

The Creeping Cruelty of Australian Crimmigration Law

Mary E Crock* and Kate Bones†

Abstract

This article examines the fraught relationship between international law and what has become known as ‘crimmigration law’ in Australia. The legal and policy framework for deportation of non-citizens on character grounds has become increasingly restrictive. It has also become confusing in its interface with obligations not to send back or refoüle individuals who engage protection obligations as refugees or on humanitarian grounds. We document and critique the treatment of long-term permanent resident non-citizens with particular claims to compassion as persons with disabilities and as refugees. We consider issues of both process — where formalistic administrative processes fail to make accommodations for disability — and substance. Law and policy give conflicting commands as to whether and how non-refoulement obligations must be considered in visa cancellation processes. Increasingly, the confusion plays out in indefinite detention. Amendments to the *Migration Act 1958* (Cth) reaffirming Australia’s commitment to non-refoulement have maintained a disconnect between domestic law and international law. We argue that it is critically important that non-refoulement obligations are considered in visa cancellation processes and that the human consequences of cancellation and removal are confronted.

Please cite this article as:

Mary E Crock and Kate Bones, ‘The Creeping Cruelty of Australian Crimmigration Law’ (2022) 44(2) *Sydney Law Review* 169.



This work is licensed under a Creative Commons Attribution-NonDerivatives 4.0 International Licence (CC BY-ND 4.0).

As an open access journal, unmodified content is free to use with proper attribution. Please email sydneylawreview@sydney.edu.au for permission and/or queries.

© 2022 Sydney Law Review and authors. ISSN: 1444–9528

* Professor of Public Law, Director of the Sydney Centre for International Law, The University of Sydney Law School, New South Wales, Australia; Accredited Specialist in Immigration Law. Email: mary.crock@sydney.edu.au; ORCID iD: <https://orcid.org/0000-0002-6897-5758>.

We gratefully acknowledge the assistance provided by Ron McCallum AO, who gave us comments on early drafts of this article. We also thank our anonymous reviewers for their useful suggestions..

† BA LLB (Hons 1) (Sydney); LLM (Harvard); Solicitor practising in immigration law. Email: kate.bones@sydney.edu.au.

I State Sovereignty, Immigration Control and the ‘Purity’ Imperative

The ability of States to expel non-citizens who have committed serious crimes or who otherwise pose a security threat finds ready support in international law and political theory. Issues of law and even moral propriety become more complicated, however, when individuals targeted for expulsion have lived in a country for virtually all their lives; entered as refugees or others in need of protection; and/or have no safe country to which they can be removed. Add into the equation links between criminal acts and issues of physical and psychosocial disability and the complexities are complete. Such is the situation of many long-term non-citizens whom Australia continues to identify for deportation on character grounds.

This article examines the fraught relationship between international law and what has become known as ‘cimmigration law’¹ in Australia. The history and operation of this contentious area of law has been the subject of considerable research across the disciplines of history, law and criminology.² Our interest is not just in the general expansion that has occurred in Australian Government initiatives to rid Australia of undesirable non-citizens, including those convicted of serious crimes. As scholars and practitioners of refugee law, we have become increasingly concerned by the human impact of ‘purity’ measures that seem to ride roughshod over Australia’s international protection obligations — and, indeed, over basic notions of human rights and dignity.

According to Australia’s politicians, criminal deportation is supposed to do two things: it should protect the community from criminal non-citizens; and it should ensure ‘that Australia fulfills its international and humanitarian obligations towards these non-citizens and their families’.³ As a party to the *Convention on the Rights of Persons with Disabilities* (‘CRPD’),⁴ it is clear that Australia’s obligations with respect to persons with disabilities are not limited to citizens.⁵

The 2013 Federal Election was fought, in part, on border control and the primacy of national sovereignty in all aspects of the migration process. In 2014, the

¹ Popularisation of the term crimmigration law has been attributed to United States academic Juliet Stumpf: see Juliet Stumpf, ‘The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power’ (2006) 56(2) *American University Law Review* 367; Juliet Stumpf, ‘The Process is the Punishment in Cimmigration Law’ in Katja Franko Aas and Mary Bosworth, (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2013) 59.

² Ibid. See also Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019).

³ Joint Standing Committee on Migration, Parliament of Australia, *Deportation of Non-Citizen Criminals* (Final Report, June 1998) iii.

⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (‘CRPD’).

⁵ See, eg, United Nations (‘UN’) Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; UN Committee against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [7]. See also Mary Crock, Christine Ernst and Ron McCallum, ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’ (2012) 24(4) *International Journal of Refugee Law* 735, 738–42.

newly-elected conservative Coalition Government wasted no time in amending the *Migration Act 1958* (Cth) (*'Migration Act'*) and *Migration Regulations 1994* (Cth) (*'Migration Regulations'*) to remove virtually all references to international legal instruments, including the United Nations ('UN') *Convention relating to the Status of Refugees* and its Protocol (*'Refugee Convention'*).⁶ Yet it made no attempt to withdraw from any of the instruments in question. Instead, select elements of various Conventions were grafted into the Act, shaped to reflect the Government's favoured interpretation of relevant provisions. Amendments included s 197C, which provides that for the purpose of the power to remove an unlawful non-citizen from Australia, 'it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen'.⁷

The idea that a State should not send or 'refoule' a non-citizen back to a country where he or she faces persecution or serious abuse of human rights is a core obligation under both refugee and general human rights law.⁸ Ministerial Directions confirm that government policy is that individuals should not be removed in breach of non-refoulement obligations.⁹ Yet, as we explore in Part IV of this article, s 197C has generated a complex and sometimes inconsistent line of case law on the extent to which the Minister for Immigration is required to consider non-refoulement issues in the process of cancelling a visa on grounds of criminality or other bad conduct.

The confusion was such that the Government introduced legislation in March 2021 to 'clarify' that s 197C of the Act does not mean what it says. The *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) passed both houses of parliament on 13 May 2021 with Labor Party support, following minimal debate. The amendments suggest that the Australian Government is not willing to cross the refoulement line. Nevertheless, the changes maintain a fundamental disconnect between domestic law and international law. This is because they do nothing to address the Kafkaesque practice of indefinitely detaining persons who fail the character test. As we will explain, the amendments perpetuate detention by separating out the criminal deportation process from the process of seeking asylum — without addressing the central question of the clash between deportation and international protection obligations.¹⁰

⁶ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the attendant *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (hereafter referred to collectively as the *'Refugee Convention'*). See *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (*'Legacy Caseload Act'*). See also the discussion of these amendments in Peter Billings, 'Regulating Crimmigrants through the "Character Test": Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of Non-Citizens in Australia' (2019) 71(1) *Crime, Law and Social Change* 1.

⁷ *Migration Act 1958* (Cth) s 197C(1) (*'Migration Act'*), introduced by the *Legacy Caseload Act* (n 6) sch 5.

⁸ *Refugee Convention* (n 6) art 33; Penelope Mathew 'Non-Refoulement' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) ch 50.

⁹ See *Ministerial Direction No 90: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (8 March 2021) [9.1] (*'Ministerial Direction 90'*).

¹⁰ See Satvinder S Juss, 'Detention and Delusion in Australia's Kafkaesque Refugee Law' (2017) 36(1) *Refugee Survey Quarterly* 146; Peter Billings, 'Refugee Protection and State Security in Australia: Piecing Together Protective Regimes' (2018) 24(4) *Australian Journal of Administrative Law* 222. See further the discussion in Part V.

In Part II, we outline the operation of the ‘character and conduct’ provisions in the *Migration Act*, tracing the incremental changes that have been made over the years and how these have played out in non-citizens spending increasingly lengthy periods in immigration detention. In Parts III–IV, we examine the extensive body of jurisprudence generated by the visa cancellation regime since 2014. Reflective of legislative changes, the cases display a growing dissociation between domestic and international law.

The extreme nature of Australia’s deportation practices came to international attention when the High Court of Australia limited attempts to remove non-citizens of Indigenous Australian heritage. The cases of *Love*¹¹ and others¹² have attracted a growing body of commentary,¹³ which we do not seek to replicate here. Rather, our focus is on the treatment of other long-term permanent resident non-citizens who engage protection obligations under international law. These are persons with disabilities who also have protection claims as refugees — in some cases persons from refugee backgrounds who have disabilities. It is this ‘creeping cruelty’ that we seek to document and critique in this article.

In Part III we outline issues of process that have alarming implications for all convicted non-citizens — but for people with disabilities and persons from refugee backgrounds in particular. These are the formalistic provisions governing notification that make no accommodations for vulnerability or for the lived experience of persons in penal custody. In Part IV, we turn to case law on the application of the character provisions to refugees, and the complex and unanticipated effects of s 197C of the *Migration Act*. In Part V we conclude by returning to the 2021 amendments to the Act, explaining the effect of the apparent attempt to require consideration of non-refoulement obligations separately from visa cancellation processes. We do not agree with this approach because it is confusing and leaves people in detention for far longer than any prison term served. Our specific concern is that the politicisation of crimmigration law has led to immigration detention centres becoming proxy ‘too-hard’ baskets for individuals who Australia does not want to accept, but who it would be unconscionable to return to abusive countries of origin. Decision-making in this politically charged area should involve ‘honest confrontation of what is being done to people’.¹⁴ We see this as a basic

¹¹ *Love v Commonwealth* (2020) 270 CLR 152.

¹² See, eg *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 (‘Hands’); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602; James Barrett, ‘Habeas Corpus, Jurisdiction, and Aboriginal-Identifying People in Immigration Detention: *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223’, *Australian Public Law (AUSPUBLAW)* (Blog Post, 10 February 2021) <<https://auspublaw.org/2021/02/habeas-corpus-jurisdiction-and-aboriginal-identifying-people-in-immigration-detention-mchugh-v-minister-for-immigration-citizenship-migrant-services-and-multicultural-affairs-2020-fcafc-223/>>.

¹³ See, eg Peter Gerangelos, ‘Reflections upon Constitutional Interpretation and the “Aliens Power”: *Love v Commonwealth*’ (2021) 95(2) *Australian Law Journal* 109, 113. See also Eddie Synot, ‘The Rightful Place of First Nations: *Love & Thoms*’, *Australian Public Law (AUSPUBLAW)* (Blog Post, 6 March 2020) <<https://auspublaw.org/2020/03/the-rightful-place-of-first-nations-love-thoms>>; Elisa Arcioni and Rayner Thwaites, ‘Indigeneity as a Basis for Constitutional Membership — Recent Developments in Australia’ (2020) 4 *Juridikum* 425.

¹⁴ *Hands* (n 12) 630 [3] (Allsop CJ).

requirement to restore a semblance of balance, restraint and respect for human rights and dignity.

II Expelling ‘Bad’ Migrants: The History and Operation of the ‘Character and Conduct’ Provisions

Section 501 of the *Migration Act*, and the ‘character test’ in s 501(6), is the centrepiece of Australia’s legislative scheme for the exclusion and removal of non-citizens considered undesirable.¹⁵ The content of this test and related procedures have become more restrictive and punitive over time. Although this history has been well documented,¹⁶ it is worthwhile to note briefly key developments, in order to give context to the provisions at the heart of the case law we will consider.

Australian immigration law has included provisions allowing for the removal and exclusion of persons deemed undesirable migrants since the inception of federal governance in this country.¹⁷ Section 3 of the *Immigration Restriction Act 1901* (Cth)¹⁸ included in its long list of ‘prohibited immigrants’:

(c) any idiot or insane person;

...

(e) any person who has within three years been convicted of an offence, not being a mere political offence, and has been sentenced to imprisonment for one year or longer therefor, and has not received a pardon.

Of course, the key to this provision was the word ‘immigrant’. In practice, most persons of Anglo-Saxon heritage were considered immune from any form of immigration control.¹⁹ Uncertainties around the precise date on which Australia became fully independent meant that issues around the constitutional power to deport British nationals persisted for more than a century.²⁰ On the one hand, the reluctance to move against British (and Irish) nationals seems to have played out over many years in a rather relaxed approach to Anglo-Saxon migrants convicted of

¹⁵ Note that there are other cancellation powers in the *Migration Act* relating to criminal charges, convictions or a person’s conduct, where a person is the holder of a temporary visa: see *Migration Act* (n 7) s 116; *Migration Regulations 1994* (Cth) (‘*Migration Regulations*’) reg 2.43. See Mary Crock and Laurie Berg *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) ch 15.

¹⁶ Michelle Foster, “‘An ‘Alien’ by the Barest of Threads’”: The Legality of the Deportation of Long-Term Residents from Australia’ (2009) 33(2) *Melbourne University Law Review* 483; Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (UNSW Press, 2007); Crock and Berg (n 15) ch 17; Michael Grewcock, ‘Reinventing “The Stain” — Bad Character and Criminal Deportation in Contemporary Australia’ in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2015) 121; Peter Billings and Khanh Hoang, ‘Characters of Concern, or Concerning Character Tests? Regulating Risk through Visa Cancellation, Containment and Removal from Australia’ in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 119.

¹⁷ See Mark Finnane and Andy Kaladelfos, ‘Australia’s Long History of Immigration, Policing and the Criminal Law’ in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 19. See also Nicholls (n 16) chs 1–2.

¹⁸ *Immigration Restriction Act 1901* (Cth) (Act No 17 of 1901), later renamed the *Immigration Act 1901* (Cth).

¹⁹ See the discussion in Crock and Berg (n 15) chs 2–3.

²⁰ See, eg, Foster (n 16).

criminal offences.²¹ On the other hand, the historical concern with the ‘purity’ of Australia’s migration program is equally long-standing.²²

The story of the increasing stringency of these provisions begins with the *Migration Amendment Act 1983* (Cth). This amended the deportation power then contained in s 12 of the *Migration Act* (now s 200) to apply to all permanent residents who had lived in Australia for less than 10 years. The change meant that ‘British subjects, Irish Nationals and Protected Persons’ lost their privileged status relative to migrants from non-Commonwealth countries. The legislation from that period reflects an understanding the Australian community should take some responsibility for long-term permanent residents, particularly those who arrived as children.²³ Before long, the ten-year limit was extended so that any period spent in correctional institutions would not count as ‘lawful’ residence in Australia. Individuals who had spent far more than 10 years in the country as permanent residents became vulnerable to deportation.²⁴

The exclusion of unwanted persons at point of arrival was initially dealt with separately.²⁵ This changed with the passage of the *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth), which came into force on 1 September 1994. The deportation provisions remained (in s 200ff of the *Migration Act*) and the Administrative Appeals Tribunal (‘AAT’) was given the power to make final determinations on merits review applications. However, a new s 180A conflated the power to *exclude* unwanted non-citizens with the power to *expel* non-citizens. For the first time, reference was made to criminality, *character and conduct*. These provisions provided the basis for the modern s 501.

The year 1994 also marked the entry into force of the first pt 8 of the *Migration Act*, which operated to confine the power of the Federal Court of Australia to engage in the judicial review of migration decisions.²⁶ The coincidence was no accident. The rise and rise of conflict between the executive government and the courts over who should control immigration did not just play out in the detention of asylum seekers arriving by boat. The conflict also extended to the early crimmigration cases.²⁷

The next turning point occurred in 1999 when Immigration Minister Ruddock disagreed vehemently with two AAT rulings overturning deportation orders made under s 201 of the *Migration Act*.²⁸ The Minister stepped in and re-cancelled the relevant visas using s 180A of the *Migration Act*. Although his actions were

²¹ Nicholls (n 16) ch 1.

²² Grewcock (n 16) 121–38.

²³ Ibid; Foster (n 16) 506–7; Crock and Berg (n 15) ch 3.

²⁴ See, eg, *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

²⁵ See Crock and Berg (n 15) ch 6.

²⁶ See Mary Crock, ‘Judicial Review and Part 8 of the *Migration Act*: Necessary Reform or Overkill?’ (1996) 18(3) *Sydney Law Review* 267.

²⁷ See Crock and Berg (n 15) chs 3, 17.

²⁸ See *Gunner v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 507; *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400 (‘*Gunner*’); *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87.

endorsed by the courts,²⁹ the conservative Government moved to tighten the law to confirm the ultimate power of the Minister. The *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) confirmed s 180A (re-numbered as s 501) as a mechanism for expulsion as well as exclusion. A complicated system was created that placed the onus of proving good character on the non-citizen — and gave the Minister power to decide whether or not the rules of procedural fairness would apply.³⁰ The scheme facilitated removal of those unable to persuade the Minister that they passed the character test.

Fast forward to the aftermath of the 2013 ‘border control’ Federal Election. The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) went further — mandating visa cancellation without notice where non-citizens were deemed to fail the character test on designated grounds. A huge initial rise in the number of visa cancellations eventually levelled out at an annual rate more than 10 times higher than before the legislative change.³¹ In the 2020–21 financial year, this meant 946 people had visas cancelled on character grounds.³² With many New Zealand citizens included in this number, Immigration Minister Dutton incited anger when he referred to the removals as ‘taking out the trash’.³³ The 2014 amendments also saw burgeoning in immigration detention rates and length of time in custody. By 31 August 2021, well over half those in immigration detention had been detained in excess of 12 months, while 8.1% (117 people) had been detained more than five years.³⁴

Amendments to the *Migration Act* since 1994 have tried to create a system where legal entitlements are determined at the point of finalising a person’s immigration status: that is, deciding eligibility for a visa and/or deciding to cancel a visa. The consequences of refusal or cancellation are automated in that unlawful non-citizens must be detained and must be removed from the country as soon as practicable.³⁵ In theory, s 197C of the *Migration Act* should underscore the primal focus on visa entitlement where it states that Australia’s non-refoulement obligations are not to be considered in the process of removing a non-citizen from Australia. As we discuss in Part IV, the problem with this structure is that considerable confusion has been generated in cases involving individuals from refugee backgrounds.

Two sources of law are particularly important in navigating the complexities of this regime. The first is the legislation setting out the elements of bad character and conduct. The second is the Ministerial Directions issued by the Immigration

²⁹ See *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507. In this case, the High Court endorsed the reasoning of the Full Federal Court in *Gunner* (n 28): see 534–5 [84]–[85]. See Crock and Berg (n 15) 527–28 [17.23]ff.

³⁰ *Migration Act* (n 7) ss 501(2)–(3).

³¹ Department of Home Affairs (Cth), *Visa Statistics: Key Visa Cancellation Statistics* (4 April 2022) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>>.

³² *Ibid.*

³³ See Katharine Murphy and Elle Hunt, ‘NZ Politicians Attack Australian Minister Peter Dutton for Comparing Deportees to “Trash”’, *Guardian Australia* (online, 11 March 2021) <<https://www.theguardian.com/australia-news/2021/mar/11/nz-politicians-attack-australian-minister-peter-dutton-for-comparing-deportees-to-trash>>.

³⁴ Department of Home Affairs (Cth), *Immigration Detention and Community Statistics Summary* (31 August 2021) 12 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-august-2021.pdf>>.

³⁵ *Migration Act* (n 7) ss 189, 198.

Minister pursuant to s 499(1) of the *Migration Act*, which bind the Minister's delegates and the Tribunal (though not the Minister). These articulate key policies relevant to visa cancellations on character grounds.

A *The Character Test*

The key to all deportation processes is the character test set out in s 501(6) of the *Migration Act*. Section 501(2) gives the Minister discretion to cancel a visa if she or he 'reasonably suspects that a person does not pass the character test' and the person 'does not satisfy the Minister that the person passes the character test'.³⁶ Section 501(6) draws together all of the historical exclusionary elements in immigration and refugee law. In addition to the standard reference to a person's criminal record, it bundles together offences relating to escape or rioting in immigration detention;³⁷ and bad character based on the reasonable suspicion of the Minister. A person will fail the character test if the Minister 'reasonably suspects' that the person is or has been a member of, or has had 'an association with' a group, organisation or person involved in criminal conduct.³⁸ A similar formulation is used to capture persons suspected of involvement in people smuggling, human trafficking and international crimes ranging from genocide to slavery and other international crimes. It is not a requirement that the person be convicted of any of the listed crimes.³⁹ Section 501(6)(c) empowers cancellation having regard to past and present *criminal* conduct or *general* conduct. There follows a paragraph that groups together the various risk factors identified in the context of exclusions at point of entry.⁴⁰

The trend towards zero tolerance of sexual offences involving children is apparent in s 501(6)(e) of the *Migration Act*, where it is sufficient to be found guilty, or a charge proven, but discharged without conviction. The final three paragraphs capture serious international crimes, adverse security assessments and the existence of an adverse Interpol notice 'from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community'.⁴¹

'Substantial criminal record' is defined in s 501(7) of the *Migration Act* as having been sentenced to 12 months or more in prison. The 2014 amendments lowered the threshold where a person has two or more sentences of imprisonment, from a total of two years to 12 months or more.⁴² An individual may also engage the provisions where they have been found not guilty by reason of mental illness or being found unfit to plead.⁴³ Triggers include where 'the court has nonetheless found that on the evidence available the person committed the offence' and 'as a result, the person has been detained in a facility or institution'.⁴⁴

³⁶ *Migration Act* (n 7) s 501(1) provides a parallel power to refuse a visa on character grounds.

³⁷ *Ibid* ss 501(6)(aa)–(ab).

³⁸ *Ibid* s 501(6)(b).

³⁹ *Ibid* s 501(6)(ba).

⁴⁰ These were the rules used to exclude or expel controversial visitors: see *Migration Act* (n 7) s 501(6)(d) and the discussion in Crock and Berg (n 15) ch 6.

⁴¹ See *Migration Act* (n 7) ss 501(6)(f)–(h).

⁴² *Ibid* s 501(7)(d).

⁴³ *Ibid* s 501(7)(e)–(f).

⁴⁴ *Ibid* s 501(7)(f).

B *Mandatory Cancellation*

The mandatory visa cancellation provision in s 501(3A) of the *Migration Act* is engaged where the Minister ‘is satisfied’ that the visa holder does not pass the character test because the person has a substantial criminal record on the basis of s 501(7)(a)–(c) — relevantly a sentence of imprisonment of 12 months or more — or if the person is convicted of sexual offences involving a child.⁴⁵ The intended purpose of the provision was to enable cancellation of a person’s visa before the person is released from prison ‘to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued’.⁴⁶

If a person is sentenced to two or more terms to be served concurrently, the whole of each term is combined in calculating the length of the sentence.⁴⁷ The time actually served is irrelevant: a person sentenced to 12 months imprisonment with a six-month non-parole period will attract mandatory cancellation. The scheme is neither intuitive nor well-aligned from a sentencing perspective. Courts in different states have diverged on whether the potential for visa cancellation — and the consequential (permanent) exile — are permissible sentencing considerations.⁴⁸ The practical result is that disproportionate consequences can often flow from sentences for relatively minor offences. This resonates with Stumpf’s observation that ‘the principle of proportionality meant to constrain government criminal sanctioning power is all but absent from [US] crimmigration law’.⁴⁹

C *Revocation of Mandatory Cancellation*

As we explore in Part III below, the reverse onus scheme manifests in a system that mandates the cancellation of a visa, but then allows individuals to seek revocation of the cancellation. After considering representations on revocation, the Immigration Minister (or delegate) must revoke the original decision if satisfied that the person passes the character test, or that there is ‘another reason’ why the cancellation should be revoked.⁵⁰ Ministerial Directions made under s 499 of the *Migration Act* guide these determinations, identifying ‘primary considerations’ and ‘other considerations’ to be addressed. *Ministerial Direction 90*, made in March 2021, provides that primary considerations are: protection of the Australian community;

⁴⁵ Ibid s 501(3A)(a).

⁴⁶ Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014, 8 [34].

⁴⁷ *Migration Act* (n 7) s 501(7A).

⁴⁸ See Ellen Moore, ‘Sentencing “Crimmigrants”: How Migration Law Creates a Different Criminal Law for Non-Citizens’ (2020) 43(4) *University of New South Wales (UNSW) Law Journal* 1271; Mirko Bagaric, Theo Alexander and Brienna Bagaric, ‘Offenders Risking Deportation Deserve a Sentencing Discount — But the Reduction Should Be Provisional’ (2020) 43(2) *Melbourne University Law Review* 423.

⁴⁹ Juliet P Stumpf, ‘Crimmigration: Encountering the Leviathan’ in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2015) 237, 246. See also Juliet Stumpf, ‘Fitting Punishment’ (2009) 66(4) *Washington & Lee Law Review* 1683.

⁵⁰ *Migration Act* (n 7) s 501CA(4)(b). See *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 (‘*Plaintiff M1*’), discussed below at nn 221–7 and accompanying text.

the expectations of the Australian community; family violence committed by the non-citizen; and the best interests of minor children in Australia.⁵¹ ‘Other considerations’ include: non-refoulement obligations; ties to the Australian community; impact on victims; and the extent of impediments if the person is removed.⁵²

If a non-revocation decision is made by a delegate of the Minister, the non-citizen may seek review by the AAT. No such review is available for decisions made by the Minister or Assistant Minister personally. To reinforce the supremacy of the Minister’s power, a revocation decision by the AAT or a delegate can be overridden by the Minister acting personally, without affording procedural fairness if cancellation of the visa is deemed to be in the ‘national interest’.⁵³ As we explore in Part IV, this network of laws and policies is both confusing and intrinsically conflicted in the treatment of obligations assumed under international law. Although beyond the general ambit of this article, it is worth noting that criminality and security concerns are also matters considered in the context of determining whether Australia owes protection obligations to individuals who seek asylum in the country.⁵⁴ One of the points of confusion has been the fundamental relationship between s 501 visa cancellations and s 36 protection processes.

III Time Limits and Notification: Accommodating Disabilities versus Strict and Complete Legalism

As we turn to examine the case law, it is timely to recall that art 14 of the *CRPD* requires State Parties to ensure that persons with disabilities enjoy the right to liberty and security of the person on an equal basis with others.⁵⁵ Paragraph (1)(b) prohibits arbitrary detention and states that ‘the existence of a disability shall in no case justify a deprivation of liberty’.⁵⁶ Our concern is that s 501 of the *Migration Act* contravenes art 14 of the *CRPD* because it operates to actively discriminate against non-citizens with psychosocial and other disabilities by making them particularly susceptible to indefinite detention.⁵⁷

In creating a scheme for mandatory cancellation while a person is in prison, the regime presents a neat example of formalist justice, replete with barriers for

⁵¹ *Ministerial Direction 90* (n 9) [8].

⁵² *Ibid* [9].

⁵³ *Migration Act* (n 7) s 501BA(2).

⁵⁴ See, especially, *Migration Act* (n 7) ss 5H(2) and 36(1C) and the discussion at Part IV(C) below. For an overview of these provisions, see Billings (n 10).

⁵⁵ See Anna Lawson, ‘Disability Equality, Reasonable Accommodation and the Avoidance of Ill-Treatment in Places of Detention: The Role of Supranational Monitoring and Inspection Bodies’ (2012) 16(6) *International Journal of Human Rights* 845.

⁵⁶ *CRPD* (n 4) art 14(1)(b).

⁵⁷ The Committee on the Rights of Persons with Disabilities (‘CRPD Committee’) upheld a complaint against Australia that raised similar issues in a different context: see CRPD Committee, *Views Adopted by the Committee under Article 5 of the Optional Protocol, concerning Communication No 7/2012 in Noble v Australia*, 16th sess, UN Doc CRPD/C/16/D/7/2012 (2 September 2016). The case involved an Indigenous man from Western Australia who was charged with sexual offences involving children. He was taken into custody after pleading unfit to plead and ended up spending over 10 years in custody — a much longer period than if he had been jailed.

vulnerable non-citizens. Where a visa is cancelled under s 501(3A), the Minister must provide notice of the cancellation and invite the person to make representations about revocation of that decision.⁵⁸ Relevant documentation typically comprises more than 90 pages in English.⁵⁹ In jail, a non-citizen's access to legal advice, linguistic or other assistance can be limited. Representations must be made in writing, in English, within 28 days of deemed notification.⁶⁰ As we will show, there is no ability to extend this period or to consider representations made out of time.

In this Part, we use a selection of cases to show that the exclusionary effect of these provisions falls hardest (though by no means exclusively) on people with mental illness or intellectual disability, and on people with limited English or literacy. This cohort typically encompasses people from refugee backgrounds.

The draconian effect of the 28-day time limit is illustrated in the case of BDS20, a young man from Sierra Leone.⁶¹ He fled this country aged 15 with his mother and siblings after witnessing his father beaten to death and his home burned to the ground. He entered Australia on a subclass 202 Global Special Humanitarian visa in 2009 after spending five years in refugee camps. In 2012, the young man was convicted on two serious sexual assault charges and sentenced to seven years in prison. This enlivened s 501(3A) of the Act. Aware that he had 28 days to lodge submissions, BDS20's mother had made substantial efforts to engage Legal Aid assistance and to compile material relating to the risks associated with the young man's return to Sierra Leone. However, through an oversight of his lawyer, the young man's submissions were lodged outside of the 28-day statutory period.

Stewart J accepted that the failure to lodge submissions in time was not the applicant's fault, a fact reflected in the Minister's initial acceptance of the material submitted.⁶² However, Stewart J found that the statutory time limit was a jurisdictional fact, such that the Minister was correct in arguing that s 501CA(4) had not been enlivened.⁶³ Stewart J observed that there was 'plainly a strong case to be made for the introduction of a discretion to extend time in appropriate cases', but that this was a matter for Parliament and not relevant to his task on review.⁶⁴ His Honour noted that, but for the conclusion on the threshold question of the 28-day time limit, he would have quashed the Minister's decision.⁶⁵ Stewart J noted in obiter dicta that the Minister had not considered whether any non-refoulement obligations were owed to the applicant under s 36(2) of the Act.⁶⁶ His Honour expressed his disquiet by ordering the Minister to pay the costs of the application, notwithstanding his finding against the applicant.⁶⁷

⁵⁸ *Migration Act* (n 7) s 501CA(3).

⁵⁹ *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508, 511 [3] ('*EFX17 (FCAFC)*').

⁶⁰ *Migration Regulations* (n 15) reg 2.52.

⁶¹ *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1176, [1]–[7].

⁶² *Ibid* [13]–[18]. See also the comments at [59] where his Honour ordered the Minister to pay the costs of the application in spite of a formal ruling against the applicant.

⁶³ *Ibid* [50]–[53].

⁶⁴ *Ibid* [51].

⁶⁵ *Ibid* [57].

⁶⁶ *Ibid* [55]–[56].

⁶⁷ *Ibid* [58]–[59].

BDS20 appealed to the Full Federal Court and was again unsuccessful.⁶⁸ This time, attention was focused on whether a letter sent to the applicant inviting comment on further material constituted a second invitation to make representations under s 501CA(3)(b) — and whether the Minister can issue such invitation.⁶⁹ Banks-Smith and Jackson JJ held that where a notice and invitation has been issued under s 501CA(3), there is no power to reissue or make a further invitation.⁷⁰ This relieved the majority from scrutinising the Minister's consideration of any non-refoulement claims. Their Honours noted that the Minister retained an overarching power to grant a visa under s 195A to address genuine changes in circumstances.⁷¹

In dissent, Rares J invoked s 33(1) of the *Acts Interpretation Act 1901* (Cth).⁷² His Honour ruled that there was no evident legislative purpose in construing s 501CA(3) to confine the Minister's power as the majority indicated. Rares J found that for s 501CA(3) to have 'an inflexible, once and for all' operation could lead to unfair and unjust consequences where further information subsequently came to light.⁷³ For example, it would fail to allow for the circumstance where a person's conviction was quashed after they had been notified of visa cancellation. His Honour noted that s 501CA(4)(b)(i) and s 501(10) contemplated that a person whose visa had been cancelled might then satisfy the Minister that they passed the character test.⁷⁴

The use of rigid time limits in the migration legislation has a long history. Cases like *BDS20* demonstrate that while time limits are ineffective when applied to judicial review processes,⁷⁵ they are very effective when used as jurisdictional requirements in administrative processes (at first instance and in merits review). As day follows night, this has generated litigation on the issue of the validity of *notification* of cancellation decisions. Here we select for discussion two cases that raise issues about the consideration that can (or should) be given to a person's cognitive functioning — and to their mental wellbeing given past experiences of severe misfortune. Both demonstrate a trend towards legal formalism that leaves little room for compassion — and raises questions about compliance with art 14 of the *CRPD*.⁷⁶ Successful arguments have had to be rooted in failure to comply with 'black letter' requirements in the legislation.

⁶⁸ *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 43 ('*BDS20 (FCAFC)*'). An application for special leave to appeal to the High Court was resolved by consent: Transcript of Proceedings, *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCATrans 41. It may be inferred that this followed from a concession that the initial invitation to BDS20 was defective on the basis of the judgments in *EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 173 ('*EPL20*'); *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 174 ('*Sillars*'), discussed below at n 117.

⁶⁹ *BDS20 (FCAFC)* 48 [17], 58 [75].

⁷⁰ *Ibid* 58 [75]–[76].

⁷¹ *Ibid* 68 [117].

⁷² Section 33(1) provides: 'Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires.'

⁷³ *BDS20 (FCAFC)* (n 68) 56–7 [60]–[62].

⁷⁴ *Ibid* 52–3 [42].

⁷⁵ See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

⁷⁶ See above n 57.

The applicant in *Aciek v Minister for Immigration and Border Protection*⁷⁷ is a citizen of South Sudan who entered Australia on a Global Humanitarian visa in 2004 after spending years in a refugee camp in Kenya.⁷⁸ His experiences left him with psychiatric issues including chronic post-traumatic stress disorder ('PTSD').⁷⁹ Mr Aciek was convicted of a number of offences by the District Court of South Australia and sentenced to four years and 11 months' imprisonment.⁸⁰ After his visa was cancelled under s 501(3A) of the *Migration Act*, a cancellation notice was sent by departmental email to a number of email addresses at the prison. A copy of the notice was then handed to Mr Aciek by a prison officer.⁸¹ Mr Aciek refused to sign to acknowledge receipt of the documents. He did not make a request for revocation within 28 days. Approximately 18 months later he applied to the Federal Circuit Court, contending that the notice of cancellation was not a valid notice for the purposes of s 501CA(3) of the Act.⁸²

The Federal Circuit Court accepted that the tasks prescribed by s 501CA(3) must be performed by the Minister personally, or by a person holding delegation pursuant to s 496 of the Act. The Departmental Officer who issued the notice did not hold such delegation.⁸³ The Court declared the cancellation notice invalid and ordered the Minister to comply with s 501CA(3) in relation to the applicant.⁸⁴ The Minister issued a replacement notification of cancellation and Mr Aciek duly lodged representations on revocation. As we note in Part IV, Mr Aciek's request was ultimately unsuccessful, in large part because his mental health continued to deteriorate as his time in immigration detention dragged on.

The facts in *EFX17 v Minister for Immigration and Border Protection*⁸⁵ have many points of similarity with those of both *BDS20* and *Aciek (FCCA)*. EFX17 is a refugee from Afghanistan of the Hazara ethnic group, a persecuted minority. He arrived by boat in 2009 and was granted a permanent protection visa.⁸⁶ He was diagnosed with a schizophrenic illness arising from his traumatic experiences at the hands of the Taliban, PTSD and substance abuse.⁸⁷ He was illiterate in any language, and had 'extremely limited English-speaking capabilities'.⁸⁸ Convicted of a serious crime in December 2016, his protection visa was mandatorily cancelled while he was in prison. Again, a notice of cancellation was sent to the prison by email and was handed to him the next day. The package comprised some 90 pages of 'densely printed material'.⁸⁹ EFX17 spoke to a lawyer from the Prisoner Legal Service two days later with the assistance of an interpreter. He claimed that he had not received any letters about his visa. By the time the lawyer ascertained from the Department

⁷⁷ *Aciek v Minister for Immigration and Border Protection* (2017) 327 FLR 412 ('*Acieck (FCCA)*').

⁷⁸ *Aciek and Minister for Home Affairs (Migration)* [2018] AATA 2755, [1] ('*Aciek (AATA)*').

⁷⁹ *Aciek (FCCA)* (n 77) 421[35]–[36].

⁸⁰ *Ibid* 414 [7].

⁸¹ *Ibid* 415–17 [13]–[18].

⁸² *Ibid* 413 [2].

⁸³ *Ibid* 427–30 [56]–[63], 432–3 [73].

⁸⁴ *Ibid* 433 [76].

⁸⁵ *EFX17 (FCAFC)* (n 59).

⁸⁶ *EFX17 v Minister for Immigration* (2018) 341 FLR 286, 288 [6].

⁸⁷ *EFX17 (FCAFC)* (n 59) 512 [6], 533 [109].

⁸⁸ *Ibid* 512 [5], 533 [109].

⁸⁹ *Ibid* 549 [182]. See also 530–4 [100]–[111].

of Home Affairs that the applicant's visa had been cancelled, through documents obtained under Freedom of Information, the 28-day period for representations had long since elapsed.⁹⁰

EFX17's counsel pressed similar arguments to those made in Mr Aciek's case about whether the notice had been issued by someone with the formal delegated authority. A majority of the Full Federal Court upheld this ground.⁹¹ However, another critical issue was whether 'notification' required any form of accommodation for EFX17's evident cognitive and linguistic disabilities. EFX17's counsel noted that the Minister's duty under s 501CA(3) is to 'give the person, in the way that the Minister considers appropriate in the circumstances' a written notice of the cancellation decision and particulars of the relevant information, and to 'invite the person to make representations to the Minister' about revocation. He argued that this required the Minister to reach a 'state of *considered* "appropriateness"',⁹² which requires consideration of the characteristics and individual circumstances of the person receiving the notice. Specifically, the Minister should examine factors that might affect a person's capacity to read, understand and make representations in response to the notice, including literacy, English language ability, mental capacity and health.⁹³

The majority accepted these arguments, ruling that the applicant's characteristics required consideration in the giving of notice. Greenwood J held that the 'irreducible minimum standard'⁹⁴ of the statutory obligation is that the person, in fact, must have been 'given notice'.⁹⁵ The obligation in s 501CA(3)(b) to invite representations about revocation also 'must meet the statutory standard of a real and meaningful invitation'.⁹⁶ That standard was not met as 'the appellant was simply not capable of comprehending the suite of documents handed to him'.⁹⁷ Rares J found that notice and invitation must 'be in a form that is actually meaningful to its intended individual recipient' so that the recipient would understand it.⁹⁸ This requires the Minister to engage in 'active intellectual consideration' about what is appropriate in the circumstances.⁹⁹ Both judgments emphasised the circumstances that a person receiving notice will be a prisoner, 'a person deprived of civil rights and liberties' with no right to seek out or obtain assistance.¹⁰⁰ Greenwood J also highlighted that EFX17 was known to the Department; the Department had granted him a protection visa and it must have been apparent 'either actually or inferentially that the appellant suffered special disadvantage'.¹⁰¹

⁹⁰ Ibid 535–7 [116]–[128].

⁹¹ Ibid 525 [69]–[71], 545–6 [162]–[163] (Greenwood J); 548 [177]–[179] (Rares J).

⁹² Ibid 513 [13] (emphasis in original).

⁹³ Ibid.

⁹⁴ Ibid 528 [89].

⁹⁵ Ibid 538 [133].

⁹⁶ Ibid 528 [90] (Greenwood J).

⁹⁷ Ibid 539 [134] (Greenwood J). See also 538–9 [133], 540 [135] (Greenwood J).

⁹⁸ Ibid 548 [175] (Rares J).

⁹⁹ Ibid.

¹⁰⁰ Ibid 549 [182] (Rares J). See also 541 [139] (Greenwood J).

¹⁰¹ Ibid 541 [139] (Greenwood J).

On appeal, the High Court found for EFX17, but only on the narrowest and most formal of grounds.¹⁰² These went to the lack of clarity over timing in the notice, as we explain below. Of equal interest are the arguments that the Court rejected. In a short, unanimous judgment, the Court held that the capacity of a person to understand the written notice or invitation is not relevant to the task set out in s 501CA(3) of the *Migration Act*.¹⁰³ Preferring the ordinary meanings of ‘giving’ and ‘inviting’, the Court held that the Minister’s duty to give notice in the way considered ‘appropriate in the circumstances’ goes to the ‘method of delivery and request rather than the content’.¹⁰⁴ The High Court noted that the Full Federal Court had reached its conclusions by reference to matters subsequent to the issuance of the notice and of which the Minister ‘might not have been aware’.¹⁰⁵ It found that the Full Federal Court’s approach would ‘require consideration of the extent of the capacity of a recipient to understand material provided, identification of how limitations could be overcome, and the taking of steps to do so’.¹⁰⁶ This would create ‘administrative difficulties ... in tension with the [legislation’s] goal [to] “ensure that the government can move quickly to take action against noncitizens who pose a risk to the Australian community”’.¹⁰⁷ The High Court acknowledged the circumstances identified by the Full Federal Court that emphasise the ‘gravity of the consequences for a person who does not understand the notice’.¹⁰⁸ However, the Court did not find the matter identified a sufficient foundation for an implication contrary to the ordinary meaning of the statutory words.¹⁰⁹ In so doing, the High Court was continuing a line of jurisprudence suggesting judicial reluctance to enforce any form of duty to inquire into an applicant’s mental state or capacity.¹¹⁰

In the event, the Court upheld a narrow point that the Minister’s invitation did not correctly state the timeframe for making representations. It found that a notice must ‘crystallise the period either expressly or by reference to correct objective facts from which the period can be ascertained on the face of the invitation’.¹¹¹ The notice issued to EFX17 was dated 3 January 2017 and included a statement that representations had to be made within 28 days. It stated that he was ‘taken to have received [the letter] at the end of the day it was transmitted [by

¹⁰² *Minister for Immigration and Border Protection v EFX17* (2021) 95 ALJR 342 (*‘EFX17 (HCA)’*).

¹⁰³ *Ibid* 348 [25], 349–50 [31]. The Court also overruled the Full Federal Court on the delegation ground, holding that the matters in s 501CA(3) are ‘tasks’ not requiring specific delegated authority: 350 [36]–[37].

¹⁰⁴ *Ibid* 348 [25].

¹⁰⁵ *Ibid* 349 [28].

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*, quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014, 10327.

¹⁰⁸ *EFX17 (HCA)* (n 102) 349 [30].

¹⁰⁹ *Ibid*.

¹¹⁰ The High Court has found that the power of the migration tribunal to make inquiries ‘does not ‘impose any duty or obligation to do so’: see *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, 21 [43] (Gummow and Hayne JJ). SGLB’s counsel had argued that accommodations should be made for the applicant’s apparent psychosis born of PTSD, exacerbated by the conditions in Woomera Detention Centre. See also *SZJBA v Minister for Immigration and Citizenship* (2007) 164 FCR 14, 25 [46] (Allsop J); *WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 277, [24].

¹¹¹ *EFX17 (HCA)* (n 102) 351 [42].

email]’,¹¹² when in fact it was delivered by hand the following day.¹¹³ On these facts the High Court ruled that the notice was invalid for want of clarity.¹¹⁴

The High Court ruling in *EFX17 (HCA)* leaves open a small window for other individuals who miss the 28-day timeframe for making representations, if they can establish that their cancellation notice was defective in stating the timeframe. Another narrow, though important, caveat emerged from the Full Federal Court judgment in *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, holding that representations are ‘made’ for the purpose of s 501CA(4) at the date they are ‘dispatched’, rather than when they are received by the Minister.¹¹⁵ This construction took into account the circumstances that a person will necessarily be in jail and so ‘at the mercy of their gaolers’ and the postal service.¹¹⁶ Two further recent judgments of the Full Federal Court found cancellation notices to be defective for incorrectly stating that representations had to be received by the Minister, rather than dispatched, within 28 days.¹¹⁷ As a general rule, however, the notification cases reinforce the dominance of form over substance in Australian crimmigration law.

It is our view that s 501CA of the *Migration Act* should be amended to allow for the extension of time for representations in compelling or exceptional circumstances. *Migration Regulations* reg 2.52 could also be amended to provide a longer period for representations to be made. Either change would increase the chance that vulnerable non-citizens will obtain access to legal assistance and be able to lodge revocation submissions. As a practical measure, where the Immigration Department is aware that an individual has impaired capacity to understand and respond to a notice, it could refrain from issuing the notice until the person recovers capacity or until there is a person placed to assist them.¹¹⁸ Putting to one side access to the key mechanism of seeking revocation, we turn now to consider whether and how Australia’s non-refoulement obligations are considered in the visa cancellation process.

¹¹² *Ibid* 351 [40].

¹¹³ *Ibid* 345 [8].

¹¹⁴ *Ibid* 351 [42].

¹¹⁵ *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 281 FCR 578, 588 [43].

¹¹⁶ *Ibid* 585 [24], 586 [35].

¹¹⁷ *EPL20* (n 68); *Sillars* (n 68). Special leave to appeal to the High Court in relation to both decisions was refused: *EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*; *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCASL 9.

¹¹⁸ In *BDS20 (FCAFC)*, Banks-Smith and Jackson JJ observed that such circumstances could be accommodated within the duty to give notice ‘as soon as practicable’, through ‘an examination of whether it is indeed “practicable” to give notice to a person who is incapable of receiving it in any meaningful way’: *BDS20 (FCAFC)* (n 68) 68–9 [118].

IV Considering Australia's Obligations under International Refugee and Human Rights Law

A *Form and Substance in Australia's Non-Refoulement Obligations*

When the Minister issued a fresh visa cancellation notice to Mr Aciek, he made a revocation request that was duly refused by the Minister's delegate. The AAT affirmed that decision.¹¹⁹ The Tribunal decision records that Mr Aciek's psychological condition had deteriorated in immigration detention. By April 2018 he was in hospital with psychotic symptoms and had been diagnosed with schizophrenia.¹²⁰ The Tribunal declined to consider whether Australia owed the young man any non-refoulement obligations in spite of evidence of the fate that would befall him were he to be returned to South Sudan. Within the policy rubric of 'hardship in the event of removal',¹²¹ the Tribunal considered detailed information about the conflict and humanitarian situation in South Sudan, including that mental health treatment was 'extremely limited or unavailable'.¹²² It concluded that the situation was 'dire',¹²³ that he 'would face real difficulty in obtaining the basic necessities of day to day living';¹²⁴ and that 'his difficulties would only be compounded by his psychological conditions and the difficulties of obtaining treatment for them'.¹²⁵ Yet, the Tribunal reasoned that 'where there is very little evidentiary basis to permit a fully informed assessment, it is undesirable to embark on any consideration of Mr Aciek's potential protection entitlement under Australia's non-refoulement obligations'.¹²⁶ The ruling left Mr Aciek with no option but to lodge a separate application for a protection visa — always from within the detention centre that was continuing to damage his mental health.

It is no coincidence that the s 501CA mandatory cancellation framework was introduced at the same time as extensive amendments legislating 'Australia's interpretation'¹²⁷ of its international legal obligations. The measures are coordinated policy designed to maximise executive power over non-citizens considered to be of character concern. Because no attempt was made to withdraw from the *Refugee Convention* or other human rights instruments, the resulting scheme is at best confusing — and at worst, perverse.

In Part IV(B)–(D), we analyse the dizzying array of cases brought in the years following the 2014 amendments to the *Migration Act*. Conflicts between the text of the law and stated intent in government policy provided fertile ground for the courts to find jurisdictional error in visa cancellation decisions concerning refugees. This

¹¹⁹ *Aciek (ATA)* (n 78).

¹²⁰ *Ibid* [35]–[40].

¹²¹ *Ibid* [65]–[87].

¹²² *Ibid* [77].

¹²³ *Ibid* [86].

¹²⁴ *Ibid* [87].

¹²⁵ *Ibid*.

¹²⁶ *Ibid* [104].

¹²⁷ See Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 2.

is ironic if the meta-intention of Parliament was to emphasise and reinforce the absolute power of the immigration authorities in every aspect of crimmigration law.

B *Must Non-Refoulement Obligations be Considered?*

The first battle was to determine whether non-refoulement obligations must be considered in visa cancellation processes where the visa cancelled was not a protection visa. *Ministerial Direction 90* now suggests that where protection claims are raised, they cannot be ignored.¹²⁸ Although a welcome development, this Direction sits at odds with earlier cases in which the Minister maintained and directed decision-makers not to confront non-refoulement obligations at the visa cancellation stage.¹²⁹ A common feature of these cases was that applicants were long-term permanent residents from refugee backgrounds suffering from psychosocial disabilities.

The facts in *Minister for Home Affairs v Omar*¹³⁰ are not dissimilar to those of Mr Aciek. Orphaned and recruited as a child soldier in Somalia, Mr Omar spent six years in a Kenyan refugee camp before coming to Australia as the dependent child of his aunt. Mr Omar suffers from schizophrenia and intellectual disabilities. The young man was sentenced to 12 months in prison for breaching a community protection order. This triggered mandatory cancellation of his visa.¹³¹ Graphic evidence was submitted of the fate that awaited someone with his problems were he to be forcibly returned to Somalia, where he had no family or other support.¹³²

In refusing to revoke the cancellation of Mr Omar's visa, the Assistant Minister had assumed that non-refoulement obligations did not have to be considered in a s 501CA(4) process because the applicant was free to apply for a protection visa. In response to a split in the Federal Court jurisprudence on the issue, the Full Federal Court convened a bench of five to hear the Minister's appeal from a ruling by Mortimer J that the Minister *was* obliged to consider whether Mr Omar engaged non-refoulement obligations.¹³³ The Full Bench ruled simply that the Assistant Minister had failed to give 'proper, genuine and realistic consideration'¹³⁴ to Mr Omar's representations about the likely risk of harm should he be returned to Somalia. Examining risk of harm is distinct from the question of whether those circumstances engage international obligations.¹³⁵ Accordingly, the Assistant

¹²⁸ *Ministerial Direction 90* (n 9) [9.1].

¹²⁹ The preceding Ministerial Directions 65 and 79 stated that it was unnecessary for decision-makers to consider non-refoulement obligations unless the visa that was being cancelled or refused was a protection visa: *Ministerial Direction No 65: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (22 December 2014) [14.1]; *Ministerial Direction No 79: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (20 December 2018) [14.1] ('*Ministerial Direction 79*').

¹³⁰ *Minister for Home Affairs v Omar* (2019) 272 FCR 589 ('*Omar*').

¹³¹ *Ibid* 591–2 [6]–[7].

¹³² *Ibid* 591–2 [6]–[7], 593–4 [10].

¹³³ *Omar v Minister for Home Affairs* [2019] FCA 279, [81]–[82].

¹³⁴ *Omar* (n 130) 606–7 [36]–[37], citing *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352.

¹³⁵ *Omar* (n 130) 603 [34(f)], 610 [44], citing *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636. See also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19*,

Minister had failed to perform his statutory duty. The Full Federal Court did not make a ruling on the central question of whether Australia's non-refoulement obligations in respect of Mr Omar were mandatory relevant considerations.¹³⁶

When a similar matter came before the High Court, the Court took a similarly minimalist approach on this issue. The applicant in *Applicant S270/2019 v Minister for Immigration and Border Protection*¹³⁷ was a Vietnamese national who had been brought to Australia as a 15-year-old in 1990 on a humanitarian visa. When his visa was cancelled under s 501(3A) of the *Migration Act*, the man sought revocation of the decision, but made no express protection claims in his representations to the Minister. This enabled the High Court to rule that, in the circumstances of the case, non-refoulement obligations were not a mandatory relevant consideration under s 501CA(4) of the Act.¹³⁸

These cases left hanging the question of whether decision-makers can proceed on the assumption that non-refoulement considerations can be deferred in cancellation cases such that an individual is forced to seek asylum at the conclusion of a cancellation process. In *Ali v Minister for Home Affairs*,¹³⁹ the applicant made claims in his request for revocation of the cancellation of his partner visa that he would be persecuted in Ethiopia on account of his Oromo ethnicity. In a unanimous judgment, the Full Federal Court held that the Minister had made three related errors in assuming that non-refoulement obligations would be 'fully assessed in the course of an application for a Protection visa'.¹⁴⁰ First, the Minister failed to consider the clearly articulated representations as required by s 501CA(4): '[H]e was not entitled to "carve off" a consideration of them for possible examination at a later stage'.¹⁴¹ Second, the Minister failed to consider the 'qualitative difference' in the manner that non-refoulement obligations would be considered under s 501CA(4) compared with a protection visa decision under s 65 of the Act.¹⁴² The Court held that the s 501CA(4) task is 'more diffuse and less categorical than the criteria of s 36(2)'.¹⁴³ Third, their Honours found that Australia's international obligations would not necessarily be fully considered in a protection visa application. This was because the criteria in s 36(2) of the *Migration Act* is narrower than the scope of protection provided by the *Refugee Convention* and other treaties.¹⁴⁴ This point echoes the earlier decision of *Ibrahim v Minister for Home Affairs* in which the Court noted the discrepancy between the internal relocation principle enshrined in the *Refugee Convention* and relevant amendments to the *Migration Act* made in 2014.¹⁴⁵ The Court also noted that reputational damage to Australia's standing as an international

where it was held that the Tribunal had failed to give genuine and realistic consideration to representations that the applicant would be harmed or killed if returned to Iraq: (2020) 280 FCR 178.

¹³⁶ *Omar* (n 130) 591 [3]–[5].

¹³⁷ *S270/2019 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897.

¹³⁸ *Ibid* 899 [10].

¹³⁹ *Ali v Minister for Home Affairs* (2020) 278 FCR 627 ('*Ali*').

¹⁴⁰ *Ibid* 632 [6].

¹⁴¹ *Ibid* 663 [103].

¹⁴² *Ibid* 664–5 [110].

¹⁴³ *Ibid* 664 [110].

¹⁴⁴ *Ibid* 665 [114].

¹⁴⁵ *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12, 33–4 [90]–[95], 35–6 [101]–[104], 37 [113]–[114] (White, Perry and Charlesworth JJ) ('*Ibrahim*').

citizen will not be relevant to s 36(2) decisions, but may provide ‘another reason’ for revoking a visa cancellation.¹⁴⁶

The significance of weighing the potential breach of international law was expressed forcefully by Allsop CJ in *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20*.¹⁴⁷ The executive government’s ratification of an international convention represents a ‘solemn assurance’ to the Australian people and the international community.¹⁴⁸ It is not only the consequences of a breach that warrant consideration. More fundamentally, ‘the violation of international law, *qua* law, is intrinsically and inherently a matter of national interest’.¹⁴⁹ The Full Federal Court held that, where the implications of Australia breaching international obligations arose squarely on the materials, it was unreasonable for the Minister not to consider Australia’s non-refoulement obligations in forming his state of satisfaction whether it was in the national interest to cancel CWY20’s visa under s 501(3) of the *Migration Act*.¹⁵⁰

C *Considering Consequences: Indefinite Detention or Removal?*

It is well established that in making a decision to cancel a visa, a decision-maker must consider the legal consequences of their decision.¹⁵¹ Where non-refoulement obligations are engaged, what are the legal consequences of a decision not to revoke a visa cancellation? This is where the apparent contradiction between the terms of s 197C of the *Migration Act* and government policy as articulated in the Ministerial Directions has confounded decision-makers. Government policy has been that Australia will not remove a person in breach of non-refoulement obligations.¹⁵² Yet s 197C(1) of the *Migration Act* states that the existence of non-refoulement obligations is irrelevant in removal processes. How these two elements can be reconciled is not immediately apparent. A complex line of cases has ensued, with courts finding legal error in visa cancellation cases where decision-makers have failed to confront the grave legal consequences mandated by the Act. Issues have arisen also around an applicant’s basic eligibility to make a protection claim after a s 501 visa cancellation. A related concern is what amounts to speculation on a future process and how far ahead a decision-maker should be required to look. The issue has seen quite dramatic differences in approach taken by different judges. The central question of the relationship between criminal deportation and protection

¹⁴⁶ *Ali* (n 139) 660 [91], quoting *Hernandez v Minister for Home Affairs* [2020] FCA 415, [63].

¹⁴⁷ *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195 (‘CWY20’).

¹⁴⁸ *Ibid* [3].

¹⁴⁹ *Ibid* [15]. See also [5].

¹⁵⁰ *Ibid* [166], [172]–[173] (Besanko J; Allsop CJ agreeing at [1] and Kenny J agreeing at [21]).

¹⁵¹ *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 39 [177].

¹⁵² See *Ministerial Direction 90* (n 9) [9.1]. A preceding Direction, *Ministerial Direction 79* (n 129), was to similar effect, but this did not prevent counsel for the Minister in at least one case asserting that removal would be pursued. Counsel suggested that the Minister was ‘prepared to proceed on the basis that Australia would breach its non-refoulement obligations and return the appellant to Iraq, even though it had been accepted that he was likely to be harmed or killed there’: *MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 283 FCR 525, 538 [61] (‘MNLR’).

obligations under international law remains complicated and we expect it will remain so, in spite of the 2021 amendments to s 197C.¹⁵³

Perhaps the most straight forward interpretation of the law is that of North ACJ in *DMH16 v Minister for Immigration and Border Protection*.¹⁵⁴ This case concerned a Syrian man who arrived in Australia in 2005 on a child visa. Faced with criminal deportation, the man claimed asylum. His protection visa application was refused personally by the Minister under s 501(1) of the *Migration Act*. The Minister stated that the applicant would not be removed from Australia if the visa application was refused, notwithstanding s 197C of the Act. The Minister acknowledged that the man may face indefinite detention.¹⁵⁵ North ACJ held that the decision was affected by jurisdictional error as the Minister had misunderstood the legal consequences of his decision. His Honour ruled that the legal effect of s 197C, read together with s 198 of the Act, was to require the applicant's removal to Syria.¹⁵⁶

Some two years later, the Federal Court held a decision of the Minister to be affected by similar error in *BAL19 v Minister for Home Affairs*.¹⁵⁷ This case involved a Sri Lankan man of Tamil ethnicity who had been held in detention for nine years by the time the case came before the Court. Refused a protection visa on the basis that he failed the s 501(6) character test, the man was both suffering from serious physical and psychosocial issues and was legally blind.¹⁵⁸

Rares J described the Minister's reasoning as a 'Catch-22'.¹⁵⁹ Having been refused a protection visa under s 501, the applicant could not apply for any other visa (with the exception of a Bridging Visa R, and then only at the Minister's invitation). The applicant could not be returned to Sri Lanka without breaching Australia's non-refoulement obligations, yet ss 197C and 198 of the *Migration Act* operated to require removal as soon as reasonably practicable. The Minister's reasons noted that he had a personal non-compellable power under s 195A to grant a visa if he considered it to be in the public interest.¹⁶⁰ Rares J said that the Minister's reasons

appear to be an attempt to lay the groundwork for keeping the applicant in indefinite immigration detention contrary to ss 197C and 198. That is why he simply referred to the possible grant of another substantive visa if he (the Minister) determined either to grant a visa under s 195A or, pursuant to s 48B, that s 48A would not operate to prevent an application for such a visa. Yet, that speculation about the possibility of the applicant being able to apply for another visa, did not begin to engage with the Minister's decision, under s 501(1), to refuse to grant the protection visa because of the risk that he found the applicant to pose to the Australian community were he to hold a protection visa. That risk and the Minister's concerns about it could not change if the applicant applied for any other visa.¹⁶¹

¹⁵³ See the discussion in Part V below.

¹⁵⁴ *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576.

¹⁵⁵ *Ibid* 579 [12].

¹⁵⁶ *Ibid* 581 [26]–[27], 582 [30].

¹⁵⁷ *BAL19 v Minister for Home Affairs* [2019] FCA 2189.

¹⁵⁸ *Ibid* [17].

¹⁵⁹ *Ibid* [43].

¹⁶⁰ *Ibid* [24].

¹⁶¹ *Ibid* [46].

Rares J ruled that the Minister had acted unreasonably and failed to consider the legal and practical consequences of his decision, being refolement.¹⁶²

His Honour also ventured the more contentious holding that protection visa applications do not engage s 501 at all.¹⁶³ His Honour ruled that this is because the regime for determining protection claims in s 36 of the *Migration Act* includes bespoke provisions on the circumstances when criminal conduct may render a person undeserving of protection. It is a criterion for a protection visa in s 36(1C) that the Minister does not consider that the person, having been convicted of a particularly serious crime, constitutes a danger to the community. This provision reflects the exception to the prohibition on refolement in art 33(2) of the *Refugee Convention*. *BALI9* had been determined to satisfy this criterion.¹⁶⁴

Some six months after the ruling in *BALI9*, eight justices sitting across two cases in the Full Court of the Federal Court overruled Rares J on this last point. They confirmed that the s 501 refusal power can be exercised in relation to a protection visa.¹⁶⁵ The cases underscore that the power to refuse a visa is much wider than the ‘exclusion criteria’ in the *Refugee Convention*. The *Migration Act* does not necessarily conform with international law, and the 2014 amendments did not alter that.¹⁶⁶

The Minister chose to ignore Rares J’s ruling in *BALI9*, despite being bound by the judgment. In the time between this case and the Full Court judgments overruling it, not one person facing character questions was granted a protection visa.¹⁶⁷ In two cases, Flick J was so frustrated that his Honour raised the prospect of instituting proceedings against the Minister for contempt of court.¹⁶⁸

An apparent side effect of the ruling in *BALI9* was to encourage greater use of s 36(1C) of the *Migration Act* to refuse protection visa applications. Cases emerged of decision-makers reconsidering s 36(1C) where an individual had previously been cleared of presenting a ‘danger to the community’. In *EPU19 v Minister for Home Affairs*, an 18-year-old from Lebanon, whose non-refolement claims had been accepted, was refused again on character grounds, reframed as s 36(1C) concerns.¹⁶⁹ The finding that the applicant was a danger to the Australian community was overturned on appeal to the AAT.¹⁷⁰ The increased use of s 36(1C) (and reassessment of criteria already satisfied) may prove to be a lasting legacy of the *BALI9* saga.

¹⁶² Ibid [48]–[54].

¹⁶³ Ibid [88].

¹⁶⁴ Ibid [3], [64].

¹⁶⁵ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A* (2020) 279 FCR 475 (‘*BFW20*’); *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1.

¹⁶⁶ *BFW20* (n 165) 514 [149]–[150], 515 [154].

¹⁶⁷ Department of Home Affairs (Cth), ‘Freedom of Information Request FA 21/04/01042’ (data extracted on 5 May 2021) <<https://www.homeaffairs.gov.au/foi/files/2021/fa-210401042-document-released.PDF>>.

¹⁶⁸ *AFX17 v Minister for Home Affairs (No 4)* (2020) 279 FCR 170, 173 [8]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* (2020) 171 ALD 608, 626–7 [74].

¹⁶⁹ *EPU19 v Minister for Home Affairs* [2020] FCA 541; *EPU19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 1536, [21].

¹⁷⁰ *JGCD and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1576, [34].

The Minister and the AAT have continued to look for ways to balance the legal effect of s 197C with practical or policy considerations that protect individuals against refoulement.¹⁷¹ In *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, the Full Federal Court found no error in an AAT decision not to revoke the cancellation of a humanitarian visa held by a Sudanese refugee.¹⁷² The Tribunal had found there was ‘**only a low risk** that Australia will breach its non-refoulement obligations,’ given the Government’s policy articulated in (then) *Ministerial Direction 79*.¹⁷³ The Court ruled that the Tribunal was entitled to take executive policy ‘at face value’, including the prospect of Ministerial intervention.¹⁷⁴ It found no necessary inconsistency between the Act and *Ministerial Direction 79* because ss 197C and 198 of the *Migration Act* do not preclude individuals from seeking the exercise of the Minister’s discretionary powers or from making a protection application.¹⁷⁵ The Court’s acknowledgement that a person could face indefinite detention as a result of a non-revocation decision is concerning, at very least. It is to this issue that we turn in Part IV(D).

D The Broadening Practice of Indefinite Detention

The confronting landing point in the cases we are examining is that indefinite detention has been accepted in policy, and law, as the primary means of managing refugees placed in the nebulous category of ‘character concern’. A common feature in many of the cases is that the individuals involved are persons with psychosocial and other disabilities. Obligations under art 14 of the *CRPD* and other human rights instruments have consistently been ignored. We offer another example here. The applicant in *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* is a Syrian asylum seeker who suffered a psychotic episode in January 2014 when he learned that his mother had been killed in a suicide attack.¹⁷⁶ The response was to detain him and to refuse his protection visa application under s 501 of the *Migration Act*. He had never been charged with or convicted of any offence, and was cleared of any security concerns. He had been in detention for over six years when a UN Working Group called for his release on the grounds that his incarceration was arbitrary.¹⁷⁷

¹⁷¹ See, eg, *XFKR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 280 FCR 535.

¹⁷² *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463 (‘*WKMZ*’).

¹⁷³ *Ibid* 498 [142] (emphasis in original).

¹⁷⁴ *Ibid* 499 [149].

¹⁷⁵ *Ibid* 492 [113], 495 [124], 497 [134], 500 [151]. An application for special leave to appeal to the High Court, on the question of the limits of the Tribunal’s ability to speculate on the future course of decision-making by the Minister, was refused in view of the subsequent legislative amendments and change to *Direction 90: WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCATrans 195.

¹⁷⁶ *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420.

¹⁷⁷ Human Rights Council Working Group on Arbitrary Detention, *Opinion No 28/2017 concerning Abdurahman Hussein (Australia)*, 78th sess, UN Doc A/HRC/WGAD/2017/28 (16 June 2017) 6 [41].

The case that prompted the Government to amend s 197C of the *Migration Act* in 2021 was *AJL20 v Commonwealth*.¹⁷⁸ The applicant in that case was the same Syrian man who was the applicant in *DMH16*.¹⁷⁹ His permanent visa was cancelled in October 2014 under s 501(2) of the Act. He remained in detention until Bromberg J ordered his release in September 2020. The Minister accepted that AJL20 was a refugee who would face serious human rights abuses if returned to Syria. However, he declined to exercise his discretionary power under s 195A to grant him a visa permitting release from detention.¹⁸⁰ Although this should have enlivened s 198 of the Act to require the young man's removal, in fact he was left to languish in immigration detention.

Bromberg J responded by ruling that the detention of AJL20 became unlawful as soon as the Minister refused to intervene in the case. His Honour noted that s 197C of the Act 'required that Australia's non-refoulement obligations in respect of the applicant be treated as irrelevant for the purpose of his removal from Australia as soon as reasonably practicable in accordance with s 198 of the Act'.¹⁸¹ Citing the High Court's ruling in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, Bromberg J ruled that immigration detention only remained lawful when used for a purpose envisioned by the Act.¹⁸² The Commonwealth had taken no steps to remove AJL20 to Syria in spite of the ability to do so. This meant that the applicant's detention was no longer for the purpose of removal.¹⁸³ Bromberg J granted habeas corpus, commanding the Commonwealth to release the man from detention.¹⁸⁴

The High Court allowed the Minister's appeal against Bromberg J's decision in a narrow 4:3 ruling¹⁸⁵ that is more than a little reminiscent of the 2004 judgment in *Al-Kateb v Godwin*.¹⁸⁶ The case exposes deep differences in the judges' views on their role in overseeing executive power affecting individual liberty. The majority judgment (Kiefel CJ, Gageler, Keane and Steward JJ) construed the detention provisions in ss 189 and 196 of the Act as 'hedged about by enforceable duties ... that give effect to legitimate non-punitive purposes',¹⁸⁷ and as such are constitutionally valid 'in all their potential applications'.¹⁸⁸ Detention under s 189 must continue 'until the first occurrence of a terminating event specified in s 196(1)', meaning until the grant of a visa or removal *actually occurs*.¹⁸⁹ The remedy of mandamus is available to compel the performance of those duties, and by that means 'judicial power is exercised to give effect to the scheme of the Act, enforcing the

¹⁷⁸ *AJL20 v Commonwealth* (2020) 279 FCR 549 ('*AJL20 (FCA)*').

¹⁷⁹ *DMH16* (n 154).

¹⁸⁰ *AJL20 (FCA)* (n 178) 553 [5].

¹⁸¹ *Ibid* 554 [10].

¹⁸² *Ibid* 562–4 [38]–[46], citing *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219.

¹⁸³ *AJL20 (FCA)* (n 178) 580 [126]–[128].

¹⁸⁴ *Ibid* 589–90 [174]–[177].

¹⁸⁵ *Commonwealth v AJL20* (2021) 95 ALJR 567 ('*AJL20 (HCA)*').

¹⁸⁶ *Al-Kateb v Godwin* also saw a 4:3 ruling on the legality of detaining a man who could not be removed from the country: (2004) 219 CLR 562 ('*Al-Kateb*').

¹⁸⁷ *AJL20 (HCA)* (n 185) 580 [44].

¹⁸⁸ *Ibid* 581 [45].

¹⁸⁹ *Ibid* 581–2 [49] (Kiefel CJ, Gageler, Keane and Steward JJ).

supremacy of the Parliament over the Executive'.¹⁹⁰ Provided that the detaining officer knows or reasonably suspects the person to be an unlawful non-citizen, that is sufficient to sustain detention until the occurrence of removal, and is unaffected by 'an unauthorised or prohibited purpose on the part of the officer in prolonging the period of detention'.¹⁹¹

In a compelling dissent, Gordon and Gleeson JJ stated that the consequence of such a construction

would enable detention of unlawful non-citizens at the unconstrained discretion of the Executive; the terminating event may never occur despite being reasonably practicable, yet detention would remain lawful. That would render the Ch III limits on Executive detention meaningless.¹⁹²

In a separate dissent, Edelman J expressed similar grave concern that [t]he effect of the Commonwealth's submission, if accepted, is that it would be lawful for the Executive, through Commonwealth officers, to continue the detention of an unlawful non-citizen for an objective purpose that is contrary to an express provision concerning the scope of the *Migration Act*.¹⁹³

The minority found that the plain text of the *Migration Act*, and the constitutional framework, define the lawfulness of detention not by the *event* of removal, but by expiry of the *time* by which removal is reasonably practicable.¹⁹⁴ That would not be to prevent the re-detention of a person if the Commonwealth resumed pursuing a lawful purpose.¹⁹⁵ While mandamus may be available, habeas is a distinct remedy and is the remedy concerned with liberty, remedying unlawful detention.¹⁹⁶ The Commonwealth had departed from the required purpose of detention, being his removal as soon as reasonably practicable, and from that point *AJL20*'s detention was not lawful under the Act.¹⁹⁷

The majority ruling in *AJL20* endorses an alarming extension of executive power, embedding the Commonwealth's power to detain non-citizens indefinitely and with impunity. Where *Al-Kateb* held that the mandatory detention provisions are constitutionally valid even where removal is not reasonably practicable in the foreseeable future,¹⁹⁸ *AJL20* concerns not an inability to remove, but a choice by the executive not to remove despite the terms of the law. The majority's reasoning is difficult to reconcile with the foundational principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* that administrative detention must be for a purpose. In that case, the High Court ruled detention provisions are lawful because 'the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation' or to

¹⁹⁰ Ibid 582 [52] (Kiefel CJ, Gageler, Keane and Steward JJ).

¹⁹¹ Ibid 586 [72] (Kiefel CJ, Gageler, Keane and Steward JJ).

¹⁹² Ibid 589 [83].

¹⁹³ Ibid 595 [106].

¹⁹⁴ Ibid 589 [84] (Gordon and Gleeson JJ).

¹⁹⁵ Ibid 590 [89] (Gordon and Gleeson JJ). See also 604 [149] (Edelman J).

¹⁹⁶ Ibid 591–2 [93]–[96] (Gordon and Gleeson JJ).

¹⁹⁷ Ibid 593–4 [102]–[103] (Gordon and Gleeson JJ).

¹⁹⁸ The majority noted that the correctness of that holding did not arise for consideration: *ibid* 577 [26] (Kiefel CJ, Gageler, Keane and Steward JJ).

enable a visa application to be made and considered.¹⁹⁹ It was accepted that AJL20's detention had continued longer than reasonably necessary for such a purpose. To sustain its conclusion, the majority placed great emphasis on the *Migration Act's* binary of lawful versus unlawful non-citizens.²⁰⁰ There is palpable discomfort at the notion that a person in the latter category might secure their release through habeas where that person otherwise lacked entitlement to be in the community.²⁰¹ It is a concerning posture towards the fundamental rights of non-citizens.

To conclude, we now turn to consider more closely the extent to which the 2021 amendments to s 197C of the *Migration Act* align with Australia's international legal obligations.

V Towards Compliance with International Law

There is much to disappoint in the current dilemma around the treatment of long-term permanent residents convicted of serious crimes. Perhaps most concerning is how little progress has been made in thinking about the human rights of persons with disabilities. The present day *Migration Act* may not contain offensive descriptors such as 'idiot' and 'insane person'. However, the case law we have considered in this article suggests that persons with psychosocial disabilities continue to be given little quarter in either criminal justice processes or immigration enforcement, notwithstanding Australia's ratification of the *CRPD* — and multiple criticisms from UN human rights mechanisms.²⁰² We repeat our observation that the practice of keeping 'crimmigrants' with disabilities in indefinite detention can place Australia in breach of art 14 of the *CRPD*.²⁰³

One positive development is that the Australian Government's commitment to observing the fundamental norm of non-refoulement was reaffirmed in the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth). The Explanatory Memorandum states that the purpose of the legislation is to:

clarify that the duty to remove under the *Migration Act* should not be enlivened where to do so would breach *non-refoulement obligations*, **as identified in a protection visa assessment process**, including Australia's obligations under [the *Refugee Convention* and other human rights instruments].²⁰⁴

Of course, a simple 'fix' would have been to repeal s 197C of the *Migration Act* — a clear and direct way to reinstate non-refoulement obligations as a constraint

¹⁹⁹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33, cited in *ibid* 576 [23] (Kiefel CJ, Gageler, Keane and Steward JJ).

²⁰⁰ *AJL20 (HCA)* (n 185) 581–2 [49] (Kiefel CJ, Gageler, Keane and Steward JJ).

²⁰¹ *Ibid* 582 [53] ((Kiefel CJ, Gageler, Keane and Steward JJ describing this result of Bromberg J's decision as a 'supreme irony').

²⁰² See, eg, CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Report of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019); Human Rights Committee, *Concluding observations on the Sixth Periodic Report of Australia*, 121st sess, CCPR/C/AUS/CO/6 (1 December 2017).

²⁰³ See the discussion above at note 55ff.

²⁰⁴ Explanatory Memorandum, *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021* (Cth), 2–3 (emphasis in italics in original; emphasis in bold added).

on removal. Instead the amendments retain the essence of this provision, but make an exception where a person has a ‘protection finding’ made in connection with a protection visa application that has been ‘finally determined’.²⁰⁵ This includes a finding by a Ministerial delegate or by the Migration and Refugee Division of the AAT on review of a protection visa application.²⁰⁶ The provision does *not* recognise protection findings made in granting a person a refugee or humanitarian visa to come to Australia. Nor does it include an AAT finding in a visa cancellation process that a person engages non-refoulement obligations. A new s 197D empowers the Minister to determine that a protection finding made on a protection visa application is no longer warranted.²⁰⁷

The amended provisions are crafted to maintain the disconnect between international law and ‘Australia’s interpretation of its protection obligations’²⁰⁸ as articulated in the *Migration Act*. They do this by confirming a protection visa application as the mechanism to establish protection needs. Two key issues arise from this. First, the amendments do nothing to address the ‘Catch-22’²⁰⁹ experienced by individuals such as applicants *BAL19* or *AJL20*. As their cases illustrate, a protection visa application following a visa cancellation is likely to be met by refusal on character grounds. As the Court observed in *WKMZ*, a separate protection visa application may well be ‘fruitless’:²¹⁰

it is difficult to see how any delegate acting rationally and reasonably, or the Minister herself or himself acting rationally and reasonably, could decide to grant a visa to a person who a) has had a different visa cancelled and b) has applied for the cancellation to be revoked but has been unsuccessful. To grant or restore a visa in such circumstances would be to return a person to free and lawful residence in the Australian community, an outcome which under a different provision has been determined to pose an ‘unacceptable’ risk to that same community ...²¹¹

Wigney J has made a similar point, noting that ‘it would be rather incongruous, if not somewhat bizarre, to think that there was a realistic possibility’ the Minister would decide to grant a visa in such circumstances.²¹² These observations are borne out in practice — departmental data released in May 2021 under a Freedom of Information Request revealed that no protection visas had been granted to individuals who had a previous mandatory visa cancellation that was not revoked.²¹³ As such, to require a ‘crimmigrant’ to apply for a protection visa to establish they engage protection obligations is only to perpetuate a vicious circle. It puts vulnerable individuals through a second complex administrative process, only

²⁰⁵ *Migration Act* (n 7) s 197C(3).

²⁰⁶ *Ibid* ss 197C(4)–(7), 36A.

²⁰⁷ Such a decision is reviewable by the Administrative Appeals Tribunal (‘AAT’) under the *Migration Act* (n 7) pt 7. This was the only substantive amendment negotiated by the Labor Party in agreeing to support the legislation.

²⁰⁸ Explanatory Memorandum, ‘Resolving the Asylum Legacy Caseload’ (n 127), 2.

²⁰⁹ See above n 159 and accompanying text.

²¹⁰ *WKMZ* (n 172) 495 [124].

²¹¹ *Ibid* (emphasis in original).

²¹² *MNLR* (n 152) 536 [55] (Wigney J).

²¹³ ‘Freedom of Information Request FA 21/04/01042’ (n 167).

to reach the same end point, providing a mere semblance of justification for prolonging detention.

The 2021 amendments to the *Migration Act* bargained compliance with one international obligation (non-refoulement) against another (the right to liberty and freedom from arbitrary detention).²¹⁴ The Migration Amendment (Clarifying International Obligations for Removal) Bill's Statement of Compatibility with Human Rights asserted that compliance with art 9 of the *International Covenant on Civil and Political Rights* is achieved through the Minister's discretionary powers in ss 195A or 197AB of the *Migration Act*:

The Minister's powers to consider whether to grant a visa to permit an unlawful non-citizen's release from immigration detention, or to permit a community placement under a residence determination, until they are able to be removed from Australia consistently with *non-refoulement* obligations, means that the person's individual circumstances, and the risk they may pose to the Australian community can be taken into account.²¹⁵

The Parliamentary Joint Committee on Human Rights nevertheless expressed 'serious concerns', stating that 'it seems unlikely that these non-reviewable and non-compellable powers would operate as an effective safeguard in practice or offer an accessible alternative to detention'.²¹⁶ The Bill passed without answers to the Committee's requests for statistics on the exercise of Ministerial powers.

The Committee observed that the legislation may have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.²¹⁷ It is well established that immigration detention is harmful to mental health, exacerbating the impact of trauma and existing psychological conditions.²¹⁸ Australia's treatment of refugees subjected to indefinite detention has drawn repeated criticism from UN bodies.²¹⁹

In maintaining the disconnect between international law and the protection visa criteria, the amendments leave space for representations on non-refoulement obligations to be considered in visa cancellation processes. Counter-intuitively, this perpetuates some of the confusion that we have seen in case law. The legal consequence of a non-revocation decision is no longer necessarily removal in breach of international law. Rather, the likely consequence is *either* indefinite detention, or

²¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.

²¹⁵ Explanatory Memorandum, 'Clarifying International Obligations for Removal' (n 204) 14 (Attachment A).

²¹⁶ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 5 of 2021, 29 April 2021) 26 [1.56].

²¹⁷ *Ibid* 25–6 [1.55].

²¹⁸ See, eg, M von Werthern, K Robjant, Z Chui, R Schon, L Ottisova, C Mason and C Katona, 'The Impact of Immigration Detention on Mental Health: A Systematic Review' (2018) 18 *BMC Psychiatry* 382.

²¹⁹ See, eg, Human Rights Committee, *Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 2233/2013 in FJ v Australia*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 (22 March 2016) [10.6]; and Human Rights Committee, *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 2094/2011 in FKAG v Australia*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) [9.8].

removal in breach of international law, owing to the protection gap between the *Migration Act* and international law.²²⁰ As such, the amendments elevate the importance and consequence of Australia's protection discrepancy. They leave decision-makers an unenviably complex legal landscape that is likely to fuel continuing litigation.

We return to the central problem with s 197C of the *Migration Act*. The provision was devised to underscore the automation of detention and removal processes — turning the focus on a person's entitlement to a substantive visa. As the punitive net of the evermore complicated crimmigration provisions has grown, individuals who would never have been considered for removal have suddenly found themselves without visas and in immigration detention. In practical terms, the cancellation/revocation process is more important than ever for individuals who engage protection obligations. In spite of the attempts through *Ministerial Direction 90* to deflect such considerations into a protection visa application, it is clear that revocation decisions must engage with the real, human consequences of visa cancellation. When the consequences of indefinite detention or refoulement are confronted honestly, these factors can lead to the restoration of a person's visa.

If the burgeoning body of crimmigration case law reveals anything, it must be that invocations of international legal obligation remain fraught. Resort to international human rights bodies has also yielded few domestic victories. Most challenges have succeeded through arguments grounded in close and careful interpretation of law and policy, aligned against relevant facts.

Subsequent to the cases discussed in Part IV, on 11 May 2022 the High Court delivered judgment in *Plaintiff M1/2021 v Minister for Home Affairs*.²²¹ The case reinforces the divide between international law and its domestic enactment, and deepens the predicament for refugees whose visas are mandatorily cancelled. Seeking revocation of the cancellation of his *humanitarian* visa, the plaintiff had made clear and detailed representations that he engaged non-refoulement obligations. He claimed that in South Sudan he would 'get killed, or persecuted then killed, or tortured then killed'.²²² A majority of the High Court held that it was open to a delegate of the Minister to defer assessment of non-refoulement obligations because the applicant was able to apply for a protection visa.²²³ Further, the majority held that 'Australia's international non-refoulement obligations unenacted in Australia were not a mandatory relevant consideration'.²²⁴ The swathe of Federal

²²⁰ See, eg, *YFTQ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*, where the AAT accepted that the Sri Lankan refugee applicant likely faced indefinite detention rather than refoulement, because he would receive a protection finding under the *Migration Act*: [2021] AATA 1792, [119]–[122]. See also *XTRG and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*, where the AAT found indefinite detention to be the likely consequence of non-revocation for a South Sudanese refugee with a psychosocial disability: [2021] AATA 3378, [130]–[132]. The AAT treated Australia's non-refoulement obligations, and the impediments to the applicant establishing a basic standard of living in South Sudan, as the weightiest factors and revoked the cancellation of his humanitarian visa: at [150]–[151]. (Disclaimer: an author represented the applicants in these cases).

²²¹ *Plaintiff M1* (n 50).

²²² *Ibid* [59].

²²³ *Ibid* [9] (Kiefel CJ, Keane, Gordon and Steward JJ).

²²⁴ *Ibid*.

Court and Full Federal Court decisions inconsistent with these propositions were overruled in footnotes.²²⁵ To say that the majority's abstracted formalism has the feeling of a Kafka play is an understatement. For the minority justices, Edelman J and Gleeson J, the delegate's perfunctory disposal of the plaintiff's representations that he would face grave harm in South Sudan was legally unreasonable and involved a fundamental denial of procedural fairness.²²⁶

While the decision in *Plaintiff M1* does not prevent consideration of representations about international law or the real consequences for an applicant after pursuing a 'doomed'²²⁷ protection visa application, it provides an easy way out for a decision-maker who is not inclined to do so. This makes detailed and persuasive submissions (and legal representation) in revocation matters all the more critical.

The hastily crafted amendments to s 197C of the *Migration Act* — which the Court did not have occasion to consider in *Plaintiff M1*²²⁸ — do little to clarify the law or to ensure Australia's compliance with non-refoulement obligations. Ultimately, the changes were not even required to overcome Bromberg J's decision in *AJL20*. The High Court did that work through the majority's perpetuation of the permissive attitude toward executive detention shown in *Al-Kateb*. The majority favoured a formalist reading of the law over acknowledgment of how Australia's mandatory detention laws work in practice.

Some comfort may be found in the fact that the Australian Government has pulled back from normalising the prospect of regular breaches to non-refoulement obligations in its policy documents. Yet it is of concern that Ministerial intervention has been embedded as the primary mechanism to ensure against arbitrary, indefinite detention. There is nothing unique in the challenges Australia faces in juggling international human rights obligations with questions of national security in the crimmigration context. Legislative protections, and not executive discretions, are crucial to end the injustice and creeping cruelty of Australia's detention practices — especially where they impact on non-citizens with disabilities.

²²⁵ Ibid [32]–[34]. This notably includes *Ali* (n 139) and *Ibrahim* (n 145).

²²⁶ *Plaintiff M1* (n 50) [97]–[101] (Edelman J); [108]–[116] (Gleeson J).

²²⁷ Ibid [91], [94] (Edelman J).

²²⁸ The decision under review was made long before the amendments: *ibid* [4], [13].