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Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number MS22-0003022

Date of Clearance: 17/01/2023

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Management of the Administrative Appeals Tribunal (AAT) set aside caseload

Timing Not time critical.

Recommendations

That you:

1. note the overview of the current settings for assessing the Administrative Appeals Tribunal (AAT) set aside caseload; and
2. endorse the proposed AAT set aside referral thresholds at Attachment A.

☒ noted / please discuss☒ endorsed / not endorsed
please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date 27/3/2023

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Minister's Comments

Purpose

1. To provide an overview of the current settings for referring Administrative Appeals Tribunal (AAT) set aside cases and to seek your endorsement of updated referral thresholds and the application of those to the current caseload. A comparison of the current thresholds and proposed updated thresholds is included at Attachment A.

Key Issues

2. You have personal powers under section 133A, section 133C, section 501A and section 501BA of the *Migration Act 1958* (the Act) to set aside a decision of the AAT and substitute an adverse decision if you are satisfied that it is in the public or national interest to do so.
3. The Minister's personal powers were introduced in recognition that the Government is ultimately responsible for ensuring that AAT decisions reflect community standards and expectations.
4. When determining which cases are referred to the Minister, a risk based approach is applied that is consistent with the intention behind the introduction of the Minister's personal powers. This allows for the AAT set aside caseload to be progressed efficiently with greater ministerial focus on high risk or sensitive cases in line with community protection objectives and community expectations.
5. Following an AAT set aside decision, the Department currently uses thresholds established in February 2020 by the former Minister for Home Affairs to determine which cases can be managed by the Department and which cases should be referred to the Minister for personal consideration. Under the current thresholds, approximately 20 per cent of cases have been determined to meet thresholds for referral.

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Proposed referral thresholds

6. The proposed referral thresholds at **Attachment A** will ensure that only cases that pose the highest levels of risk and are inconsistent with Australian values such that the 'national interest' or 'public interest' is invoked, are considered by you.
7. In line with the intent of the current thresholds, cases to be referred to the Minister will include those where there is a very serious ongoing risk to the safety of the Australian community. This will primarily be on the basis of objective criteria including the length of imprisonment and abhorrent or repugnant offending that is sexual or violent in nature. Consideration will also be given to matters considered to be exceptional, including significant media interest, or victim or community issues. The new approach will take into account Australian community values and long term residence.

Background

8. The AAT provides a final independent merits review of decisions made by delegates of the Minister. A set aside decision by the AAT can apply to both general and character cancellation/refusal powers and may result in the immediate reinstatement of the non-citizen's visa and, if in held immigration detention, immediate release into the community. Any delay in releasing the non-citizen from detention may give rise to unlawful detention claims, mandamus proceedings, criticism, reputational risk and possible compensation.
9. The Department does not have the ability to set aside or overturn a decision of the AAT. Decisions made by the Minister using their personal non-delegable powers under the Act to set aside an AAT decision and cancel or refuse a visa are not reviewable by the AAT, but are subject to judicial review. The Minister also has the power to overturn a favourable decision of the delegate.

Current and new process

10. AAT set aside cases are triaged upon referral and marked for priority threshold assessment based on any identified community protection, legal or reputational risks. Threshold assessments are largely subjective in nature and result in one of two outcomes:
 - Refer to Minister – where a case is determined to meet thresholds for referral to the Minister, a client brief and/or a submission with draft statement of reasons incorporating a national/public interest argument may be prepared for consideration.
 - Department to manage – where a case is determined to not meet thresholds for referral to the Minister, the case is administratively finalised. This includes cases where there are no very serious ongoing community protection risks, and cases where identified legal or reputational risk outweigh any ongoing community protection or serious integrity concerns, or where there is a more suitable option available (for example new offending that warrants further cancellation consideration). Unless a more suitable option has been identified, AAT set aside cases that are administratively finalised generally proceed to visa/citizenship grant.

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11. The current time taken to complete the above process means it is possible that a non-citizen will reside in the community for several months after their release from detention as a result of a positive AAT decision until a decision is made by the Minister personally.

Legacy referrals on-hand

12. As at 30 September 2022, there were approximately 70 AAT set aside cases that have been assessed as meeting the current thresholds for referral to the Minister, or otherwise specifically requested by the former Minister for personal consideration. There are approximately a further 450 cases that require assessment by the Department.
13. All on hand cases have been robustly triaged at referral with a view to prioritising and escalating those cases likely to pose community protection, legal or reputational risk to the Department, in line with existing processes thereby ensuring the caseload is in good health and being appropriately managed. An internal process review has identified a number of efficiencies including earlier point in time triaging (pre-AAT) to mitigate against risks and better inform legal and other stakeholders of particular cases that should be carefully managed at the review stage to ensure any community protection or other issues are minimised and managed in a time critical manner.
14. To illustrate the application of the thresholds and potential shifts a desk top sample exercise was conducted of cases that had previously been assessed according to the updated thresholds and the results are included at **Attachment B**. To further test the impacts the Department also applied the proposed AAT set aside thresholds to an additional sample of existing cases (40), which identified:
- 90 per cent of cancellation matters did not meet the threshold to progress under section 501BA to the Minister; and
 - 80 per cent of refused cases remitted or set aside did not meet the threshold to progress a consideration to refuse under section 501A to the Minister.
15. It should be noted under the current draft Character Case Allocation Matrix, which is yet to be endorsed by the Minister for Home Affairs and the Minister for Cyber Security, there is a potential increase in delegate decision making, including in the space of serious risk, which may result in a slightly higher overall number of AAT outcomes and number of threshold assessments that meet the new referral guidelines.
16. If endorsed, the Department will triage and assess the current case load and any new referrals against the updated thresholds. Updates will be provided to your office through the weekly character and cancellations meeting on the progress and outcomes of this case load for your visibility.

Consultation – internal/external

17. Nil.

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18. The Secretary was not consulted on the approach in the submission.

Client service implications

19. Nil.

Sensitivities

20. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au

Financial/systems/legislation/deregulation/media implications

21. Nil.

Attachments

Attachment A Comparison of referral thresholds for AAT set aside cases

Attachment B Example thresholds assessments

Authorising Officer
Cleared by: s. 22(1)(a)(ii) A/g Assistant Secretary Character and Cancellation Branch Date: 17/01/2023 Ph: s. 22(1)(a)(ii) Mob: s. 22(1)(a)(ii)

Contact Officer: **s. 22(1)(a)(ii)** A/g Assistant Secretary, Character and Cancellation Branch,
Ph: **s. 22(1)(a)(ii)**

CC: Minister for Home Affairs, Minister for Cyber Security
Secretary
Associate Secretary

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ATTACHMENT A**Comparison of AAT set aside referral thresholds****Refer to Minister for consideration
(Current)**

- Where there is a **serious** risk to the Australian community or an individual, which could include:
 - Serious violent or sexual offences, particularly against women or children
 - Substantial criminal record
 - Disregard for Australian laws, i.e. breaching bail conditions, continual reoffending
- Where the non-citizen been convicted or found guilty of a violent and/or repeated domestic violence offence(s).
- Where the AAT's decision is inconsistent with community expectations, including:
 - Historic offending that is serious in nature, including murder and sexual assault
 - Serious identity and/or fraud concerns
- Where there are other exceptional circumstances, including:
 - Significant media interest
 - High profile case

**Refer to Minister for consideration
(Updated)**

- Where there is a **very serious** ongoing risk to the Australian community based on abhorrent violent, sexual, child sex or family violence offending which generally resulted in a substantial term of over 10 years imprisonment
- Historic offending that is repugnant in nature to the Australian community, such as offences causing the death of a person or child sex offending where such does not equate with Australian community values bearing in mind long term residence.
- Exceptional circumstances, including significant media interest, significant victim or community issues
- High profile involvement in organised criminal activity or syndicates, including Outlaw Motorcycle Gangs

OFFICIAL: Sensitive**ATTACHMENT B****Example thresholds assessments****Example 1**

Thresholds assessment	Current (2020) thresholds: Met – Refer to Minister	Updated (2022) thresholds: Not met – Department to manage
Client name: Date of birth: Nationality: Client ID: Arrival:	s. 47F(1)	
Offending type:	s. 47F(1)	
Delegate decision:	On s. 47F(1) a delegate decided not to revoke the mandatory cancellation of s. 47F(1) Global Special Humanitarian (subclass 202) visa.	
AAT decision:	On s.47F(1) 2020, the AAT set aside the delegate's decision and substituted a decision that the mandatory cancellation of s.47F(1) visa be revoked. The AAT considered s.47F(1) to be a medium risk of reoffending, s.47F(1) The AAT considered the best interests of s.47F(1) children and s.47F(1), though noted that he has played a minor role in their lives to date. The AAT afforded significant weight to the impediments of s.47F(1) removal as a s.47F(1), given the ongoing conflict in s.47F(1) and the adverse effect his removal would have on his immediate family members, all of whom reside onshore.	
Thresholds assessment:	s.47F(1) case has been assessed by the Department as meeting current thresholds for referral to the Minister on the basis of community protection risk given the violent nature of his offending. It is noted however, that s.47F(1) case would not meet the updated thresholds for referral to the Minister, having not received a sentence of imprisonment of ten years or more for a very serious offence, and no other exceptional circumstances, with his s.47F(1)	

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Example 2

Thresholds assessment	Current (2020) thresholds: Met – Refer to Minister	Updated (2022) thresholds: Not met – Department to manage
Client name: Date of birth: Nationality: Client ID: Arrival:	s.47F(1)	
Offending type:	s.47F(1)	
Delegate decision:	On s.47F(1) 2021, a delegate decided not to revoke the mandatory cancellation of s.47F(1) Special Category (subclass 444) visa. The delegate considered the very serious nature of s.47F(1) offending involving s.47F(1)	
AAT decision:	On s.47F(1) 2021, the AAT set aside the delegate's decision and substituted a decision that the mandatory cancellation of s.47F(1) visa be revoked. The AAT considered that s.47F(1) offending constituted s.47F(1) , though noted that his actions were s.47F(1) . While the offending was 'overall not thoroughly serious', the AAT nevertheless acknowledged that the act of s.47F(1) . The AAT placed significant weight on s.47F(1) ties to the community, having resided in Australia for 20 years with family members and maintaining employment. The AAT considered that s.47F(1) genuinely intended to establish a relationship with his s.47F(1) .	
Thresholds assessment:	s.47F(1) case has been assessed by the Department as meeting current thresholds for referral to the Minister on the basis of community protection risk, given the significant consequences that may have resulted from s.47F(1) . It is noted however, that s.47F(1) case would not meet the updated thresholds for referral to the Minister, having not received a sentence of imprisonment of ten years or more for a very serious offence, and no other exceptional circumstances in the absence of any serious physical harm to the victim.	

OFFICIAL: Sensitive**Example 3**

Thresholds assessment	Current (2020) thresholds: Met – Refer to Minister	Updated (2022) thresholds: Not met – Department to manage
Client name: Date of birth: Nationality: Client ID: Arrival:	s.47F(1)	
Offending type:	s.47F(1)	
Delegate decision:	On s.47F(1) 2020, a delegate decided not to revoke the mandatory cancellation of s.47F(1) Employer Nomination Scheme (subclass 856) visa. The delegate considered that due to the very serious nature of s.47F(1), he represents an unacceptable risk of harm to the Australian community such that the protection of the Australian community outweighs any countervailing considerations.	
AAT decision:	On s.47F(1) 2020, the AAT set aside the delegate's decision and substituted a decision that the mandatory cancellation of s.47F(1) visa be revoked. The AAT considered that while s.47F(1) had committed a serious s.47F(1), he is at very low risk of reoffending, has no history of repeated serious criminal behaviour in Australia and has demonstrated considerable remorse. The AAT placed substantial weight on the detriment his removal would have on his s.47F(1) parents and s.47F(1) minor children s.47F(1). s.47F(1) stated that he had cared for his children prior to s.47F(1). The AAT noted that s.47F(1) and has maintained gainful employment with strong ties to the community. The AAT accepted that s.47F(1) would likely face a greater degree of societal discrimination in s.47F(1).	
Thresholds assessment:	s.47F(1) case has been assessed by the Department as meeting current thresholds for referral to the Minister on the basis of community protection risk given the sexual nature of his offending. It is noted however, that s.47F(1) would not meet the updated thresholds for referral to the Minister, having not received a sentence of imprisonment of ten years or more and in the absence of any repeat offending of a s.47F(1) or violent nature, and no other exceptional circumstances extant such as media interest or victim concerns.	

OFFICIAL: Sensitive**Example 4**

Thresholds assessment	Current (2020) thresholds: Met – Refer to Minister	Updated (2022) thresholds: Met – Refer to Minister
Client name: Date of birth: Nationality: Client ID: Arrival:	s.47F(1)	
Offending type:	s.47F(1)	
Delegate decision:	On s.47F(1) 2020, a delegate decided not to revoke the mandatory cancellation of s.47F(1) Class BB Subclass 155 Five Year Resident Return visa.	
AAT decision:	On s.47F(1) 2022, the AAT set aside the delegate's decision and substituted a decision that the mandatory cancellation of s.47F(1) visa be revoked. The AAT considered that while s.47F(1) had committed s.47F(1), the hardship suffered by him on removal, his lengthy ties in Australia, low risk of reoffending, his age, his physical and mental health, and risk of suicide, mean that on balance those matters outweigh the reasons not to revoke the visa cancellation.	
Thresholds assessment:	s.47F(1) case has been assessed by the Department as meeting current and updated thresholds for referral to the Minister on the basis of serious s.47F(1) The Department has further determined that s.47F(1) case would continue to meet the updated thresholds for referral to the Minister, due the serious s.47F(1) and the historic offending that is repugnant in nature to the Australian community.	

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Example 5

Thresholds assessment	Current (2020) thresholds: Met – Refer to Minister	Updated (2022) thresholds: Not met – Department to manage
Client name: Date of birth: Nationality: Client ID: Arrival:	s.47F(1)	
Integrity issue:	s.47F(1) was granted a permanent Protection (subclass 866) visa (his wife and daughter being dependent applicants) on the basis of claims that the family were stateless s.47F(1). Two years later, s.47F(1) submitted a police report claiming to have lost his s.47F(1) passport s.47F(1).	
Delegate decision:	On s.47F(1) 2017, a delegate cancelled s.47F(1) Protection (subclass 866) visa under section 109 of the <i>Migration Act 1958</i> on the basis that he had provided incorrect information regarding his citizenship. The delegate was satisfied that s.47F(1) was a citizen s.47F(1), and that his claim to be stateless was fundamental to the determination that he is someone to whom Australia has protection obligations and therefore, the grant of the visa.	
AAT decision:	On s.47F(1) 2019, the AAT set aside the delegate's decision and substituted a decision not to cancel the visa. s.47F(1) claimed to have used a false passport to depart s.47F(1) and, in making the police report, had been referring to the travel document issued to him by s.47F(1) authorities. s.47F(1) later stated that the police report was false, made with the intention of obtaining s.47F(1) documents in order to pursue Australian citizenship. Taking into account country information, the AAT accepted it was possible that the s.47F(1) passport used for departure could have been forged or otherwise fraudulently obtained. The AAT also accepted that s.47F(1) had filed a false police report following the advice of his s.47F(1) that it would assist with his Australian citizenship application s.47F(1). The AAT considered this willingness to provide false information to police concerning, though nevertheless determined that the information was in fact false (that is, no s.47F(1) passport had been stolen). The AAT found that s.47F(1) is a stateless s.47F(1), not an s.47F(1) citizen.	
Thresholds assessment:	s.47F(1) case has been assessed by the Department as meeting current thresholds for referral to the Minister on the basis of significant identity concerns in an attempt to undermine the integrity of Australia's migration program. s.47F(1) who have been subject to visa cancellation, having been granted protection visas on the basis of claims to be stateless, only to later report their s.47F(1) passports lost or stolen. It is noted however, that s.47F(1) would not meet the updated thresholds for referral to the Minister where he does not pose a very serious risk to the community and where there are no other exceptional circumstances extant such as media interest.	