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Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS24-001670

Date of Clearance: 10/10/2024

To Minister for Home Affairs, Minister for Immigration and Multicultural Affairs, Minister for Cyber Security

Subject Management of the Administrative Appeals Tribunal 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;
2. endorse the proposed AAT set-aside referral thresholds at **Attachment A**; and
3. note that until new referral thresholds are endorsed, the Department Home Affairs will prepare submissions for all AAT set-aside decisions made under Ministerial Direction 110 for your consideration to exercise your personal non-delegable powers.

noted / please discuss

endorsed / not endorsed /
please discuss

noted / please discuss

**Minister for Home Affairs, Minister for Immigration and
 Multicultural Affairs, Minister for Cyber Security**

Signature.....

Date 22/10/2024

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Minister's Comments

Key Issues

1. This submission provides 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**.
2. For character decisions made by the Department of Home Affairs (the Department), non-citizens can seek review of the decisions at the AAT. The AAT provides independent merits review of decisions made under Commonwealth law and must comply with relevant Ministerial Directions.
3. Under the *Migration Act, 1958* (the Migration Act), portfolio ministers retain personal non-delegable powers to set-aside and substitute a decision of a delegate or the AAT, if the Minister reasonably suspects the person does not pass the character test and the Minister is satisfied the visa refusal or cancellation is in the 'national interest.' The two relevant personal powers are:
 - section 501A – the Minister may set-aside a delegate or AAT decision not to refuse to grant a visa under section 501(1) or not to cancel a visa under section 501(2) and refuse to grant or cancel the visa; and
 - section 501BA – the Minister may set-aside a delegate or AAT decision under section 501CA to revoke a visa cancellation under section 501(3A) and cancel the visa.
4. While the delegate or AAT's decisions may be based on legal and factual assessments, they may not always account for the broader implications on national security, public safety and community expectations. The Minister's personal powers under sections 501A and 501BA were introduced in recognition that the Government is ultimately responsible for ensuring that delegate or AAT decisions reflect community standards and expectations. They allow the Minister to consider new intelligence or developments that may warrant a different outcome, or make decisions that reflect the broader public sentiment and governmental policy priorities in the national interest.
5. When determining which cases are referred to the Minister, a risk-based approach is applied, focused on the protection of the Australian community 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 ministerial focus on high risk or sensitive cases in line with the community protection objectives and community expectations.

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6. On 29 March 2023, the former Minister for Immigration, Citizenship and Multicultural Affairs, the Hon Andrew Giles MP, endorsed the current referral thresholds to guide which cases are to be referred to the Minister for personal consideration.
7. On 21 June 2024 Ministerial Direction 110 (MD110) – *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*, signed by the former Minister for Immigration, Citizenship and Multicultural Affairs, commenced replacing Ministerial Direction 99 (MD99). MD110 addressed concerns that some AAT decisions to set-aside visa character refusals, cancellations and non-revocations were not consistent with the Australian Government policy intent as expressed through previous MD99. The new MD110 priorities and strengthens the principles of community safety.
8. On 1 August 2024, you requested that all departmental losses decided by the AAT since the introduction of MD110, are referred to you for consideration of exercising your personal non-delegable powers to set-aside and substitute a decision of the AAT. The Department will continue this process until such time that you endorse revised referral thresholds. To date, eight losses have occurred since the introduction of MD110 and submissions are being developed for ministerial consideration.

Proposed referral thresholds

9. The Department has reviewed the referral thresholds in line with the new Ministerial Direction 110.
10. The proposed referral thresholds at **Attachment A** will ensure that cases that pose a serious ongoing level of risk to the community or an individual, or that are inconsistent with community expectations, such that the 'national interest' may be invoked, are considered by a portfolio Minister.
11. In line with the intent of the current thresholds, cases to be referred to the Minister under the new thresholds will include those where there is a serious ongoing risk to the safety of the Australian community or an individual or where the offending is inconsistent with community expectations. This will primarily be on the basis of objective criteria including serious violent offending, particularly against women or children, a substantial criminal record, violent or repeated family violence, and serious historic offending. Consideration will also be given to matters considered to be exceptional, including significant media interest, high profile matters and serious identity or fraud concerns.

Background

12. 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.

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13. 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.
14. 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. Noting the non-citizen's visa has been reinstated, and they are likely residing in the community. This includes cases where there are no 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 renders the person liable for mandatory cancellation consideration). Unless a more suitable option has been identified, AAT set-aside cases that are administratively finalised generally proceed to visa/citizenship grant.
15. 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 (or prison) as a result of a AAT decision until a further decision is made by the Minister to personally consider the cancellation of their visa.

Legacy AAT set-aside referrals on-hand

16. As at 8 October 2024, the Department has approximately 99 legacy 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 Immigration, Citizenship and Multicultural Affairs for personal consideration. There are approximately a further 47 cases that are undergoing threshold assessment under the current thresholds.
17. All on-hand legacy cases have been triaged with a view to prioritising and escalating those cases likely to pose community protection risk.

New AAT set-aside referrals under Ministerial Direction 110

18. As at 8 October 2024, there have been eight AAT set-aside decisions made by the AAT under MD110 (of a total of 41 outcomes). Legal Group are providing the Minister's office visibility of AAT set-aside cases within 48 hours. Where the case meets agreed thresholds the Department will aim to provide the relevant Minister with an AAT set-aside submission within 30 days from the receipt of the AAT's written reasons.

Consultation – internal/external

19. Nil.

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Consultation – Secretary / Associate Secretary Immigration / ABF Commissioner

20. The Secretary, Associate Secretary Immigration and the ABF Commissioner were not consulted on the approach in this submission.

Client service implications

21. If a person is re-detained following the refusal or cancellation of their visa, they will be liable for removal under section 198 of the Migration Act. It is expected that a number of cases will seek judicial review of the decision and or challenge their removal from Australia.

Risks and Sensitivities

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

Financial/systems/legal/deregulation/media implications

23. There is a very high risk that some or all of those re-cancelled will seek judicial review of the exercise of the section 501A or 501BA powers by the Minister, in particular where the person has been in Australia for a significant period of time and where all of their family resides in Australia. The Federal Court has jurisdiction to hear applications for judicial review of such decisions. The Department has prepared a previous submission for the former Minister for Immigration, Citizenship and Multicultural Affairs that details the legal risks associated with decisions under section 501A and 501BA and outlines how the Department will work to reduce or ameliorate these risks (MS24-000942).

Attachments

Attachment A Comparison of referral thresholds for AAT set-aside cases

Authorising Officer Cleared by: Jaycob McMahon First Assistant Secretary Character, Cancellation and Case Resolution Division Date: 10/10/2024 Mob: s. 22(1)(a)(ii)
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 Mob: s. 22(1)(a)(ii)

CC Assistant Minister for Immigration
 Secretary
 Associate Secretary Immigration

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ATTACHMENT A

AAT set-aside thresholds March 2023

PROPOSED NEW AAT set-aside thresholds
October 2024**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

s. 47E(d)

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CHARACTER CASE REFERRAL MODEL

S. 47E(d)

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*

CHARACTER REFERRAL MODEL – NCCC PROCEDURAL VERSION

S. 47E(d)