THE EFFECT OF MINISTERIAL DIRECTIONS ON TRIBUNAL INDEPENDENCE

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The Administrative Appeals Tribunal ('the Tribunal') may review a decision to cancel a person"s visa made under section 501 of the *Migration Act 1958*[1]. Because it is easier to remove non citizens under section 501 than under the criminal deportation provisions, which protect long term permanent residents from deportation[2], it has become the principal mechanism used to remove people from Australia[3]. All non citizens are potentially subject to section 501, regardless of length of residence in Australia and level of absorption into the Australian community. The consequences of the decision are serious, including removal and permanent exclusion from Australia. The decision to cancel is a two stage process. First, the Minister or his or her delegate must decide whether the person fails the character test, which includes having been sentenced to a term of imprisonment of 12 months or more[4]. Second, if the person fails the character test, the decision maker must decide whether to cancel the person"s visa. The Migration Act itself provides little guidance about the circumstances in which a person"s visa should be cancelled. Instead, section 499 of the Migration Act empowers the Minister to give written directions relating to the exercise of powers under the Migration Act. A direction is effectively "an order or command which must be obeyed"[5]. Three have been made under the present form of section 499 relating to section 501.

An irresponsible Tribunal?

The Tribunal was established in the 1970s as part of a wider administrative law package intended to provide individuals with access to faster and cheaper justice. The Tribunal was set up as an independent, merits review body, with wide powers to affirm, vary, set aside, remit or substitute decisions[6]. When introducing the Bill establishing the Tribunal into Parliament, the Attorney-General explained that the intention was "to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible..."[7]:

> It will be called upon to review decisions by Ministers and of the most senior officials of government. In the words of the Franks Committee on Tribunals and Inquiries, the Tribunal is not to be an appendage of Government departments. The Tribunal is to be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of departmental administration[8].

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Independence comprises two concepts, namely structural independence and independence of thought. Structural independence refers, amongst other things, to "the allocation of financial resources and accountabilities for those resources to the [relevant] Department[9]" and the lack of "formal and informal monitoring of tribunal outcomes in individual cases and classes of cases[10]" by the relevant government departments. Independent thought "encompasses matters such as non-interference, non-delegation and the exercise of unbiased, individual judgement"[11].

Without independence, the Tribunal cannot be an "effective check on executive power[12]" in practice and in appearance:

> Applicants and the broader community must have reason to be confident that the members of review tribunals both have the skills required to provide merits review and will consider the merits of their cases in an impartial way, and make a different decision to that of the relevant government agency where they consider that appropriate. In other words, it is crucial to ensure that there is no perception (let alone any reality) that tribunals are in any way subject to undue influence either in reaching decisions in particular cases or more generally[13].

O'Connor J, a former President of the Tribunal, argued that "there has never been any doubt as to the AAT's independence", which she attributed to its "judicial mould", "the absence of any statutory restriction on its capacity to review policy" and the separation of the Tribunal's administration from the Attorney-General's Department[14]. This may be the case, but the Tribunal has, perhaps, a more serious problem. In the closely-related section 501 and criminal deportation jurisdictions, there is a longstanding view that the Tribunal acts too independently because it fails to follow government policies relating to the removal of non citizens.

Since its inception, the Tribunal has reviewed deportation decisions; although, until 1992, the Tribunal only had the power to make recommendations[15]. The otherwise "harmonious"[16] relationship between the government and the Tribunal was disturbed when the Tribunal began to "reach a different conclusion" from the Department or the Minister[17]. In 1988, for example, Senator Ray, the then Minister for Immigration, issued a statement criticising the Tribunal's decision making on the basis that the Tribunal gave insufficient weight to people's criminal history and too much weight to their potential difficulties upon return to the country of origin[18]. Senator Ray was not the only Immigration Minister concerned about the Tribunal's decision-making. Mr Ruddock was so troubled by the Tribunal's decisions, particularly following the cases of *Jia*[19] and *Ram*[20], that he launched a parliamentary inquiry into criminal deportation[21], criticised the Tribunal in the media[22] and personally wrote to the then President of the Tribunal to express his dissatisfaction with the small but significant "number of recent decisions made by the AAT, which allowed convicted offenders to remain in Australia[23]". The Minister periodically exercised his personal powers to overcome the effect of a Tribunal decision[24].

Dissatisfaction with the Tribunal's track record in this jurisdiction is not limited to the Minister and the Department of Immigration. Victims, families of victims, and organisations such as the Police Force Association have also expressed strong views about Tribunal decisions allowing convicted criminals to remain in Australia. Recently, for example, in the case of *Taufahema v Minister for Immigration and Citizenship*[25], in which the Tribunal set aside the decision to cancel the applicant's visa, the NSW Police Commissioner and the Police Association of NSW wrote to the Minister. The NSW Police Commissioner said:

> On behalf of all police officers in NSW we would ask [the Federal Government] to do everything within their power to make sure that this guy does not become or remain an Australian citizen. He's not a good character. He doesn't deserve to stay here[26].

Community concerns relate to two particular issues: first, the contention that the Tribunal acts irresponsibly by setting aside the Department's decision and allowing the person to remain. In *Pemberton v Minister for Immigration and Citizenship*, for example, Amanda Pemberton, a 17 year old New Zealander, participated in the torture and murder of a school girl[27]. The Tribunal's decision to allow her to remain created a backlash. The victim's mother said:

> I think she should be sent back to where she came from. Anyone who commits murder, doesn't matter where they come from, should never be allowed back into Australia[28].

Secondly, the Tribunal is criticised when, having set aside the decision, the person re-offends. For example, in the case of *JSFD v Minister for Immigration and Citizenship*[29], the Herald Sun noted that "there was widespread public outrage" when it revealed that the applicant had re-offended "just weeks after the federal Administrative Appeals Tribunal ruled he [could] not be deported[30]". In relation to the same case, the Herald Sun editorial observed:

> This young man has an appalling history of violence and disrespect for Australian law. We can well and truly do without him. A Federal Government agency, the AAT is supposed to provide fair and just reviews of administrative decisions. This one seems quite wrong[31].

Given this context, it is not surprising that Ministers have turned to directions to influence Tribunal decision making.

Directions under section 499

Directions are a flexible mechanism by which the government can shape policy, to reflect its broader social objectives[32]. The development of directions is essentially "a political function, to be performed by the Minister who is responsible to the parliament ..."[33] As Rares J noted:

> The constitutional scheme of responsible government would be defeated if departmental decision makers were entirely free to arrive at their own idiosyncratic views, unfettered by the control of the Minister who, by s 64 of the Constitution, is the person who administers a department of State and answers for that administration in the Parliament[34].

The process of laying directions before Parliament also enables public scrutiny of the directions and "political comment and debate"[35], for which the Minister is again accountable[36].

Like policy, directions encourage internal consistency within the Tribunal but also between the Department and the Tribunal, by acting as a "constant reference point"[37]. Furthermore, directions bolster "the integrity" of the decision making process by "diminishing inconsistencies" and enhancing "the sense of satisfaction with the fairness and continuity of the administrative process..."[38]

In 1999, section 499 was amended to strengthen the Minister's power to "specify more precisely how a discretion should be exercised"[39]. Section 499 of the Migration Act now provides as follows:

> (1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:
>
> (a) The performance of those functions; or
>
> (b) The exercise of those powers.
>
> ...
>
> (2A) A person or body must comply with a direction under subsection (1).

Three directions have been issued under the amended section 499 in relation to section 501, namely Direction No 17, No 21 and No 41. They are legally binding on departmental decision makers and the Tribunal[40]. The three directions have adopted the same structure, namely two principal parts: the first part deals with the application of the character test, the second part deals with the exercise of the discretion. Under the second part, the focus of this paper, decision makers are obliged to weigh primary and secondary, known as "other", considerations.

Applying the directions

In order to ensure independence, directions cannot force decision makers, including the Tribunal, to arrive at a particular conclusion in individual cases. The Tribunal must take into account the considerations and their weight as set out in the directions. However, the Tribunal is not bound to consider only the factors stipulated in the direction[41], nor is it bound by the weight the government gives to each of these factors[42].

In sum, in order to comply with the directions, the Tribunal is required to consider all relevant factors and weigh the factors as it sees fit. It cannot simply apply "some ritualistic formula[43]"; it must make the correct or preferable decision, according to the merits of the case and "independently of any instruction, advice or wish of the executive government, including in cases where government policy is a relevant factor for consideration..."[44]

An unlawful direction

Part 2 of Direction No 17 was held to have been imperfectly formulated as it operated as a fetter on the Tribunal"s discretion, conferred by section 501[45]. Direction No 17 set out three primary considerations; namely, the protection of the Australian community, the expectations of the Australian community and the best interests of the child. The relevant paragraph of Direction No 17 provided that "no individual considerations can be more important than a primary consideration, but that a primary consideration cannot be conclusive in itself in deciding whether to exercise the discretion to refuse or to cancel a visa"[46]. In *Aksu v Minister for Immigration and Multicultural Affairs ('Aksu'),* Dowsett J held that Direction No 17 overstepped its legal limits for the following reasons:

> Two primary considerations, protection and expectations will be present in almost all cases, militating in favour of refusal or cancellation of the visa. Where there are two primary considerations, and no other consideration can have more weight than either of them standing alone, an almost mathematical logic compels a decision which upholds those primary considerations. Further, as the primary considerations are really direct outcomes of the person"s bad character, the effect is that once he or she fails the character test, there is virtually a prescription in favour of refusal or revocation of the visa. This is inconsistent with the unfettered discretion conferred by s 501[47].

A number of not always consistent Federal court cases followed[48]. The Tribunal acknowledged the invalidity of part two but took it into account as it represented the government"s policy[49]. The issue was put to rest with the Full Federal Court decision in *Howells v Minister for Immigration and Multicultural and Indigenous Affairs,* which upheld *Aksu*[50]. By the time *Howells* was decided, however, the Minister had revoked Direction No 17, replacing it with Direction No 21.

An unjust direction

Direction No 21 was lawful[51]. It was, however, condemned for being unjust. Direction No 21 required decision makers to take into account the same three primary considerations as Direction No 17, when exercising the discretion to cancel a visa; first, the protection of the Australian community; second, the expectations of the Australian community; and third, the best interests of children. It stipulated other considerations such as the extent of the

disruption to the person's family, a genuine marriage to an Australian citizen or permanent resident, family composition, evidence of rehabilitation and previous Departmental warnings. Decision makers were also required to consider Australia's international obligations under various treaties.

The Direction conspicuously omitted what were considered to be highly relevant factors, such as whether the person had arrived in Australia as a minor, had been absorbed into the Australian community and had familial, linguistic, cultural and educational ties in the country of citizenship[52].

The effect of the directions on Tribunal independence

Direction No 21

On review of all section 501 cases heard and determined by the Tribunal over a five year period[53], the Direction clearly channelled Tribunal decision making. Although the Tribunal is required to consider all relevant considerations, the file review indicates a correlation between the considerations specified in the Direction and the factors considered by the Tribunal. Furthermore, factors which were not specified in the Direction were generally omitted from the decisions. During the relevant time period, 38% of cases were set aside, although no conclusion can be drawn from the set aside rate. The fact that the Tribunal sets aside cases supports the conclusion that it acts independently. Alternatively, were it not for the Direction, perhaps the set aside rate would be much higher.

The Direction appeared to strongly influence Tribunal decision making in one particular group of cases, those in which the crime was particularly violent or reprehensible. Crimes falling into this category include murder and attempted murder, particularly of vulnerable people, incest and child abuse. The general community would consider these crimes "vilely, inexcusably wrong"[54]. Direction No 21 commanded the Tribunal to consider the crime in two of the three primary considerations. In considering the protection of the Australian community, the first primary consideration, the Tribunal was required to consider the seriousness and nature of the crime. In the Direction's hierarchy of crimes, "murder, manslaughter, assault or any other form of violence against persons" were considered "very serious". Sexual assaults in general, and specifically against children, were "particularly repugnant". In relation to the expectations of the community, the second primary consideration, the Direction stated as follows:

> Visa refusal or cancellation and removal of the non citizen may be appropriate simply because the nature of the character concerns or offences are such that that (sic) the Australian community would expect that the person would not be granted a visa or should be removed from Australia[55].

In these types of cases, the decision was almost always affirmed by the Tribunal[56]. In *Tumanako v Minister for Immigration and Multicultural Affairs* ('*Tumanako*'), for example, the applicant went to meet his former de facto wife at their daughter's kindergarten[57]. When he saw that she was accompanied by another man, he stabbed her to death, in front of their daughter. In considering the protection of the community, the Tribunal found that the crime was "very serious", the applicant's risk of re-offending was low to moderate and that general deterrence weighed "against disturbing the reviewable decision". The community expectations also favoured visa cancellation, given the nature of the crime and the risk of recidivism. The Tribunal affirmed the decision on the basis that the protection and expectations of the community outweighed all other factors, which included fourteen years of lawful residence in Australia prior to the commission of the crime and his extensive and remaining family in Australia.

One of the rare cases to go against the trend was *Holland v Minister for Immigration and Citizenship* ('*Holland*'), which involved a man who had persistently sexually assaulted his daughter and grandchildren, crimes described by the Tribunal as "revolting" and "wicked"[58]. The applicant, a 74 year old UK national, was married to a 73 year old Australian citizen. The applicant had type 2 insulin-dependent diabetes, emphysema, ischaemic heart disease and stabilised angina, while his wife was in remission from cancer and had had a heart attack. Despite the nature of the crimes, the Tribunal set aside the decision. In an oral decision, the Tribunal explained the reasons for its decision as follows:

> Your relationship with your wife over a 54-year period; the fact that three of your children support you staying in Australia and are prepared to provide you with financial support to have ongoing treatment; your own attitude that you would not go to your children"s houses unless invited; your and your wife"s health problems, your likely foreshortened life expectancy; the terms of your parole which should ensure you will not have contact with any of the victims or any under age child without the consent of your parole officer being first obtained; the fact that you have little or no family support if you are returned to the United Kingdom; the uncertainty of what, if any, official support you would receive if returned as against the guaranteed support you will receive if you remain in Australia. What I conclude is the reduced risk of recidivism; all combine to leave me satisfied that the decision under review should be set aside and the case remitted to the respondent with a direction to reinstate your cancelled visa[59].

It is not surprising that the Tribunal rarely sets aside these types of decisions, given the importance, as expressed in the Direction, that the Government places on the nature of the crime. It is not, however, possible to state that the Direction produced this effect as it is not known whether the Tribunal would have affirmed the decision in any event, particularly in light of the nature of the crimes.

Although shaped by the Direction, the decision making process retains sufficient flexibility to enable the Tribunal to reach the preferable decision. Firstly, as noted earlier, the Direction cannot force the Tribunal to reach a particular conclusion in individual cases. As in all highly discretionary areas of decision making, the Tribunal must "search for the preferable view of the law"[60] and "choose" the preferable decision. In *Holland*, for example, the Tribunal would have been justified in affirming the decision, given the Direction"s emphasis on the nature of the crime. Instead, it justifiably chose to set aside the decision, on the basis of the applicant"s limited life expectancy and other factors. Ironically, in searching for the preferable decision, the Tribunal gains little guidance from the Direction, as its language is general, requiring the Tribunal to import its own "connotation"[61] of the considerations. The concept of the expectations of the community, for example, is vague, "necessarily evaluative and conclusionary in character...[62]". It can mean "different things to different people"[63].

Secondly, the range of factual circumstances in individual cases is extensive and includes the applicant"s age, family ties in Australia, education, employment, criminal history, mental and physical health problems. The range of facts allows the Tribunal to "shape" its findings of fact to enable it to apply the Direction in a particular way[64]. *Tumanako* exemplifies this phenomenon: the applicant gave evidence indicating that he was genuinely remorseful, was a model prisoner, had performed part time jobs well on weekend release, had been offered full time employment and was able to live with his twin brother and his wife, with whom he would attend church. The Tribunal, however, observed as follows:

> ...some might question whether any combination of remorse, rehabilitation courses, religious renewal, family support and good works could atone for a crime so atrocious as stabbing a young mother to death in front of her four year old daughter[65].

The Tribunal found that the nature of the crime, in combination with his low to moderate risk of reoffending, favoured visa cancellation. However it could be argued that the material was there for the Tribunal to set aside the decision. His length of residence in Australia alone would have protected him from removal under the criminal deportation provisions.

Thirdly, the language of the decisions is not always transparent[66]. As Kirby J notes, the willingness of Tribunal members to affirm or set aside decisions may ultimately depend on "their own value system"[67]. In such a "vexed area of administration"[68], Tribunal members may well have their own views relating to the outcome of the case, which are not fully articulated in the decision. Under the umbrella of the Direction, these three elements – the generality of the Direction, the flexibility of fact finding and the opaqueness of the reasoning - secure the Tribunal"s independence of thought and allow it to make what it considers to be the just decision.

Direction No 41

On 15 June 2009, the current Government revoked Direction No 21 and issued Direction No 41 in its stead. The new Direction addressed the concerns relating to Direction No 21: in addition to the protection of the Australian community, there are three new primary considerations, namely, whether the person arrived as a minor, the length of residence and relevant international obligations[69]. The expectations of the Australian community are no longer explicitly mentioned as a consideration. The "other considerations" include numerous new considerations, such as the applicant"s age, health and level of education, links to the country to which he or she would be removed and hardship to members of the applicant"s family in Australia[70].

In a similar fashion to Direction No 21, Direction No 41 seems to be influencing Tribunal decision making, as evidenced by the decisions themselves, which take into account the new considerations, and by the increase in the number of decisions set aside[71]. The number of Ministerial appeals, however, has also increased[72]. Despite the deliberate shift in policy, as in the past, the Tribunal is still perceived as being too independent. Again, the issue is the Tribunal"s approach to the exercise of discretion.

In *Taufahema*[73], for example, a decision reviewed under Direction No 41, the Minister cancelled the applicant"s visa under section 501, following numerous convictions, including the manslaughter of a police officer. The Tribunal found that although the applicant had lived in Australia since the age of 11, had close ties to the Australian community and had taken steps towards rehabilitation, the protection of the Australian community was more important. However, the Tribunal set aside the Minister"s decision on the basis of the best interests of the applicant"s daughter as well as the interests of his partner. The Minister sought judicial review on the basis that the Tribunal failed to take into account primary and other considerations. Buchanan J found the Tribunal"s discussion of the competing primary and other considerations to be "lucid and balanced"[74]. The Tribunal had not committed a jurisdictional error: "the Minister"s criticism amounts to a complaint ... that the AAT did not reach a conclusion that the risk to the Australian community outweighed all other, countervailing, considerations"[75]. The Minister has since used his personal power under the Migration Act to cancel the applicant"s visa[76].

Conclusion

In the criminal deportation and section 501 jurisdiction, the Tribunal is considered to be far too independent, far too willing to allow non citizens to remain in Australia. In response to this perception, the government has made legally binding directions, designed to influence the Tribunal"s decision making process. Direction No 17, the first relevant direction issued under an amended section 499, overstepped its legal limits and was held to improperly fetter the Tribunal"s discretion, conferred by section 501. Direction No 21 was criticised for a different reason, namely that it treated non citizens unjustly. Despite its controversial nature, the file review indicates that Direction No 21 clearly influenced Tribunal decision making. The decisions adopted the structure of primary and, where relevant, other considerations and assessed their weight in accordance with the Direction. The Tribunal rarely considered

factors outside the Direction. Furthermore, the Direction appeared to strongly influence cases involving violent crimes. However, although the Direction had force, there was sufficient scope within the decision making process to enable the Tribunal to exercise independent thought and to reach what it considered to be the just decision.

Direction No 41 has now replaced Direction No 21. It represents a significant shift in government policy, seeking to redress the previous imbalance by creating three new primary considerations; namely, whether the person was a minor when he or she began living in Australia, the length of residence in Australia and relevant international obligations. With such a clear and markedly different approach, it is unsurprising that Direction No 41 has influenced Tribunal decision making and led to an increase in decisions being set aside. There is, however, renewed criticism of the Tribunal. Given the high level of emotion and the lack of understanding of the role of the Tribunal, the response of victims, their families and law enforcement bodies is comprehensible. Of much greater concern is the overturning of Tribunal decisions by the Minister personally, particularly when the Tribunal decision has been upheld on judicial review. The comments of Wilcox J, noted in the context of the review of criminal deportation cases, are equally applicable to section 501 cases:

> The making of an application to the Tribunal, in a deportation case, involves the applicant, and usually members of the applicant's family, in a distressing recapitulation of events for which the applicant has already undergone punishment. It involves the applicant, or members of the applicant's family, in a considerable burden of costs at a time when financial resources are likely to be low. And, of course, it involves expenditure by the taxpayer, both in the presentation of the Department's case and in connection with the Administrative Appeals Tribunal. Unless the decisions of the Tribunal are customarily accepted, all of this effort and expense is wasted. The decisions of the Tribunal fall into disrepute[77].

The Tribunal has been given a challenging and unpopular task. In order to retain public confidence in the Tribunal‟s independence, however, it is critical that the Government sees the interests at stake when it does not abide by the Tribunal‟s decisions, regardless of the outcome. Where a decision is considered legally wrong, the appropriate forum to challenge this is the judicial system. Overturning the Tribunal‟s decision, particularly after it has been affirmed on judicial review, will only damage the Tribunal‟s standing and bring into question the Tribunal‟s role in our system of administrative justice.

Endnotes

1 The Tribunal may review the decision of a delegate of the Minister under section 501 where the applicant would otherwise have had a right of review: *Migration Act 1958*, s 500(3).
2 *Migration Act 1958*, ss 200, 201.
3 See the Senate Legal and Constitutional References Committee: *Administration and operation of the Migration Act 1958* (Canberra, 2 March 2006), para 9.30.
4 *Migration Act 1958* s 501(7).
5 *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 699.
6 *Administrative Appeals Tribunal Act 1975*, s 43.
7 Michael Kirby, ‘Administrative Review: Beyond the Frontiers Marked Policy - Lawyers Keep Out‟ (Paper presented to the Australian National University Administrative Law Seminar, Canberra, 19 July 1981), 10.
8 Ibid.
9 Gabriel Fleming, „The Proof of the Pudding is in the Eating: Questions about the Independence of Administrative Tribunals‟ (1999) 7 *Australian Journal of Administrative Law* 33, 40.
10 Ibid.
11 Gabriel Fleming, „Tribunals in Australia: How to Achieve Independence‟ in Robin Creyke (ed), *Tribunals in the Common World*, 2008, 8.
12 Ibid.
13 Ibid.
14 Deirdre O‟Connor, „Effective Administrative Review: An Analysis of Two-tier Review‟ (1993) 1 *Australian Journal of Administrative Law* 4, 8.

15 Joint Standing Committee on Migration Deportation of Non-Citizen Criminals Parliament of the Commonwealth of Australia, June 1998, para 3.1.
16 Mary Crock, *Immigration and Refugee Law in Australia* (1998), 235.
17 Joint Standing Committee on Migration, above n 17, para 3.1.
18 Margaret Allars, „Human Rights, UKASES and Merits Review Tribunals: The Impact of *Teoh's* Case on the Administrative Appeals Tribunal in Australia" in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (1999), 344.
19 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 („*Jia*").
20 *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431(„*Ram*").
21 Joint Standing Committee on Migration, above n 17.
22 See *Minister for Immigration and Multicultural Affairs v Jia Legeng*, above n 21, para 215: the Minister's comments on the radio included the following: "I'm very unhappy about the way in which the Administrative Appeals Tribunal has been dealing with numbers of matters involving the Immigration Department, in the way in which these discretions have been exercised by members of the Tribunal."
23 *Minister for Immigration and Multicultural Affairs v Jia Legeng*, above n 21, para 217.
24 *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400.
25 *Taufahema v Minister for Immigration and Citizenship* [2009] AATA 898.
26 „Police Want Cop Killer Motekiai Taufahema Deported from Australia", *The Herald Sun*, (Sydney) 9 April 2010, < http://www.news.com.au/breaking-news/police-want-cop-killer-motekiai-taufahema-deported-from-australia/story-e6frfku0-1225851848721>
27 *Pemberton v Minister for Immigration and Citizenship* (2009) 111 ALD 483.
28 S Hewitt, Renato Castello, „Teen Killer Allowed to Stay", *Sunday Mail* (Brisbane) 27 September 2009, <http://www.adelaidenow.com.au/news/south-australia/teen-killer-allowed-to-stay/story-e6frea83-1225779993722>
29 *JSFD v Minister for Immigration and Citizenship* (2009) 111 ALD 685.
30 M Buttler, „Teenage Thug on the Loose", *Herald Sun* (Melbourne), 1 February 2010 <http://www.heraldsun.com.au/news/victoria/teenage-thug-on-loose/story-e6frf7kx-1225825263970>
31 The Editorial, *Herald Sun* (Melbourne) 23 November 2009, 24.
32 *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356.
33 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644.
34 *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356.
35 *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565, 578.
36 *Migration Act 1958* s 499(3): The Minister shall cause a copy of any direction given under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after that direction was given.
37 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644.
38 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979)* 2 ALD 634, 640.
39 Explanatory Memorandum to *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998* Item 30. Previously the government could only issue general directions, such as Direction No 5, which related to refusals to grant a visa under section 501.
40 *Migration Act 1958* s 499(2A); *Rokobatini v Minister for Immigration & Multicultural Affairs* (1999) 90 FCR 583.
41 *SAAC v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 85 ALD 202, 220.
42 *Milne v Minister for Immigration and Citizenship* [2010] FCA 495, para 45.
43 *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580, 598.
44 *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 346.
45 *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667.
46 Direction – Visa Refusal and Cancellation under Section 501 – No 17, para 2.2.
47 *Aksu v Minister for Immigration and Multicultural Affairs,* (2001) 65 ALD 667, 674.
48 See *Ruhl v Minister for Immigration and Multicultural Affairs* (2001) 184 ALR 401; *Javinollar v Minister for Immigration and Multicultural Affairs* [2001] FCA 854; *Jahnke v Minister for Immigration and Multicultural Affairs* [2001] FCA 897; *Andary v Minister for Immigration and Multicultural Affairs* [2001] FCA 1544. *Aksu* was not followed in *Turini v Minister for Immigration and Multicultural Affairs* [2001] FCA 822.

49 *Shvarts v Minister for Immigration and Multicultural Affairs* [2001] AATA 840, para 54: "to the extent that Part 2 represents the Government"s policy with respect to the refusal or cancellation of visas, the Tribunal"s view is that it should take into account such policy without fettering its discretion by giving pre-eminent weight to particular considerations". See also *Policarpio v Minister for Immigration and Multicultural Affairs* [2001] AATA 658.
50 *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580: The Full Federal Court held at page 598 as follows: "Insofar as Direction No 17 requires the decision-makers to give greater weight to the primary considerations, Direction No 17 fetters the discretion given to that decision maker."
51 *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 357 -358.
52 Australian Human Rights Commission, *Background Paper: Immigration detention and visa cancellation under section 501 of the Migration Act* (Sydney, January 2009).
53 I reviewed all section 501 cases heard and determined by the Tribunal between July 2003 and July 2008, there were 146 such cases.
54 Elizabeth Farelly, „Something Rotten in our Sterile World", *Sydney Morning Herald* (Spectrum) 29-30 May 2010, 12.
55 Direction – Visa Refusal and Cancellation under section 501 - No 21, para 2.12.
56 Oral decisions: *Middleton v Minister for Immigration and Multicultural and Indigenous Affairs* (W2004/61)12 May 2004 (murdered his wife); *Norman Hogermeer v Minister for Immigration and Multicultural Affairs* (W2006/27) 24 April 2006 (incest); *Rocky Hogermeer v Minister for Immigration and Multicultural Affairs* (W2004/477) 2 March 2005 (incest); *Iordanishvili v Minister for Immigration and Multicultural and Indigenous Affairs* (V2004/1106) 9 December 2004 (attempted murder of his wife); *Anderson v Minister for Immigration and Citizenship* (N2008/2300) 15 July 2008 (murdered his wife).
57 *Tumanako v Minister for Immigration and Multicultural Affairs* [2006] AATA 848.
58 *Holland v Minister for Immigration and Citizenship* [2008] AATA 340: see also *Baskin and Minister for Immigration and Citizenship* [2008] AATA 420, where the Tribunal set aside the decision to cancel following the applicant"s conviction for murder.
59 The Department did not seek judicial review of the Tribunal"s decision.
60 Michael Kirby, Review on the Merits - the Right or Preferable Decision (Seminar on Review of Administrative Action Mechanisms of Accountability Canberra, 14 November 1979), 15.
61 Kirby, above n 9, 27.
62 *Preston v Minister for Immigration and Multicultural Affairs and Indigenous Affairs (No 2)* [2004] FCA 107, para 23.
63 *Re Afoa and Minister for Immigration and Citizenship* [1999] AATA 82.
64 Peter Bayne, „The Proposed Administrative Review Tribunal – Is there a Silver Lining in the Dark Cloud?" (2000) 7 *Australian Journal of Administrative Law* 86, 98.
65 *Tumanako v Minister for Immigration and Multicultural Affairs*, above n 59, 77.
66 Fiona McKenzie, „The Immigration Review Tribunal and Government Policy: To follow or not to follow?" (1997) 4 *Australian Journal of Administrative Law* 117, 128.
67 Kirby, above n 9, 27.
68 Joint Standing Committee on Migration, above n 17, para 3.4.
69 Direction [No 41] - Visa refusal and cancellation under s 501 (3 June 2009), para 10: Relevant international considerations include the best interests of the child, a primary consideration under the previous directions, as well as *non-refoulement* obligations under treaties such as the Convention and the Protocol Relating to the Status of Refugees.
70 Ibid, para 11.
71 Since Direction No 41 came into force, the Tribunal has heard and determined 31 cases, 15 of which were set aside and 16 affirmed. In the year prior to Direction No 41 coming into force, 40 cases were heard and determined, of which 15 were set aside and 25 affirmed. The numbers are small and there may be a range of factors affecting the set aside rate.
72 In the year prior to Direction No 41 coming into force, excluding discontinued appeals, 13 appeals were lodged by applicants. No appeals were lodged by the Minister. In the year following Direction No 41 coming into force, excluding discontinued appeals, 11 appeals were lodged by applicants and four lodged by the Minister.
73 *Taufahema v Minister for Immigration and Multicultural Affairs* [2009] AATA 898.
74 *Minister for Immigration and Citizenship v Taufahema* [2010] FCA 330, para 38.
75 *Minister for Immigration and Citizenship v Taufahema* [2010] FCA 330, para 30.
76 Yuko Narushima, „Police Killer will be deported", *Sydney Morning Herald*, 30 April 2010. 4.
77 *Nikac v Minister for Immigration and Ethnic Affairs*, above n 7, 84.