



Interpreting Criminal History and Sentence Calculations

Table of Contents

Interpreting Criminal History and Sentence Calculations	1
Table of Contents	1
Interpreting Criminal History	2
Failing the character test under 6(a)	2
Failing the character test under 6(e)	2
Terms of Imprisonment	2
MAKASA/XJLR Ruling	3
Multiple Sentences	4
Child Sex Offences	5
Commonly Used Terms	6

Interpreting Criminal History

There are two common objective grounds that non-citizens fail the character test under:

Failing the character test under 6(a)

7(c): the person has been sentenced to a term of imprisonment of 12 months or more.

7(d): the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more.

Failing the character test under 6(e)

A court in Australia or a foreign country has:

- i. Convicted the person of one or more sexually based offences involving a child; or
- ii. Found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction

Terms of Imprisonment

The following terms are equivalent to a term of imprisonment in relation to the character test:

- ✓ Imprisonment
- ✓ Imprisonment (aggregate)
- ✓ Imprisonment suspended
- ✓ Intensive Correction Order (ICO)
- ✓ Suspended Imprisonment Order (SIO)
- ✓ Control Order s33(1)(G) (children's court) (**CONVICTION RECORDED**)
- ✓ Periodic detention (equivalent to the actual number of days spent in a custodial institution)
- ✓ Detention in a Youth Training Centre (VIC)
- ✓ JL (on a QLD Traffic History)
- ✓ Court Secure Treatment Order
- ✓ Imprisonment to be served by way of home detention

These are not imprisonment:

- × Bond s33(1)(B)
- × S10 Bond
- × Community Corrections Orders (CCO)
- × Good Behaviour Bond
- × Intensive Supervision Order (ISO)
- × Conditional Release Order
- × Custodial Supervision Order (CSO)
- × Children's Court offending with NO conviction
- × Diversion Plan (VIC)

MAKASA/XJLR Ruling

The MAKASA/XJLR ruling means that the Department cannot consider offending once it has previously been considered. Offending is deemed to be considered if it falls within the life cycle of the cancellation consideration, this includes the revocation process.

CASE SCENARIO:

POI has been sentenced to 12 months in 2016 and his visa was revoked in 2017. In 2018 the POI was sentenced to another term of 12 months imprisonment	✓
<i>YES – in this scenario the POI objectively re-fails the character test as they were sentenced to a fresh 12 month sentence in 2018. The NCCC can consider the POI for visa cancellation based on the 2018 offending.</i>	
POI has been sentenced to 12 months in 2019 and their visa was revoked in 2020. In 2021 the POI was sentenced to a term of 8 months imprisonment	✗
<i>NO – in this scenario the POI does NOT objectively re-fail the character test. Once the Department has made a determination (visa revoked or visa not cancelled), the Department can't re-consider this particular offending again. The POI will need to be sentenced to a fresh 12 months or more (either single sentence or totalling) as per the above scenario.</i>	
POI has been sentenced to 12 months imprisonment in both August and December of 2024. The August offending was used for the failure of the character test and their visa was revoked in 2025.	
<i>NO – in this scenario the POI does not have a fresh 12 month sentence outside of the consideration of the NCCC. Whilst the August offending was only used, the December offending would have been taken into account at the time of revocation and therefore constitutes being 'considered' by the NCCC.</i>	✗

Multiple Sentences

When analysing the criminal history there may be multiple court hearings where the POI has received a term of imprisonment that isn't a single sentence of 12 months or more. Case officers will need to know how to calculate these sentences to determine if they fail the character test under 6(a).

CASE SCENARIOS:

Do the following sentences cause a person to fail the character test under 6(a):

On one occasion sentenced to CUMULATIVE terms of imprisonment of: 5 months, 5 months, 5 months.	✓
<i>YES – the POI would fail the character test as they have been sentenced to multiple terms of imprisonment that total 12 months or more. When reading court documents, case officers can look for terms such as 'on each count' or 'on each charge'. This wording indicates that the POI received an individual sentence on each offence which can be included in the calculation. The term CUMULATIVE means that each sentence will be served on top of the other, so in this scenario the POI will serve 15 months imprisonment.</i>	
On one occasion sentenced to CONCURRENT terms of imprisonment of: 5 months, 5 months, 5 months.	✓
<i>YES – the POI would fail the character test here as they have been sentenced to multiple terms of imprisonment totalling 12 months or more. When reading court documents, case officers can look for terms such as 'on each count' or 'on each charge'. This wording indicates that the POI received an individual sentence on each offence which can be included in the calculation. The term CONCURRENT means that the sentences will be served at the same time, so in this scenario the POI will serve 5 months imprisonment.</i>	
On one occasion sentenced to CUMULATIVE terms of imprisonment of: 4 months, 4 months, 3 months.	✗
<i>NO – the POI would NOT fail the character test in this scenario as the total amount does not equal 12 months or more. The POI has been sentenced to 4, 4, and 3 which amounts to 11 months imprisonment and thus wouldn't meet the threshold for failing the character test.</i>	
On one occasion sentenced to CONCURRENT terms of imprisonment of: 4 months, 4 months On another occasion sentenced to imprisonment of 4 months.	
<i>YES - the POI would fail the character test in this scenario as over their criminal history they have been sentenced to term of imprisonment totalling 12 months or more. Case officers will need to keep in mind the MAKASA ruling as outlined above.</i>	
On one occasion sentenced to AGGREGATE term of imprisonment of: 11 months for 3 separate offences	
<i>NO – the POI would NOT fail the character test in this scenario. The term AGGREGATE means that it is a sentence for multiple offences as a whole. If the POI has been sentenced to an aggregate term the term cannot be counted as 11 months for each offence.</i>	
On one occasion sentenced to an AGGREGATE term of imprisonment of 12 months	
<i>YES - the POI would fail the character test as they have been sentenced to a single term of imprisonment of 12 months or more and may meet s501(3A) mandatory cancellation.</i>	

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Child Sex Offences

A child is deemed to be any person under the age of 18 for the purpose of visa cancellation and offence. Child sex offences include physical/violent offending as well as possessing child pornography. Please see legal opinion C62876 (ADD2022/3717942) for more detailed reasoning.

s6(e) states that the POI needs to be **convicted (i)** or **found guilty (ii)** of a child sex offence. So if the POI has a child sex offence on a criminal history report that states 'No Conviction Recorded' or 'Without Conviction', they are still liable as they meet 6(e)(ii).

DIVERSIONS

In VIC, first time offenders have the opportunity to be dealt with by way of a diversion. A diversion is a type of sentence that is similar to a warning, it will not show on a criminal record and a conviction will not be recorded. For the offender to be considered for a diversion they must acknowledge the offending.

Diversions for child sex offences do NOT meet s6(e)(ii) as acknowledging the offending is not a formal finding of guilt and thus are not liable. Please see legal opinion C63301 (ADD2022/3822066) for more detailed reasoning.

Commonly Used Terms

- **Bail** – a decision to keep a person in custody or not, after an arrest and prior to a verdict. A person kept in custody that is yet to be sentenced is on Remand. A person who is allowed in the community that is yet to be convicted is on bail.
- **(call up)** – when a person breaches a condition of their previous sentence and is called upon to receive a new sentence that replaces the old.
- **No Conviction Recorded/Without Conviction** – a sentence can be made with conviction or without conviction/no conviction recorded. Both are findings of guilt. Without Conviction/No conviction recorded means that the offender can answer 'no' when they are asked if they have been convicted of any crime e.g. on a job application.
 - o **PLEASE NOTE:** that 'No Conviction Recorded' or 'Without Conviction' still means the person is found guilty of the crime and this important for Child Sex offences.
- **Order confirmed** – After an appeal, the new judge agrees with the original conviction and sentence and does not change anything.
- **Order varied** – After an appeal, the original sentence is replaced by a new sentence with new conditions. Sometimes the length of imprisonment changes, or the parole period or the dates etc.
- **Recognizance** – found in federal sentencing, a release order with conditions, e.g. good behaviour or payment.
- **Rising of the Court** – a person can be sentenced to imprisonment until the 'rising of the court' meaning until the end of that day. This can happen if the person has been on remand, or to ensure that an imprisonment term is recorded on their criminal record for minor offences.



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S501 Character Consideration Process

Character Branch Overview

The Character Cancellation Branch (CCB) sits within Immigration Compliance Group of the Department and is responsible for all visa cancellation, revocation and refusal cases under section 501 of the *Migration Act 1958*.

The CCB aims to protect the Australian community by refusing and cancelling visas of non-citizens who may pose character or security concerns.

The Character Cancellation Branch considers all visas, permanent or temporary.

Character program

The three main categories of cases in the Character program area are:

Visa refusal - Refusal of visas applied for by non-citizens onshore and offshore

Discretionary cancellation - Discretionary cancellation of visas held by non-citizens most often found in the community

Mandatory cancellation and Revocation - Mandatory cancellation of visas held by non-citizens currently in prison, and the processing of the revocation of the mandatory cancellation

In all three categories, if a decision is made by the delegate, these decisions can be merits reviewed at the ART, and the Minister has the power to then overturn the ART decision in the national interest. The Merits Judicial Review team prepares these submissions



Decisions are made by the Minister, or a delegate of the minister under a Ministerial Direction.

Character Program continued...

The Character Delegates and Assurance and Legal Engagement (ALE)

The Assurance and Legal Engagement team is responsible for litigation contingency planning, quality assurance of Ministerial submissions and legal guidance, support and training for the CCB.



The Character Delegates make discretionary s501 decisions for refusals, discretionary cancellations revocations, & provide views for Ministerial submissions. They follow a Ministerial Direction (currently Ministerial Direction 110) which sets out the decision making criteria as prioritised by the Minister.

The delegates use the case officer submissions/statements of reasons as a base for their decision records, often needing to change very little before signing.

They are also called upon on occasion to provide views on cases that the Minister would decide.



The team meet each day to discuss their cases and ensure that their decision making is aligned.

Cancellation (and refusal) powers under the *Migration Act 1958*

Section	Description
s109	Incorrect information and bogus documents
s116	General grounds including non-compliance with visa conditions
s128	Offshore cancellation – relies on grounds at s116
s134	Cancellation of permanent business migration visas only
s134B	Emergency cancellation without notice on security grounds (ASIO)
s137J	Automatic student visa cancellation (not used since 13 April 2013)
s137Q	Cancellation of regional sponsored employed visas – not commencing/finishing contract
s137T	Consequential cancellation – primary visa holder's visa is cancelled under s137Q
s140	Consequential cancellation – primary visa holder's visa is called under s109, s116, s128
s500A	Cancellation of temporary safe haven visas
s501	Character grounds
s164	Cancellation of criminal justice visas



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Section 501 Powers



Section 501 powers

Main powers

501(1)	Discretionary power to refuse (VACCU)
501(2)	Discretionary power to cancel
501(3)	Minister's power to refuse or cancel without natural justice in the national interest
501(3A)	Mandatory cancellation

Powers to revoke / overturn previous decisions

501CA	Power to revoke a mandatory cancellation
501A, 501B, 501BA	Minister's discretionary power to set aside and substitute an Administrative Review Tribunal decision in the national interest
501C	Minister's power to revoke the decision under 501(3) or 501(A)3

Subsequent powers

501E	Prohibition to apply for other visas except a protection visa
501F	Subsequent refusal of all other visa applications and cancellation of other visas

Visa Refusal – s501(1)

Decision of Minister or delegate - Natural Justice applies

The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.



Note: Character test is defined by subsection (6).

Discretionary Cancellations – with natural justice

Section 501(2) – the Minister may cancel a visa that has been granted to a person if:

- The Minister reasonably suspects that the person does not pass the character test; and
- The person does not satisfy the Minister that the person passes the character test.

Decision of Minister — natural justice does not apply – s501(3)

Section 501(3) - the Minister may:

- (a) refuse to grant a visa to a person; or
- (b) cancel a visa that has been granted to a person;
if:
 - (c) the Minister reasonably suspects that the person does not pass the character test; and
 - (d) the Minister is satisfied that the refusal or cancellation is in the **national interest**.

No NOICCs or NOICRs need to be sent.

Mandatory cancellation and Revocation

Section 501(3A) – The Minister **must** cancel a visa that has been granted to a person if:

- (a) The Minister is satisfied that the person does not pass the character test because of the operation of:
 - (i) Paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
 - (ii) Paragraph (6)(e) (sexually based offences involved a child); and
- (b) The person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

Section 501CA – The minister or delegate may revoke the mandatory cancellation. The delegates use the Minister's considerations detailed in the Ministerial Direction to see if there are reasons to revoke.

s501A and s501BA set asides

Section 501A and 501BA are personal powers of the Minister to cancel or refuse a visa, setting aside a positive decision of the Administrative Review Tribunal (ART) or a delegate, in the national interest **with or without natural justice**.

When a delegate of a Minister administering the Migration Act 1958 (the Act) refuses a visa under s501(1), or refuses to revoke a cancellation under s501CA of the Act, the visa applicant may seek review of the decision.

At review, the ART, working under the Ministerial Direction, may make a positive decision to not refuse the visa, or to revoke the mandatory cancellation.

The Minister may personally consider whether to set aside the decision of the ART and refuse the visa under s501A or re-cancel the visa under s501BA.

Currently the Minister is looking at all ART positive decisions.

Other Grounds

Section 501B - Refusal or cancellation of visa - setting aside and substitution of adverse decision under subsection 501(1) or (2)



This ground allows the Minister to set aside a section 501 **delegate** decision, and substitute it with their own decision. The Minister must be satisfied that the refusal/cancellation decision is in the national Interest and they must reasonably suspect that the non-citizen does not pass the Character test.



This only applies to delegate decisions.

Knowledge check



1) Mr Jones is residing in the Australian community, holding a Resident Return visa. The Department has become aware that he has a criminal history and would like to consider cancelling his visa under Character grounds. What section 501 power would they use to consider the visa cancellation?

- a) Section 501(1) 😊
- b) Section 501(3A) ❤️
- c) Section 501(2) 👍
- d) Section 501(BA) 😮

Answer: Section 501(2)

Knowledge check



1) You are a Case Officer in VACCU. You have just been allocated a case for section 501 consideration and you need to send out a Notice of intention to consider refusal (NOICR). What section 501 power will the visa refusal be considered under?

a) Section 501(1)



b) Section 501(CA)



c) Section 501(3)



d) Section 501(2)



Answer: Section 501(1)

Knowledge check



- 1) Ms Smith's visa has been cancelled under the Mandatory cancellation provisions under section 501 of the Migration Act. She has now applied for revocation of that decision. What was the Mandatory Cancellation power, and what power will the Department consider her Revocation request?
- a) Section 501(3) 
 - b) Section 501(CA) 
 - c) Section 501(2) 
 - d) Section 501(3A) 

Answer: Section 501(3A) – Mandatory Cancellation and Section 501(CA) - Revocation



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The Character test

The Character Test

A person may be liable for visa cancellation or refusal if they do not satisfy the decision maker that they pass the **character test**. The various grounds of the character test are set out in s501(6). Just because a person fails the character test doesn't mean their visa must be refused or cancelled.



Some character test grounds are objective and failing them is black and white. Some character test grounds are subjective and require the decision maker to make an argument supported by documentation.



Most common grounds are 'substantial criminal record', 'risk of future conduct that would bring harm' and 'sexually based offences involving children'.

Summary of the character test

Section		Subjective /Objective
501(6)(a)	Substantial criminal record (with reference to s501(7))	Objective

Section	
501(7)(a)	Sentenced to death*
501(7)(b)	Sentenced to life imprisonment*
501(7)(c)	Sentenced to a term of imprisonment of 12 months or more*
501(7)(d)	Sentenced to two or more terms of imprisonment totalling 12 months or more
501(7)(e)	Acquitted on the grounds of insanity and detained in an institution
501(7)(f)	Found not fit to plead, however committed the offence and detained in an institution

Summary of substantial criminal record – section 501 (6)

Section		Subjective /Objective
501(6)(aa)	Offences in detention	Objective
501(6)(b)	Association or membership with a group or organisation involved in criminal conduct	Subjective
501(6)(ba)	Reasonably suspected of people smuggling, trafficking in persons, war crimes, or crimes of serious international concern	Subjective
501(6)(c)	Past and present criminal or general conduct	Subjective
501(6)(d)	Risk in regards to intentions of future conduct	Subjective
501(6)(e)	Sexually based offences involving a child	Objective
501(6)(f)	Charged or indicted overseas for war crimes	Objective
501(6)(g)	Adverse ASIO security assessment (ASA)	Objective
501(6)(h)	Interpol notice in effect (risk to the community)	Subjective

The character test s501(6) of the Migration Act

(6) For the purposes of this section, a person does not pass the character test if:

(a) the person has a **substantial criminal record** (as defined by subsection (7));

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

(f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution.

The character test s501(6) of the Migration Act cont...

(aa) the person has been convicted of an offence that was committed:

- (i) while the person was in immigration detention; or
- (ii) during an escape by the person from immigration detention; or
- (iii) after the person escaped from immigration detention but before the person was taken into immigration detention again

(ab) the person has been convicted of an offence against section 197 A

- (Detainees must not escape from detention)

(b) the Minister reasonably suspects:

- (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
- (ii) that the group, organisation or person has been or is involved in criminal conduct

The character test s501(6) of the Migration Act cont...

(baa) subsection (6A) applies to the person (spreading hatred and extremism)

If the non-citizen meets s.501(6A), they fail the character test

(ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:

- (i) an offence under one or more of sections 233A to 234A (people smuggling);
- (ii) an offence of trafficking in persons;
- (iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern; whether or not the person, or another person, has been convicted of an offence constituted by the conduct

(c) having regard to either or both of the following:

- (i) the person's past and present criminal conduct;
- (ii) the person's past and present general conduct;
- the person is not of good character

The character test s501(6) of the Migration Act cont...

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person might:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way

The character test s501(6) of the Migration Act cont...

(e) a court in Australia or a foreign country has:

- (i) convicted the person of one or more sexually based offences involving a child; or
- (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction.

(f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:

- (i) the crime of genocide;
- (ii) a crime against humanity;
- (iii) a war crime;
- (iv) a crime involving torture or slavery;
- (v) a crime that is otherwise of serious international concern.

The character test s501(6) of the Migration Act cont...

(g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

(h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the *character test*.



Section 501 (6A) - Spreading hatred and extremism

subsection applies to:

Australia cancels visa of Jewish influencer who previously called for Islam to be banned

Krishani Dhanji

Tue 27 Jan 2026 10:57 AEDT

Sammy Yahood accuses Labor of 'tyranny' after the government cancelled his visa hours before his flight was due to depart

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The home affairs minister, Tony Burke, confirmed he cancelled Sammy Yahood's visa, saying "spreading hatred is not a good reason to come". Photograph: Dominic Giannini/AAP

The government has cancelled the visa of a Jewish influencer who has previously called for the ban of Islam and was booked to speak at several events in Australia.

The right-leaning Australian Jewish Association (AJA) said Sammy Yahood's visa was cancelled three hours before his flight was due to depart.

The home affairs minister, **Tony Burke**, confirmed he had cancelled the visa on Monday evening, and said "spreading hatred is not a good reason to come".

"If someone wants to come to Australia they should apply for the right visa and come for the right reason," Burke told Guardian Australia in a statement.

The cancellation, which was made under existing laws, comes just one week after the federal government passed new legislation that increases the grounds the home affairs minister can use to reject or cancel a visa. The minister could prevent an individual coming to Australia if they believe a person has engaged in **hate, vilification or extremist conduct** under the character test.

reasonably suspects that:



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Consequences of visa refusal or cancellation

Impacts of a visa refusal or cancellation

If a non-citizen's visa is cancelled or refused, non-citizens are rendered 'unlawful' and are liable for immigration detention with a view to removal from the country.

Subsequent Powers

S.501E Refusal or cancellation of visa - prohibition on applying for other visas

If the non-citizen's visa is cancelled or refused under section 501 while onshore, **you cannot apply for most other visas** while in Australia.

******There are **exceptions** such as Protection visas (if there are no bars), or prescribed visas (Bridging visa R)

S.501F Refusal or cancellation of visa - refusal of other visa applications and cancellation of other visas

If a non-citizen whose visa is refused or cancelled under section 501, has made another (undecided) visa application in progress, then that must also be refused under section [501F](#).

Similarly, if the non-citizen also holds another visa, then that visa must be cancelled under section [501F](#).

The only **exceptions** to this are an application for a Protection visa or a visa specified under regulation [2.12A](#) such as a Bridging visa R.

Special Return Criteria – Schedule 5001



** Some non-citizens are unable to be removed due to non-refoulement obligations or they are found to be non-alien (i.e indigenous). Those non-citizens can be granted a Bridging Visa R and allowed in the community with conditions until they can be lawfully removed from Australia.

NOTE: The unlawful non-citizen may also seek to pursue appeal options such as revocation, merits review at the ART or judicial review.



Australian Government
Department of Home Affairs

Direction No. 110

Ministerial Direction under s499 of the Migration Act 1958

Visa refusal and cancellation under s501 and revocation of a mandatory cancellation under s501CA

Purpose

By the end of this course, participants will have an understanding of:

- The history and background of the Ministerial Direction
- The purpose of the Ministerial Direction
- The underlying principles of the Ministerial Direction
- The primary and secondary considerations in the Ministerial Direction and how to interpret them in a Statement of Reasons

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.

- Ministers issue Directions to guide decision makers about the considerations relevant to a discretionary s501 decision
- Applies primarily to s501(1) refusals, s501(2) cancellations and s501CA revocation cases
- Binds departmental decision makers and the Administrative Review Tribunal
- Reflects the Minister's priorities

Directions are not law, they reflect the Minister's priorities and set parameters to assist with consistency in decision making and ensure such decisions are consistent with the Minister's expectations.

Previous Directions

Direction No.	Validity	Minister
110	21 June 2024 – Present	Minister Giles
99	3 March 2023 to 20 June 2024	Minister Giles
90	22 March 2021 to 2 March 2023	Minister Hawke
79	28 February 2019 to 21 March 2021	Minister Coleman
65	23 December 2014 to 27 February 2019	Minister Morrison
55	1 September 2012 to 22 December 2014	Minister Bowen
41	15 June 2009 to 31 August 2012	Minister Evans
21	23 August 2001 to 14 June 2009	Minister Ruddock
17	21 June 1999 to 22 August 2001	Minister Ruddock

Direction 110

The current Direction commenced on 21 June 2024. It provides binding guidance to delegated decision makers:

- in relation to the grounds of the character test (Annex A – Application of the character test), and
- to delegates and Administrative Review Tribunal (ART) members who are making visa refusal, cancellation or revocation decisions under section 501

Section 501 delegates and ART members must comply with Direction 110 when making any decision under section 501.

For cases where the Minister acts personally, the Minister can refer to Direction 110 but is not bound by it in making a personal decision.

Direction 110

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

Part 1 – Section 4 - Interpretation

Definitions in the Act:

family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the family member to be fearful.

forced marriage is defined as taken to have occurred where the victim entered into the marriage without freely and fully consenting.

A **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.

Serious conduct includes behaviour or conduct of concern that does not constitute criminal offence, though may reflect adversely on a non-citizen's character.

Section 5 - Preamble

5.1 Objectives

5.1(1)	Regulate in the national interest the coming into and remaining in Australia of non-citizens
5.1(2)	Non-citizens may be refused a visa under s501(1) or their visa 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 also considered making that decision.
5.1(3)	The decision maker must cancel a person's visa under s501(3A) if they are satisfied the person does not pass the character test based on specific limbs of the character test and the person is serving a sentence of imprisonment on a full time basis for an offence. The person may request revocation of the cancellation under s501CA, and the decision maker must consider whether to revoke the cancellation given the circumstances of the case.
5.1(4)	the purpose of the Direction is to guide decision makers in performing functions or exercising powers under s501 and s501CA of the Act. Under s499(2A) of the Act decision makers must comply with a direction made under s499.

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) | The safety of the Australian community is the highest priority of the Australian Government. |
| 5.2(3) | 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(4) | 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(5)	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(6)	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.
5.2(7)	Decision makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizens conduct, or the harm that would be caused if it were repeated, may be so serious that even strong countervailing considerations may be insufficient to justify a favourable decision for the non-citizen.
5.2(8)	The inherent nature of certain conduct, such as family violence, is so serious that even strong countervailing considerations may be insufficient to justify a favourable decision for the non-citizen, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

Part 2 – Making a decision

Section 6

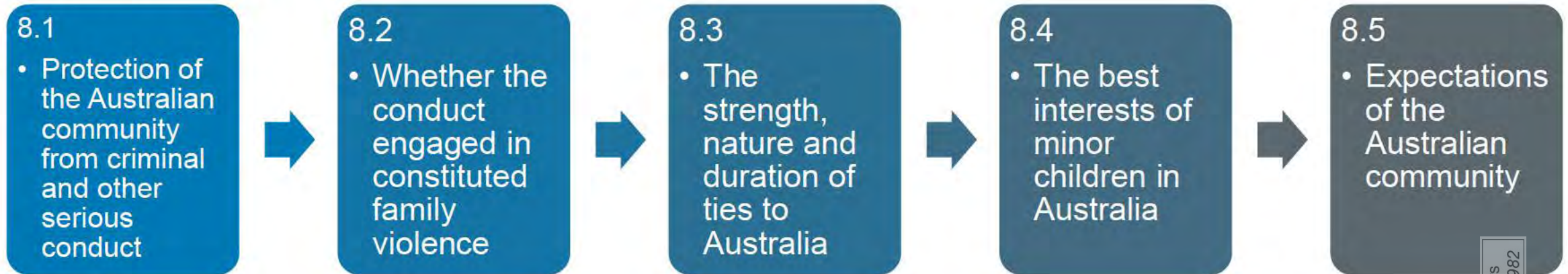
Informed by the principles, a decision maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.

Section 7 – Taking the relevant considerations into account

- (1) In applying the considerations, information and evidence from independent and authoritative sources should be given appropriate weight.
- (2) The **Protection of the Community** should generally be given **greater weight** than any other Primary consideration. Otherwise, Primary considerations should generally be given greater weight than the Other considerations.
- (3) One or more primary considerations may outweigh other primary considerations, including the Protection of the Community.

Section 8 & 9 – Primary and Other considerations

Primary Considerations:



Other considerations:





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Primary Consideration:

8.1 Protection of the Australian community

8.1 – Protection of the Australian community

Direction 110 specifies that decision makers should be mindful that the safety of the Australian community is the highest priority of the Australian government. Decision makers should also have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens.

There are two limbs to this consideration:

First limb (8.1.1) – Nature and Seriousness of offending

Consideration of the offences or other serious conduct, the nature of the conduct and objective seriousness of the conduct.

Second limb (8.1.2) – The risk to the Australian community should the non-citizen reoffend

Consideration of the likelihood of a non-citizen reoffending and the nature of the harm that would be caused if the non-citizen did reoffend.

First limb - Nature and seriousness of offending

Direction 110 provides guidance on the types of crimes or conduct that are viewed very seriously and seriously, however is non-exhaustive

Serious offending:

- Forced marriage regardless of conviction or a sentence imposed
- Committed against vulnerable members of the community and officials
- Conduct that forms the basis for a finding that a non-citizen does not pass the CRIT dependent on delegate's opinion
- Immigration detention

Aggravating factors

The Direction specifies other factors to be considered in assessing the seriousness of the offending include:

The sentence imposed by the Court(s)

Impact of the offending on the victim(s), their families and/or the community

The frequency of the conduct and whether there is any trend of increasing seriousness

The cumulative effect of repeated offending

The provision of false or misleading information to the department, including failing to declare offending

Reoffending since being formally warned about the consequences of further offending in relation to the non-citizen's migration status

Whether the offence/conduct committed in another country constitutes an offence in Australia

Determining seriousness

Evaluate the seriousness of person's offending, ensuring to remain neutral and make judgments based on the available information

Avoid emotive or inflammatory language and/or making inferences about a non-citizen's conduct, which are not supported by independent information.

Useful resources include sentencing remarks, criminal history, parole board comments, police fact sheets, psychological reports, etc.

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. For example, a lengthy term of imprisonment indicates the offence/offending was considered more serious than a good behaviour bond or other non-custodial disposition.

Where to start

- 1 • **Develop a reverse chronology** of the client's criminal conduct and a general understanding of the client's criminality.
- 2 • Ensure you **follow convictions though the appeals process**. Do not double count offending that has been subject to an appeal – it will still only be one offence and, where an appeal was successful, only the sentence of the appellate court matters.
- 3 • **Second time** – read actively, highlighting more serious crimes and annotating crime types (violent, sexual, involving minors etc.). Identify which crime/crimes will be the strongest failure of the character test.
- 4 • Mark anything to follow up / query.
- 5 • Mark convictions where sentencing remarks may be particularly useful.
- 6 • Compare the history to corroborative documents (if available) to ensure it is accurate

Second limb - Risk to the community

Direction 110 specifies that:

In considering the need to protect the Australian community, decision makers should have regard to the Government's view that the Australian community's tolerance for any risk of harm becomes lower as the seriousness of the potential harm increases.



In assessing the risk posed to the Australian community, decision makers must have regard to, cumulatively:

- The nature of the harm if the non-citizen reoffended;
- The likelihood of the non-citizen reoffending
 - the available information regarding the non-citizen's risk; and,
 - evidence of the non-citizen's rehabilitation at the time of the decision



For refusal:
Consideration should be given the type and purpose of the visa being applied, noting that the duration of the visa may affect the risk of harm or there may be compassionate reasons to grant 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 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 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.

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)

Indications of
reformed
behaviour while
in the community

Any submissions the non-citizen
has made regarding the nature
and harm and likelihood of the
offending



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Primary consideration:

8.2 Family violence committed by the non-citizen.

Family Violence (FV) concerns

The family violence consideration was first introduced in Direction 90.

Direction 110 stipulates that the Government has serious concerns about allowing those who have engaged in Family violence to enter or remain in Australia. The concerns are proportionate to the seriousness of the family violence engaged in by the non-citizen.

In determining the relevance of this consideration, we must identify whether:

- A non-citizen has been convicted, found guilty, or had charges proven (howsoever described) that involved FV; and/or,
- There is independent and authoritative information to indicate that the non-citizen has been involved in the perpetration of family violence

Definition of Family Violence

Section 4 of Direction 110 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 family violence behaviour can include:	
• Assault	• sexual assault or other sexually abusive behaviour
• stalking	• repeated derogatory taunts
• intentionally damaging or destroying property	• intentionally causing death or injury to an animal
• Unreasonably denying financial autonomy	• Unreasonably withholding financial support
• Deprivation of liberty	• preventing the family member from making or keeping connections with their family, friends or culture

Definition of Family Member

Direction 110 does not explicitly define what constitutes a **family member** for the purposes of the definition of family violence, however, it is specified that a **member of the person's family** includes:

'a person who has, or has had, an intimate personal relationship with the relevant person'.

Given the absence of specified parameters, discretion can be used when considering whether the victim of a non-citizen's conduct is a member of the visa applicant/holder's family and can extend beyond the immediate family.



Use your discretion to examine the evidence and determine the extent/nature of the relationship. Does the relationship fit within the definitions of MOFU/Relative and can you explain why the combination of the relationship and conduct constitutes family violence?

Definition of Family Member

MOFU is defined in the Migration Regulations at Reg 1.12 and can include a:

- spouse or de facto partner
- child or step-child (unless engaged/married or has a spouse/de facto partner)
- is a dependent child of child/step-child.

Determining the seriousness of the FV

Direction 110 also specifies that the seriousness of a non-citizen's family violence must be considered.

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

- Frequency and any trend of increasing seriousness in the conduct
- Cumulative effects of repeated acts of family violence
- Rehabilitation achieved at time of decision since the last known act of family violence including:
 - Extent of acceptance of responsibility for the family violence conduct
 - Extent they understand the impact of the behaviour on victim and any witnesses (especially children)

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



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Primary Consideration:

8.3 The strength, nature and duration of ties to Australia



Impact on immediate family

Direction 110 specifies that decision makers **must** consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

The key elements here are that we are considering the impact to **immediate** family members (parents, siblings, children, spouse), where those persons are **citizens, permanent residents or have a right to remain indefinitely**.

While we may still use our discretion to give consideration to immediate family who do not fit the aforementioned parameters, we must consider and would generally give greater weight to those who do.



Other ties to the community

The direction also specifies that decision makers must consider the strength, nature and duration of any other ties that a non-citizen has to the Australian community, having particular regard to:

a) How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:

- less weight should be given where the non-citizen began offending soon after arriving in Australia; and
- more weight should be given to the amount of time a non-citizen has spent contributing positively to the Australian community.

b) the strength, duration and nature of any family or social links with other citizens or permanent residents or people with a right to remain indefinitely.

Common issues

Failure to acknowledge the impact to immediate family members, including the nature of the hardship (practical, financial, emotional)

Do not include family members' comments about offending/risk here – consider impact of decision

When did the person start offending/receive their first conviction?

Minor children may be identified in the ties, however, will primarily be addressed under the following consideration, the 'Best Interests of minor children in Australia'

Family overseas – not required to consider family that are not located in Australia at the time of the decision, even if they are ordinarily resident. This information can be considered under the other considerations of 'Extent of impediments if removed'.



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Primary consideration

8.4 Best interests of minor children in Australia affected by the decision

Whose best interests?



- The best interests are those of the child and not the non-citizen
- Relationship to an affected child is not confined to a parental relationship and extends to any minor child who may be impacted by a decision, such as siblings, nephew/niece, grandchildren, children of close friends, etc.
- However, a non parental relationship may be able to be given less weight – is there evidence that the child is reliant on the non-citizen for care and responsibility?
- A child may decide at any time that they wish to have a relationship with the non-citizen
- 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

Introductory concepts

The 'best interests of minor children' are derived from International and Common law, in particular:

International Law	Article 3 of Convention on the Rights of the Child (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 110 specifies that: • there must be a definitive and specific finding in relation to a child affected by a decision; • this consideration only applies to children under 18 years of age at time of decision; • for two or more children, each child should be given individual consideration if their interests differ; and, • outlines eight factors that should be taken into consideration	

Factors to be considered

The Direction specifies the following factors must be considered, if relevant:

the nature and duration of the relationship between the child/children and the non-citizen, giving less weight where the relationship is non-parental, no existing relationship or long periods of absence;

the extent to which the non-citizen is likely to play a positive parental role up until the age of 18;

the negative impact the non-citizen's conduct has had, or will have, on the child;

the effect that separation from the non-citizen would have on the child;

whether other persons fulfil a parental role for the child;

whether the child is at risk of being, or has been exposed to family violence, abuse or neglect perpetrated by the non-citizen;

whether the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

For our purposes

Identify all minor children – sources include

- personal details form
- written submissions
- sentencing remarks
- letters of support
- psychological reports, etc

Determine whether relevant children need individual assessments or can be considered in a group context

Determine whether the views of the child are known

Identify any factors weighing in favour of or against the best interests of the affected children

In almost all instances, this consideration will be in the non-citizen's favour or neutrally weighted



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Primary Consideration:

8.5 Expectations of the Australian community

What does the Direction say?

- Direction 110 specifies that the Australian community expects non-citizens to obey Australian laws. Further, where a non-citizen engages in conduct breaching this expectation, or where there is an unacceptable risk of doing so, the community expects the government not to allow the person to enter or remain in Australia.
- Visa cancellation, or refusal or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through specified conduct in Australia or elsewhere.

Serious character concerns – 8.5.1

The Direction specifies the following kinds of conduct for the purposes of the previous point.

a)

acts of family violence;

b)

causing a person to enter into, or being party to (other than being a victim of) a forced marriage;

c)

serious crimes against women, children or other vulnerable members of the community, such as the elderly or disabled. 'Serious crimes' include violent or sexual crimes, and/or serious crimes against the elderly or other vulnerable persons, such as fraud, extortion, financial abuse or neglect;

d)

commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties.

e)

involvement or reasonable suspicion of involvement in human trafficking, people smuggling, or crimes that are of serious international concern;

f)

worker exploitation

What does the Direction say?

The aforementioned expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.



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, without independently assessing the community's expectations in the particular case.



The above being said, non-citizens and/or their representatives will often make submissions in relation to this consideration, particularly reflecting their own interpretations of what the community would expect. While we are solely focused on the Government's views, we must not ignore the non-citizens submissions in considering each individual matter, even though we will not give them particular weight.



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Other Considerations:

9.1 Legal consequences of the decision under section 501 or 501CA

Legal consequences of decision under s501 or s501CA

Direction 110 specifies the following:



Decision makers should be mindful that unlawful non-citizens are liable for immigration detention and removal from Australia (s.198 the Act) as soon as reasonably practicable.

Australia has non-refoulement obligations under the following three human rights treaties:

- Convention relating to the Status of Refugees as amended by the 1967 Protocol (Refugees Convention)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol Aiming at the Abolition of the Death Penalty.

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.

Non-citizens covered by a protection finding

The decision must account for non-refoulment obligations, but under Direction 110, these considerations cannot override the higher-order criterion of community protection.

Specific legally cleared wording has been provided to assist case officers in completing this section

NRO Wording – Post NZYQ	ADD2023/1644674
Legal Consequences Flowchart	ADD2023/5878063
S36(1C) Finding Wording	ADD2022/2752433

Non-citizens covered by a protection finding – removal and Bridging R visas



Furthermore, due to the effect of s48A of the Act, without further Ministerial intervention, a non-citizen is unable to apply for a further Protection visa. The person will also be prevented from applying for any other visa other than a Bridging R (Removal Pending) visa due to the character cancellation, refusal or non-revocation decision.



The **NZYQ** ruling found that people with NRO obligations cannot be indefinitely detained, so if their visa is refused/cancelled/cancellation not revoked, then they would generally be released into the community on a BVR because they cannot be removed, unless they can be removed to another country or are granted another visa.

Non-citizens not covered by a protection finding

The Direction (9.1) states that International non-refoulement obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a non-refoulement 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 an INRO claim that clearly emerged from the materials despite not being articulated as an INRO claim will lead to an error of law and the decision will need to be remade.



If you have any doubts/concerns regarding the applicability of INRO's, always conduct thorough investigations and/or seek a second opinion

What does this all mean?

Non-Citizens with a protection finding

- Australia has NRO obligations and cannot remove them even if their visa is refused or cancelled.
- They would normally be liable for indefinite detention, but due to the NZYQ precedent, they are:
 - Removability effected;
 - Cannot be lawfully detained; and
 - Must be granted a Bridging visa R in order to remain in the community.

Non-Citizens without a protection finding

- Any claims raised must still be considered to a certain degree;
- The assessment can be deferred, or claims dismissed if there has already been a negative protection visa finding;
- A decision can be made under section 501.