Section 501: The character test, visa refusal and visa cancellation

Procedural Instruction

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3.4 Natural Justice

Consideration of whether to provide natural justice

About NOICCs and NOICRs

If an assessing officer decides to pursue a possible refusal or cancellation under section 501(1) or section 501(2) and the delegate has the discretion to refuse or cancel the visa on character grounds, the assessing officer must, for reasons of natural justice, issue a NOICC or NOICR.

The provisions for which natural justice is **not** required to be provided include:

- mandatory cancellation under section 501(3A) (noting the express provision at section 501(5) that the rules of natural justice and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under section 501(3A))
- the Minister's personal, non-delegable, power under section 501(3)(a) relating to refusal, and section 501(3)(b) relating to cancellation, also noting the express provision at section 501(5) that the rules of natural justice and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under section 501(3)
- the Minister's personal, non-delegable, power under section 501A(3) relating to the setting aside of a non-adverse decision by a delegate or the AAT and substituting it with an adverse decision (refusal or cancellation depending on the circumstance), noting the express provision at section 501A(4) that the rules of natural justice and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to such a decision.
- The Minister's personal, non-delegable, power under section 501BA relating to the setting aside and substitution of non-adverse decision in the national interest under section 501CA with an adverse decision (cancellation of the visa), noting the express provision at section 501BA(3) that the rules of natural justice and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to such a decision.

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Section 501C - Revocation of a decision

About section 501C

Under section 501C, the Minister must invite the non-citizen to apply for revocation of a decision made without natural justice under section 501(3) or section 501A(3).

Section 501C(3) provides that, as soon as practicable after making a decision under section 501(3) or section 501A(3) to either refuse or cancel a visa (that is, decisions made without natural justice), the Minister must invite the non-citizen to make representations about revocation of that decision. Section 501C(3) requires the Minister to:

- give the non-citizen, in the way that the Minister considers appropriate in the circumstances:
    - a written notice that sets out the original decision, and
    - particulars of the relevant information, and
- invite the non-citizen to make representations to the Minister, within the period and in the manner ascertained in accordance with the Regulations, about revocation of the original decision, unless the non-citizen is not entitled to make representations about revocation of the original decision (refer to section 501C(10) and regulation 2.52(7).

It also empowers the Minister, acting personally, to revoke any such decision under section 501C(4) if the non-citizen:

- makes representations in accordance with the invitation and
- satisfies the Minister that the non-citizen passes the character test (as defined by section 501) or
- satisfies the Minister there is another reason the original decision should be revoked.

Note: If the Minister decides to **not** exercise the power under section 501C(4), that decision is not reviewable by the AAT.

If a non-citizen will be unlikely to satisfy the Minister that they pass the character test because of their substantial criminal record, this should be brought to the Minister's attention. This is generally included in the draft statement of reasons for the Minister's consideration.

Who is entitled to make representations?

Under regulation 2.52(7), a person is not entitled to make representations about revocation if:

- the non-citizen is not a detainee, and
- the non-citizen is in Australia, and
- either:
    - the non-citizen has been refused a visa under section 501 or section 501A of the Migration Act, or
    - the last visa held by the person has been cancelled under either of those sections.

Non-citizens whose visa was subject either to mandatory cancellation under section 501(3A), or cancellation by the Minister without notice under section 501(3), will usually be in Australia at the time of the cancellation decision. If these non-citizens request revocation under section 501CA or section 501C (whichever applies), and they are no longer serving a custodial sentence of imprisonment, it is open to them to request removal and continue with those revocation requests from outside Australia. For non-citizens who were outside Australia when their visa was cancelled under section 501(3), there is no impediment to their initiating a request from outside Australia provided the statutory timeframes and other formal requirements are met.

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Revocation of a mandatory cancellation decision

Invite the person to make representations about revocation of decision under section 501(3A)

Under section 501CA, the Minister or a delegate must invite the non-citizen to apply for revocation of a decision under section 501(3A).

Section 501CA provides that as soon as practicable after making a decision under section 501(3A) to cancel a visa, the non-citizen must be given a written notice that sets out the original decision and particulars of information relevant to the decision and invite the non-citizen to make representations about revocation of that decision within the time and in the manner prescribed in the Regulations. The particulars should include evidence of the basis upon which the Department determined that the non-citizen was in prison.

Regulation 2.52 prescribes the time and manner in which non-citizens must make their representations. Representations must be made within the given timeframe, that being 28 days from the date of deemed notification and this timeframe cannot be extended. However, additional relevant information provided after the expiry of the 28 day period, but before the revocation decision is made, must be taken into account.

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Judicial review

All decisions made under s501 (including decisions made by the Minister personally under sections 501(3)), 501A, 501B, 501BA, 501C or 501CA) may be subject to judicial review by the Federal Court or the High Court. This is regardless of whether the person is in or outside Australia.

Under section 477A, an application to the Federal Court for judicial review of a decision must be made within 35 days of the date of the decision. Therefore, it is necessary to ensure the non-citizen is in fact notified of the visa cancellation or refusal decision, that is, wherever possible, the Department should be able to provide evidence that the person has personally received the notification.

To achieve actual notification, officers should:

- wherever possible, hand deliver notification of the section 501, 501A, 501B, 501BA, 501C or 501CA decision to the non-citizen, and request that the non-citizen sign to confirm receipt of the decision, and
- record the decision in ICSE and on the file.

This should be the standard procedure for notification if the non-citizen is in criminal custody or in immigration detention.

Where it is not possible to physically hand deliver a copy of the decision, then:

- a copy of the decision should be sent by registered post to the last address known to the Department (or the last addressed notified by the non-citizen in the case of a refusal decision)
- if the registered post is not returned, then the non-citizen will be taken to have been notified of the decision
- if the registered post is returned undelivered, then this should be recorded both in ICSE/IRIS and on the file to ensure that if the non-citizen is subsequently located, they can be properly notified, and
- If the non-citizen is subsequently located, they should be physically handed another copy of the decision.

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Australian Government
Department of Home Affairs

MANDATORY CANCELLATION STEP-BY-STEP GUIDE

This guide is for the processing of mandatory cancellation decisions under s501(3A) of the *Migration Act 1958*. Prior to conducting a mandatory cancellation, a case officer would have undergone a thorough assessment of the case, having received a referral through a prison list or an external source.

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8. Prepare the decision record s. 22(1)(a)(ii) s. 22(1)(a)(ii)

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9. Prepare the formal notice of cancellation s. 22(1)(a)(ii)

NOTE: When referring to a visa always refer to Schedule 2 of the Migration Regulation given date of an application for a visa being subject to character assessment - s. 22(1)(a)(ii)

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14. Update notification letter (current date, file note included as evidence if required) and send to the Correctional Centre/Prison where the client is accommodated

    All notifications are sent via email with the exception of notifications sent to NSW, this should be sent via registered post unless there is an imminent release date or where there are some exceptional circumstances warranting sending notification via email. Each case needs to be assessed on its individual merits seek team leader advice before sending the notification

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19. Ensure actual notification has occurred

    If acknowledgement is NOT received within a week of cancellation notification, you will need to contact the prison to follow-up. If the client requests revocation, this is sufficient to act as deemed receipt of notification. We can also accept written advice from corrective services that the client was provided the documentation

    Evidence of actual notification may include:

    - Acknowledgement of receipt signed by the client
    - An email from the relevant corrections officer detailing hand delivery (sometimes the client refuses to sign)
    - Application for revocation

Note: NSW notification are taken to have received it seven (7) working days after the date of the notice. A working day does not include weekends or public holidays in the Australian state or territory to where the notice was posted