state is unable to protect him.

Sample 3

Damien s. 47F(1), fled Sudan with his small family, after experiencing the traumas of wars. He managed to escape Sudan, and lived in a refugee camp, in Kenya for some 2 years.

He eventually arrived in Australia on a Humanitarian (Class BA, Subclass 200) visa to start a new life.

Damien was convicted of a white collar crime and sentenced to 4 years imprisonment.

His visa was cancelled under s501(3A).

In his representations Damien fears returning to Sudan and claims he would face persecution by non-state groups on account of belonging to a particular tribe.

Sample 4

- Michelle s. 47F(1), Cuban national, was granted a Protection (Class XA) onshore in June 2017 and has not travelled overseas since then.
- In the meantime, Michelle has been contravening traffic rules, and recently was convicted of high range drink driving and sentenced to 2 years imprisonment
- Her visa was cancelled under s501(3A) when she was serving the sentence.
- In her representations, she has expressed her concerns of being returned to Cuba, fearing she would be harmed by the state because of her political opinion.

Sample 5

- Tom, an Albanian national, had his Protection (Class XA) visa recently cancelled under s501(3A) on account of his association with the notorious Bambi Motor Cycle Gang.
- An ITOA was undertaken to reassess Tom's claims of persecution in Albania based on blood feud claims and it was found that non-refoulement obligations were not owed given the availability of adequate state protection and improved law enforcement in Albania to counter criminal activity involving feuding families.

Questions?

This is a very complex issue – many changes have been made by Court interpretation and you can expect that further changes will be made. Ensure that you use the latest templates as they are constantly updated to take into account court losses and to ameliorate those losses.



Australian Government

Department of Home Affairs

Ministerial Direction 99

Other Considerations: Extent of impediments if removed and Impact on victims and Impact on Australian business interests

April 2024

Content and structure

9.2(1) – factors to be taken into account:

- 9.2(1) a) Age and health
- 9.2(1) b) Substantial language or cultural barriers
- 9.2(1) c) Social, medical and/or economic support available to them in their country

In SOR, note impediments and do not neutralise them unless there is information to justify this.

Age and Health

- X is aged Y YEARS (fact)
- X has not indicated any health issues OR X has indicated XXX Health issues (check PDF/SR)
- NZ has a comparable/similar health system BUT can accept hardship in adjusting to doctors, mental health will deteriorate/exacerbate without support
- X speaks LANGUAGE/ENGLISH (but do not assume this)
- Check language in home country – ie Fiji
- Check culture (returning to a western country after a long period will still result in cultural adjustment)
- Consider how long absent from home country, if visited since arrival in Australia, check schooling, adult, accept adjustment to culture in most cases

Social and Economic factors

- Check for family/friends
- If partner/children may relocate with the NC, finding to include this will exacerbate hardship because of the toll it will also take on them in moving away from Australia.
- Check outgoing passenger cards/old files.
- If family in Australia – always accept hardship w/o family (unless serious offending against family). This is how the person feels, not the family.
- Use employment/education to minimise practical hardship such as job, money, housing. Consider age & health and relevant impeding factors.
- Consider comparable welfare and health systems. Caution if Minister case and non-citizen not given NJ on this.

Hitting the middle ground

In constructing the arguments in the Statement of Reasons you need to keep some factors in mind.

- Tread the line between insufficient articulation of impediments and over stating them (stronger/diluted).
- Even where first world destination country, non-citizen is likely to face some level of impediment.
- Usually this section will always be ‘in the non-citizens favour’ – i.e. they will be impeded in some form or face some hardship.

Country information

- NCCC has not typically used official country information or provided natural justice on the topic. Minister cases must avoid this.
- Risks around incorrect facts and assumptions regarding life in home country leading to an error of law a jurisdictional error.

Any Questions?

Regarding 9.2 extent of impediments if removed?



Australian Government
Department of Home Affairs

Ministerial Direction 99 Impact on Victims

April 2024

Impact on Victims – Legal basis as a consideration

Direction 99 lists **Impact on victims** as an ‘other’ consideration. The relevant paragraph is:

9.3(1)

Must consider the impact of the decision on members of the Australian community, including victims and family members of victims of the criminal behaviour where this information is available and the non-citizen has been afforded procedural fairness.

Limitation of consideration

Direction 99 refers to the impact on a victim of a decision under the character provisions. This can be distinguished from the harm that a victim suffered as a result of the non-citizen's offending, which is relevant to the seriousness of the offending and the harm that could result if the person reoffended.

Therefore, if the Department does not have any evidence before it as to the impact of a character decision on the victim, or the family members of the victim, a finding with respect to this consideration in the SOR cannot be made

Example 1 YKSB

Mr YKSB, arrived in Australia in June 1965. On 19 March 2018, his BF Transitional (Permanent) visa was mandatorily cancelled under s501(3A) on account of a substantial criminal record, involving indecent/sexual assaults against several child victims. The offending occurred between 1982 and 1990.

On 31 January 2019, the delegate decided not to revoke the visa cancellation decision. In making his decision, the delegate considered the victim impact statements mentioned in the sentencing remarks.

While evidence of the impact of the offending on his victims at the time of the offending or sentencing may be relevant to considering the seriousness of the offence and other considerations in the context of a decision regarding revocation, it does not assist the decision maker in assessing the impact of a decision not to revoke the visa cancellation on the victim, or on the Australian community more generally.

The only information that will be relevant is if the victim provides *disclosable* information explaining the impact of a non-revocation decision.

Example 2 - M

M was a 44 year old citizen of Iraq and has resided in Australia for 22 years, having arrived January 1996 as the holder of Special Humanitarian visa, with his wife and eldest daughter, and has not departed since.

M has an extensive criminal history, including convictions for breaching AVOs, and some offences of a violent nature committed against his partner.

M's visa was cancelled under s501(3A). As part of his representations, a letter of support from his wife was produced. His wife had been a victim of M's violent behaviour. In her letter she has pleaded with the Department to allow her husband to remain in Australia and states that M has changed. She has forgiven him for his past transgressions against her and believes a non-revocation decision will tear the family apart, as she is unable to relocate to Iraq and disrupt her children's future in Australia. She states that she relies on M for emotional and financial support in Australia, as he is the main breadwinner.

What do you think the delegate decided? Who was the victim? What is the impact?

Example 3 - C

C migrated to Australia from Malta as child in 1948, and has not returned to Malta since.

C was convicted of murdering his wife and sentenced to 25 years imprisonment.

C's visa was cancelled under s501(3A) and he is currently in immigration detention after serving his sentence.

Some of his children are fearful for their lives should C be released in the community, and they have provided letters expressing their concerns for their safety.

However, they want this information to remain confidential.

Any Questions?

Any questions regarding impact on victims?



Australian Government

Department of Home Affairs

Ministerial Direction 99 Impact on Australian business interests

April 2024

What does the direction say?

- 9.4(1) Must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an **employment link** would generally only be given weight where the decision would **significantly compromise the delivery of a major project, or delivery of an important service** in Australia.

- General examples:
 - Artists/musicians performing in concerts (ie rappers)

 - Commentators attending speaking events

 - Business owners/Investors delivering major infrastructure projects

 - Employees with highly specialised and valuable skills

Example 1 – Mr L

Mr L, a national of North Macedonia arrived in 2012 on a Provisional Partner visa. He was granted a Permanent Partner visa in April 2017. In April 2018, his visa was cancelled under s109 on account of providing false information to the Department.

On 4 May 2018, Mr L applied for a Bridging visa. Mr L failed the character test on account of substantial criminal record and referred to VACCU.

Facts/Arguments

Mr L has worked hard developing a business and providing a good life for his wife and son. Since arriving in Australia Mr L has opened and ran two successful coffee shops. His latest venture is in construction, where he had commenced his own business. This business has secured a major contract to provide the basement for a 15 apartment complex. He estimated the overall project value at approximately \$5 million.

Mr L argued that refusal of his bridging visa would compromise a multi-million dollar property development which had been commenced but cannot proceed until his company completes its contracted work of building the development basement. The development was expected to generate significant employment opportunities and provide significant revenue to downstream suppliers.

Example 2 – Mr S

Mr S is a US national, who has been a long term resident of Australia. He recently applied for a RRV. Mr S has a concerning criminal history. His matter was referred to VACCU for character consideration under s501(1).

Facts/Arguments

Mr S is currently employed on a major tunnelling project in Perth. His employer states that his role is 'critical' as Mr S supervises the underground boring machines and up to 100 staff. His employer states that the project is the largest infrastructure project in Australia, using machines that are highly technical and requires experienced technical supervisors, like Mr S, to ensure that the project is completed successfully.

The employer states that it would impossible to find a replacement given the tight timeframes, and fears that the project will suffer financially as a result.

Example 3 – Mr C

Mr C is a UK citizen wishing to travel to Australia and applied for a Temporary Work (Class GA) visa. He intends to be a speaker at events scheduled for one month across various capital cities in Australia. Mr C has a lengthy criminal history and fails the CT. His case was referred to VACCU for an assessment under s501(1)

Facts/arguments

Mr C submitted that XYZ Pty Ltd is an Australian business which scheduled/organised Mr C's tour of Australia, and should his visa be refused it would result in the cancellation of the tour and cause damage to the reputation and finances of XYZ Pty Ltd. He also argued that other associated Australian businesses involved in the organisation of the tour will suffer as well.

Any Questions?

This consideration is being used sparingly but there is a body of decisions building up about it.

Any further questions about the Direction?