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National Legal Aid

12 September 2012

Mr David Fredericks
Deputy Secretary
Civil Justice & Legal Services Group
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Mr Fredericks

Re: Visa Cancellation Briefing - NLA Meeting July 2012

We refer to the meeting of NLA and AGD on the 6th July 2012, at which a presentation was given about access to justice issues in relation to visa cancellation matters.

At that meeting a written briefing in relation to the issues was sought by Commonwealth representatives for the purpose of assisting legal aid commissions to address those issues.

Accordingly, please find attached a more detailed briefing (August 2012) in relation to visa cancellation matters, legal assistance services, and the implications for access to justice.

We trust that you will address the matters raised as a priority, including by bringing them to the attention of Ministers and/or relevant Commonwealth departments, as you consider appropriate.

If you require anything further from us, or would like to discuss matters, please do not hesitate to contact us. NLA's Executive Officer, Ms Smith, will refer matters as appropriate.

We look forward to hearing back from you in due course.

Yours sincerely

Bevan Warner

Bevan Warner
Chair

Briefing note

Visa Cancellation – implications for access to justice
August 2012

Introduction

National Legal Aid (NLA) represents the Directors of the eight State and Territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the cost of legal representation;
- Obtain access to the Federal and State and Territory legal systems; or
- Obtain adequate information about access to the law and the legal system.

NLA welcomes the opportunity to provide advice to the Commonwealth in relation to the impact of the application of s.501 of the Migration Act on disadvantaged groups.

Under s.501 of the Migration Act the Minister for Immigration or his delegate can cancel the visa of a permanent or temporary resident if he is satisfied that the visa holder fails the character test. A person is said to fail the character test if they:

- would be likely to engage in criminal conduct in Australia;
- would vilify a section of the Australian community;
- represent a danger to the Australian community;
- are associated with someone whom the Minister suspects has been involved in criminal conduct;
- would incite discord in Australia;
- have been convicted of an offence committed while the person is in immigration detention, or
- is 'not of good character'.

If a visa is cancelled under s.501 the person is permanently excluded from Australia.

The vast majority of the cases seen by legal aid commissions relate to people who have been subjected to visa cancellation on the basis that they are 'not of good character'. Broadly speaking this means they have a 'substantial criminal record'.

A person is said to have a 'substantial criminal record' if they have received a sentence of 12 months or more for one offence, or two or more terms of imprisonment totalling two years or more. The sentence is not required to have been served, just imposed. People who have been acquitted of a crime on the basis of mental illness and deemed not criminally responsible for the offence can also have their visas cancelled under this section and be permanently excluded from Australia.

If a person fails the character test the delegate or the Minister then goes on to consider whether their visa should be cancelled. The guidelines for decision makers are contained in a policy document titled Ministerial Direction 41.[1]
If a visa is cancelled by a delegate under s.501 there is right of merit appeal to the Administrative Appeals Tribunal (AAT).

Increase in demand and recent developments

There has been a significant increase in the number of Notices of Intention to Cancel (NOIC) issued over the last 4 years in particular. For example, Legal Aid NSW receive an average of about 10 requests for assistance per month, with 99% of these requests coming from people in prison.

DIAC reports that in 2007-2008 there were 42 visas cancelled; in the 2010-2011 financial year 132 visas were cancelled, representing a 214% increase.

The AAT reports that in 2007-2008 there were 42 visa cancellation applications made Australia-wide. In the 2010-2011 there were 69 applications made Australia-wide, representing an increase of 64%.

Recently there has been an increase in the number of personal Ministerial interventions, both before and after review by the AAT. Under the Migration Act the Minister can cancel a visa under this personal power on the national interest ground, even after the AAT has set aside a cancellation. The Minister can also cancel the visa under his personal power at first instance, without the matter having gone to the Department of Immigration. There is no right of merits review to the AAT.

A number of legal aid commissions provide various levels of assistance to people in this area[2] however report that it is not possible to meet the demand. In some states no assistance is available due to lack of resources. There are few, if any, free legal services offering assistance in this area of law. Additionally, at least in New South Wales, there are fewer welfare workers within gaols, who historically have been available to assist inmates with responding to a NOIC. The vast number of people who receive a NOIC are now unrepresented and unassisted at both the primary

[1] From 1 September 2012 a new Ministerial Direction, Direction 55, will apply. Whilst broadly similar to Direction 41 it is more directive as to the types of matters that must be considered, and the weight to give those matters, and thereby has the effect of diminishing the level of discretion available to decision-makers.
[2] NSW, WA, ACT, VIC, SA

stage and the review stage and have not had the benefit of even rudimentary legal advice about their situation.

Legal aid commissions are struggling to meet the demand for assistance, which is growing exponentially. Critically we believe that where assistance is provided at the primary and review stage there is less likelihood that a person's visa will be cancelled. The reasons for this are discussed in more detail below.

Legal aid commissions have developed innovative responses to try and meet demand including engaging private law firms to act on a pro bono basis, partnering with community legal centres to provide assistance, and publishing a self help kit. However there is still very substantial unmet need, which has serious implications for people subject to cancellation, particularly those at most disadvantage, which include long-term permanent residents and those with Australian citizen children.

From 1 September 2012 a new Ministerial Direction applies. Direction 55 is more directive as to what must be taken into account and the weight to be afforded to each of the factors identified for consideration. This may exacerbate further the need for legal assistance (see below).

Outcomes when legal assistance is available

Legal aid commissions report that there is a very high success rate when assistance is provided to respond to a NOIC.

Many of the clients assisted by legal aid commissions in these matters are uneducated, illiterate, from a non-English speaking background, in prison with no or little community support, and have few internal or external resources.

The difficulties of having no assistance at the primary stage, when all that is required is a submission in writing (which could be impossible for a person who is functionally illiterate) are even more exacerbated at the AAT level which, whilst inquisitorial in nature, becomes adversarial when the Minister's lawyers appear to cross-examine the applicant and his/her witnesses. At the AAT level it also becomes more expensive to represent (both) parties.

Possible policy responses

1. **Earlier Critical Analysis**
   It appears anecdotally that NOICs are being issued to every person who receives a 12 month+ sentence. There appears to be no critical analysis of the subjective factors in each case. Earlier critical analysis of the facts of a case by DIAC would exclude some people from being automatically sent a NOIC based on the current Ministerial Direction. This will also lessen the administrative burden on DIAC (in having to process submissions in cases where it is clear that a person's visa should not be cancelled).

Example: Legal Aid NSW assisted a Sudanese man who had been granted a refugee visa some years ago. He received a NOIC after being acquitted on the grounds of mental illness of a violent crime. It was clear that after appropriate treatment he would not be a risk to Australia and also that as a citizen of Sudan our protection obligations under the Refugee Convention were engaged, thus making any prospect of his removal illusory. With our assistance he made submissions to DIAC and his visa was not cancelled but the stress of addressing the NOIC had a terrible impact on him and created unnecessary work for DIAC.

2. **Exempt long term permanent residents**
   Exempt long term permanent residents and/or people who arrived as children, from the operation of s.501 of the Migration Act. Many long-term residents, particularly those who have arrived as children, are not aware that they are not citizens or that they are at risk of removal. Some believe they have received the NOIC in error and do not respond. In 2006, the Commonwealth Ombudsman recommended that if a person came to Australia as a minor and lived here for at least 10 years before committing an offence, they should not be subject to visa cancellation under s.501 of the Migration Act.

   Example: Legal Aid NSW assisted a 47 year old resident of Maltese origin who migrated to Australia with his family at age 2. He was issued with a NOIC in 2010 after a number of convictions over many years. He was in a relationship and had a 6 year old Australian citizen child, who had a serious chronic medical condition. He was issued a warning after submissions from Legal Aid.

3. **Issue a Formal Counselling Letter**
   The Formal Counselling Letter has been used by DIAC in the past but appears to have no contemporary application. The Formal Counselling letter basically puts people on notice that as they are not Australian citizens they are subject to visa cancellation should they commit further criminal offences.

Issues and possible responses

The current system of AAT review severely disadvantages those people subject to cancellations and creates significant procedural fairness issues.

Examples of this include:

1. The 'two day rule'

   This rule requires all applicants to serve on the Minister all evidence on which they will rely two business days prior to the hearing. This evidence often includes statements from the applicant, his or her friends or family, former employers. Critically, if this evidence is not provided in writing then no oral

evidence can be led. Often the applicant has poor writing skills, or has English as a second language, and this often results in the failure to submit evidence which can then be relied on at trial.

2. Payment of a $100 application fee

   Many prisoners have no money and no access to money. An application to the AAT for merits review on a decision to cancel their visa requires payment of an application fee of $100. There is no discretion within the Migration Act or the AAT Act to waive or defer the fee on any grounds. If the fee is not paid at the time of the application the application is invalid and the AAT has no jurisdiction to hear the appeal. The result is that people who cannot pay the fee are simply denied the opportunity of merits review.

3. Removal of discretion within the AAT to accept late applications

   Removal of any discretion within the AAT to accept late applications - an application must be lodged within 9 days of notification. In NSW for example, we have seen many applications lodged out of time because of errors or inefficiencies within the NSW Department of Corrective Services. Through no fault of their own the applicant is prevented from seeking review because of mistakes made by correctional centres. A related issue is that of the mode of delivery of the letter advising a person their visa has been cancelled. There are deemed notification periods in the Migration Act which in effect provide that if the letter is sent by post to the last known address of a person (usually a correctional centre in the case of visa cancellation applicants) they are deemed to have received it within a particular time, and the 9 days starts to run, even if in fact they did not receive the letter. A way of addressing this particular issue would be to hand deliver all letters of cancellation or start the 9 days from the date of actual notification, which would be certified by the prison authorities.

4. The 84 day rule

   The 84 day rule which requires the AAT to make a decision within 84 days of the cancellation. If no decision is made by the AAT within that time, the decision to cancel is a deemed affirmation. Whilst this can work in favour of an applicant, because it may reduce the time spent in immigration detention, it also puts enormous pressure on the applicant, because the AAT need to set the matter down quickly and this means the applicant is under pressure to get his/her evidence on quickly. Without representation it is very difficult for people to organise their own evidence, and the added time pressure exacerbates the difficulty.

We would be pleased to discuss the contents of this briefing note and explore any of the options referred to above.