



Direction [no.41]—Visa refusal and cancellation under s501

I, CHRIS EVANS, Minister for Immigration and Citizenship, give this Direction under section 499 of the *Migration Act 1958*.

Signed 3rd June 2009

Minister for Immigration and Citizenship

Note: Section 499(1) of the Act empowers the Minister to give to a person or body having functions or powers under the Act written directions not inconsistent with the Act or the Regulations, in accordance with which the person or body shall perform those functions and exercise those powers. The person or body must comply with the Direction.

Part 1 Preliminary

1. Name of Direction

This Direction:

- (a) is the Direction [no.41]—Visa refusal and cancellation under s501; and
- (b) may be cited as Direction [41].

2. Commencement

This Direction commences on 15 June 2009.

3. Revocation

Direction no. 21, given under section 499 of the Act and signed on 23 August 2001, is revoked.

4. Application

- (1) This Direction applies to decision-makers performing functions or exercising powers under section 501 of the Act to refuse to grant a visa to, or to cancel a visa of, a person who does not satisfy the Minister that the person passes the character test.

Note: Section 501 of the Act empowers the Minister to refuse to grant a visa to, or to cancel a visa of, a person who does not satisfy the Minister that the person passes the character test.

5. Preamble

5.1 Objectives

- (1) The objective of the Act is to regulate, in the national interest, the coming into and presence in Australia of non-citizens.
- (2) In this regard, in order to safeguard the Australian community and to enable it to effectively discharge its duties and responsibilities to the Australian people, the Government seeks to protect the Australian community from unacceptable risks of harm as a result of criminal activity or other serious conduct by non-citizens.
- (3) The Government is especially mindful to protect the safety of the community's more vulnerable members, including minors, the elderly and the disabled.

5.2 General Guidance

- (1) To facilitate these objectives, this Direction provides direction to decision-makers with respect to performing functions and exercising powers under section 501 of the Act. The Direction is binding on all decision-makers.

Note: Under section 499(2A) of the Act, persons and bodies must comply with a direction made under section 499.

- (2) In reaching a decision on whether to refuse or cancel a visa, a decision-maker needs to consider:
 - (a) the nature of any harm that the person concerned may cause to the Australian community; and
 - (b) the risk of that harm occurring.
- (3) Exercise of the section 501 power must also be considered in the context of a wide range of factors, including whether the person began living in Australia as a minor, the length of time the person has been ordinarily resident in Australia and any relevant international law obligations.
- (4) In some circumstances it may be appropriate for the Australian community to accept more risk where the person concerned has, in effect, become part of the Australian community owing to their having spent their formative years, or a major portion of their life, in Australia.
- (5) Among other matters, therefore, this Direction provides direction on the relevant factors that must be considered in making a decision under section 501 of the Act.

Note: See Part B of this Direction.

6. Interpretation

- (1) In this Direction:

Act means the *Migration Act 1958*

association is an association with someone else, or with a group or organisation, whom the decision-maker reasonably suspects has been, or is, involved in criminal conduct

character test has the same meaning as in section 501(6) of the Act

court takes its ordinary meaning and includes a court defined by section 501(12) of the Act

decision-maker means a person (sometimes referred to as a delegate) or body (such as the Administrative Appeals Tribunal but other than the Minister) with the power to perform functions or exercise powers under section 501 of the Act.

enter Australia has the same meaning as in section 5(1) of the Act

imprisonment has the same meaning as in section 501(12) of the Act

minor has the same meaning as in section 5(1) of the Act

non-citizen has the same meaning as in section 5(1) of the Act

periodic detention has the same meaning as in Regulation 1.03 of the *Migration Regulations 1994*

person, for the purposes of this Direction, means a non-citizen who is an applicant for, or the holder of, a visa

primary consideration is a consideration listed in paragraph 10 of this Direction

remain in Australia has the same meaning as in section 5(1) of the Act

section, in relation to a provision of the Act, means, as appropriate, section, subsection, paragraph or subparagraph

sentence has the same meaning as in section 501(12) of the Act

substantial criminal record has the same meaning as in section 501(7) of the Act.

visa has the same meaning as in section 5(1) of the Act

visa applicant has the same meaning as in section 5(1) of the Act

visa holder has the same meaning as in section 5(1) of the Act.

Part 2 Directions

Decision-makers must be aware that, regardless of whether the final decision relates to refusal or cancellation, the section 501 process comprises two stages:

- (1) The person must satisfy the decision-maker that the person passes the character test; and
- (2) If the person does not satisfy the decision-maker that they pass the character test, and in the case of a possible cancellation decision the decision-maker reasonably suspects that the person does not pass the character test, the discretion to refuse to grant or to cancel a visa is enlivened, and the decision-maker should consider whether it is appropriate to refuse or cancel the visa given the specific circumstances of the case.

This Direction, therefore, comprises two Parts:

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| Part A | provides directions on the application of the character test. The character test is set out in section 501(6) of the Act; and |
| Part B | provides directions on the primary and other considerations that are relevant to determining whether it is appropriate in the specific circumstances of the case to exercise the discretion to refuse to grant or cancel the visa. Decision-makers should note that a number of the primary and other considerations may not be relevant to a decision under certain circumstances. In the case of a visa applicant who is outside Australia (offshore), the primary consideration relating to length of residence in Australia may not be relevant. |

Part A - Application of the character test

7. Overview of the character test

- (1) A visa may be refused if the person does not satisfy the Minister that the person passes the character test. A visa may be cancelled if the decision-maker reasonably suspects that the person does not pass the character test and the person does not satisfy the decision-maker that they pass the character test.
- (2) The character test is set out in section 501(6) of the Act and it provides that a person does not pass the character test in certain, specified, circumstances. Those circumstances are discussed in further detail below.

Note: Persons who are being considered under section 501 of the Act must satisfy the decision-maker that they pass the character test set out in section 501(6) of the Act. In practice, if a person does not satisfy the decision-maker that the person passes the character test, that will be because the decision-maker has determined, on the basis of all relevant information including information provided by the person, that the person does not pass the character test by reference to section 501(6) of the Act.

Section 501(6) of the Act prescribes the four circumstances in which a person does not pass the character test. A person need only fail one ground to fail the character test – failure under all grounds is not necessary.

If the person does not pass the character test, section 501(1) of the Act enables a visa to be refused and section 501(2) of the Act enables a visa to be cancelled.

Part B of this Direction provides direction on the relevant factors that must be considered in exercising or not exercising the discretion under section 501 of the Act.

7.1 Substantial criminal record

- (1) A person does not pass the character test if the person has a substantial criminal record. The term 'substantial criminal record' is defined in section 501(7) of the Act.

Note: See section 501(6)(a) of the Act.

7.2 Association

- (1) A person will not pass the character test if the person has or has had an association as defined in paragraph 6(1) of this Direction.

Note: See section 501(6)(b) of the Act.

In some cases the information concerning association will be protected from disclosure by section 503A of the Act. In all cases, great care should be taken not to disclose information that might put the life or safety of informants or other persons at risk.

- (2) In establishing association, the following factors are to be considered:
 - (a) the nature of the association;
 - (b) the degree and frequency of association the person had or has with the individual, group or organisation; and
 - (c) the duration of the association.
- (3) Subject to paragraph 7.2(2) of this Direction, an assessment of whether the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation is required – mere knowledge of the criminality of the associate is not, in itself, sufficient to establish association. In order to not pass the character test on this ground, the association must have some negative bearing upon the person's character.

7.3 Not of good character on account of past and present criminal or general conduct

- (1) A person will not pass the character test if the person is not of good character, having regard to their past and present criminal and/or their past and present general conduct.

Note: See section 501(6)(c) of the Act.

- (2) In considering whether a person is not of good character, all the relevant circumstances of the particular case are to be taken into account, including evidence of rehabilitation and any recent good conduct.

Note: 'Past and present criminal conduct' and 'past and present general conduct' are discussed further below.

7.3.1 Past and present criminal conduct

- (1) In considering whether a person is not of good character on the basis of past or present criminal conduct, the following factors are to be considered:
 - (a) the nature, severity and frequency of the offence/s;
 - (b) the period since the offence/s were committed;
 - (c) where the offence/s were committed;
 - (d) the person's record since the offence/s were committed, including:
 - (i) any evidence of recidivism or continuing association with criminals;
 - (ii) any pattern of similar offences;
 - (iii) any pattern of continued or blatant disregard or contempt for the law;
 - (e) any circumstances surrounding the offending which may explain the conduct such as may be evident from judges' comments, parole reports and similar documents; and
 - (f) any good acts of the person after their criminal conduct are indications that the person's character may have reformed.

Thus, both good and bad conduct must be taken into consideration in obtaining a complete picture of the person's character.

7.3.2 Past and present general conduct

- (1) In considering whether the person is not of good character on the basis of past and present general conduct, the following factors are to be considered:
 - (a) whether the person has been involved in activities indicating contempt or disregard for the law or for human rights. This includes, but is not limited to:

- (i) involvement in activities such as terrorist activity, activities in relation to trafficking or possession of trafficable quantities of proscribed substances, political extremism, extortion, fraud; or
- (ii) a history of serious breaches of immigration law; or
- (iii) involvement in war crimes or crimes against humanity;

Note: The past and present general conduct provision allows a broader view of a person's character where convictions may not have been recorded or where the person's conduct may not, strictly speaking, have constituted a criminal offence. Therefore, the list of examples above is broader than those listed in paragraph 10.1.1 of this Direction. The provision is generally used in respect of the refusal caseload and very rarely in relation to cancellation.

- (b) whether the person has been removed or deported from Australia or another country and the circumstances that led to the removal /deportation; or
- (c) whether the person has been:
 - (i) dishonourably discharged; or
 - (ii) discharged prematurely;
 from the armed forces of another country as the result of disciplinary action in circumstances, or because of conduct, that in Australia would be regarded as serious.

Note: Conduct considered to be serious in Australia is set out in paragraph 10.1.1 of Part B of this Direction.

- (2) In addition to the above matters, if the person's conduct is the subject of criminal charges in Australia, which have not been finalised before the relevant court, no decision should be made in respect of the character test until the charges have been resolved.
- (3) Where charges have been brought against a person in a jurisdiction other than an Australian jurisdiction, the conduct that is the subject of those charges must be considered in the context of its impact on the person's character.
- (4) General conduct also includes recent good conduct. Any good acts of the person after any reprehensible conduct are indications that the person's character may have reformed. Thus, both good and bad conduct must be taken into consideration in obtaining a complete picture of the person's character.

7.4 Significant risk in regards to future conduct

- (1) A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a significant risk that the person would engage in any of the conduct specified in section 501(6)(d) of the Act. Those types of conduct are discussed below.

Note See section 501(6)(d) of the Act.

- (2) The 'significant risk' grounds are enlivened if there is evidence suggesting that there is more than a minimal or trivial likelihood that the person, if allowed to enter or to remain in Australia, would engage in conduct specified in section 501(6)(d) of the Act.
- (3) It is not sufficient to find that the person has engaged in conduct specified in paragraph 501(6)(d) of the Act in the past. There must be a significant risk that the person would engage in the future in the specified conduct set out in section 501(6)(d) of the Act.

7.4.1 Significant risk of engaging in criminal conduct in Australia

- (1) A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a significant risk that the person will engage in criminal conduct in Australia.

Note See section 501(6)(d)(i) of the Act.

- (2) The reference to criminal conduct must be read as requiring that there is a significant risk of the person engaging in conduct for which a criminal conviction could be recorded.

7.4.2 Significant risk of harassing, molesting, intimidating or stalking another person in Australia

- (1) A person will not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a significant risk that the person will harass, molest, intimidate or stalk another person in Australia.

Note See section 501(6)(d)(ii).

- (2) 'Harassment', 'molestation', 'intimidation' and 'stalking' are to be given their ordinary meaning.

Note: Section 501(11) of the Act clarifies the scope of conduct amounting to harassment or molestation. Conduct and behaviours that may fall under this category include, but are not limited to, the following:

- (a) conduct that could be construed as harassment or intimidation (whether or not it breaches the terms of an Apprehended or Domestic Violence (or similar) Order);
- (b) conduct that potentially places children in danger, such as unwelcome and/or inappropriate approaches, including, but not limited to, approaches made through electronic media; or
- (c) conduct that would reasonably cause an individual to be severely apprehensive, fearful, alarmed or distressed regarding the person's behaviour or alleged behaviour towards the individual, or in relation to the property of that or any other individual.

7.4.3 Significant risk of vilifying a segment of the community, of inciting discord or of representing a danger through involvement in disruptive and/or violent activities

Note See section 501(6)(d)(iii), (iv) and (v) of the Act.

- (1) In deciding whether a person does not pass the character test under section 501(6)(d)(iii), (iv) or (v) of the Act, factors to be considered include, but are not limited to, evidence that the person would:
 - (a) hold or advocate extremist views such as a belief in the use of violence as a legitimate means of political expression;
 - (b) vilify a part of the community;
 - (c) has a record of encouraging disregard for law and order;

Note: For example, in the course of addressing public rallies.

- (d) has engaged or threatens to engage in conduct likely to be incompatible with the smooth operation of a multicultural society;

Note: For example, advocating that particular ethnic groups should adopt political, social or religious values well outside those generally acceptable in Australian society, and, which, if adopted or practised, might lead to discord within those groups or between those groups and other segments of Australian society.

- (e) participates in, or is active in promotion of, politically motivated violence or criminal violence and/or is likely to propagate or encourage such action in Australia;
 - (f) is likely to provoke civil unrest in Australia because of the conjunction of the person's intended activities and proposed timing of their presence in Australia with those of another individual, group or organisation holding opposing views.
- (2) The operation of section 501(6)(d)(iii), (iv) and (v) of the Act must be balanced against Australia's well established tradition of free expression. The grounds in these sub-paragraphs are not intended to provide a charter for denying entry or continued stay to persons merely because they hold and are likely to express unpopular opinions, even if these opinions may attract strong expressions of disagreement and condemnation from some elements of the Australian community.

PART B - EXERCISING THE DISCRETION

8. When to exercise the discretion

- (1) If, following formal consideration, the person does not satisfy the decision-maker that the person passes the character test, consideration should be given to whether to exercise the discretion to refuse or cancel a visa.

9. Taking the relevant considerations in account

- (1) Consistent with Part 2, paragraph 2 (Part B) of this Direction, decision-makers must take into account the primary considerations in every case. The other considerations (defined in paragraph 11) should be taken into account where relevant.

Note: The primary considerations are set out in paragraph 10 of this Direction. The other considerations are set out in paragraph 11.

- (2) Decision-makers should only take into account directly relevant considerations.

Note: For example, when considering a possible refusal where the person is offshore, the decision-maker may only need to take into account some of the primary considerations.

10. The primary considerations

- (1) In deciding whether to refuse to grant a person a visa or cancel a person's visa, the following (the ***primary considerations***) are to be considered:
 - (a) the protection of the Australian community from serious criminal or other harmful conduct, particularly crimes involving violence;
 - (b) whether the person was a minor when they began living in Australia;
 - (c) the length of time that the person has been ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct; and
 - (d) relevant international obligations, including but not limited to:
 - (i) the best interests of the child, as described in the Convention on the Rights of the Child (CROC); and
 - (ii) the non-refoulement obligations contained in the Convention and the Protocol Relating to the Status of Refugees (the Refugees Convention), the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

10.1 Protection of the Australian community

- (1) Due consideration is to be given to the Government's objectives set out in Part 1, paragraph 5 of this Direction.
- (2) The factors relevant to assessing the level of risk of harm to the community of the person's entry or continued stay include:
 - (a) the seriousness and nature of the relevant conduct; and
 - (b) the risk that the conduct may be repeated.

Note: Both of these factors are discussed further below.

10.1.1 The seriousness and nature of the conduct

- (1) Crimes involving violence or the threat of violence are of special concern to the welfare and safety of the Australian community. Those crimes involving violence, particularly against vulnerable persons (such as minors, the elderly and the disabled), are especially abhorrent to the whole community.
- (2) The following are examples of offences and conduct that are considered serious:
 - (a) murder, manslaughter, or any other form of unlawful killing;
 - (b) all offences perpetrated against a child (particularly sexually-based offences);
 - (c) rape and any other sexually-based offences;
 - (d) grievous bodily harm, reckless injury, assault and aggravated assault (including abduction);
 - (e) robbery;
 - (f) the production, possession, importation or trafficking of trafficable or commercial quantities of illicit drugs;
 - (g) terrorist activity;
 - (h) people smuggling, trafficking and/or harbouring or concealing;
 - (i) ancillary offences in respect of offences and conduct that are considered serious, including:
 - (i) convictions for attempting to commit an offence;
 - (ii) convictions for conspiracy to commit an offence; and
 - (iii) convictions for being an accessory before or after the fact in respect of an offence.
 - (j) organised criminal activity resulting in a conviction in Australia or elsewhere;
 - (k) arson;
 - (l) blackmail and/or extortion; and
 - (m) serious theft.

Note: For the purposes of paragraph 10.1.1(2) of this Direction, the list of offences and conduct is non-exhaustive.

For the purposes of paragraph 10.1.1(2)(e) of this Direction, robbery is defined as the direct taking of property (including money) from a person (victim) through force, threat or intimidation. 'Armed robbery' involves the use of a weapon capable of causing bodily harm, such as, but not limited to, a firearm, knife or club.

Paragraph 10.1.1(2)(f) of this Direction is not intended to include offences related to personal use of illicit drugs less than a trafficable quantity.

- (3) The sentence imposed for an offence is considered indicative of the seriousness of the offender's conduct against the community. Due regard must be given to the extent of the person's criminal record, including:
 - (i) the number and nature of offences;
 - (ii) the period between offences; and
 - (iii) the time elapsed since the most recent offence.
- (4) The following factors are also to be considered:
 - (a) any relevant information, including, but not limited to, evidence from independent and authoritative sources in respect of the person such as judicial comments in an individual's case, professional psychological reports, pre-sentence reports for the courts, parole assessments, victim impact statements and similar sources of authoritative information or assessment;
 - (b) any relevant factors the person provides as mitigating factors;
 - (c) whether the offence or conduct in another country is not classified as an offence in Australia;

Note: For example, a person who has been subject to imprisonment in another country as a result of political, religious or ethnic persecution may have a substantial criminal record and thus not pass the character test. However, it may nonetheless be appropriate not to exercise the discretion to refuse or cancel the visa, thus permitting the person to enter or remain.

- (d) whether a lighter sentence would be incurred in Australia for a similar offence committed in another country; or
- (e) whether the person has been pardoned.

Note: In some jurisdictions, a pardon may only have the status of spent convictions legislation in Australia. Furthermore, a distinction must be made in respect of pardons between a person being pardoned in relation to their convictions (such as a person being exonerated) and where a person has been 'pardoned' the remainder of any custodial sentence imposed. A sentence is to be disregarded pursuant to section 501(10) of the Act only in respect of a pardon of the former kind.

- (5) If the person does not pass the character test due to an acquittal resulting from unsoundness of mind or insanity, the degree of recovery is to be taken into consideration. In such cases:
 - (a) information is to be obtained through a mental health assessment and/or report compiled by an appropriately

qualified professional that outlines the nature and extent of any mental impairment;

- (b) if the person is in Australia, consideration is to be given to whether they would have access to appropriate medication or treatment in the country to which they would be removed, noting the hardship that they would face, and potential danger the person may represent, if this were not available to them; and
- (c) if the person continues to rely on medication to control their condition, consideration is to be given as to whether they can reasonably be considered to have fully recovered. The likely consequences of the person deliberately or accidentally not taking their medication must also be considered.

10.1.2 The risk that the conduct may be repeated

- (1) The person's previous general conduct and total criminal history are to be considered highly relevant to assessing any risk of re-offending.
- (2) The following factors are to be considered as particularly relevant to this assessment:
 - (a) a recent history of convictions, which should be considered as indicating an increased risk of re-offending;
 - (b) evidence of the extent of rehabilitation already achieved and the prospect of further rehabilitation. Greater weight should generally be given to evidence from independent and authoritative sources, such as judicial comments, professional psychological reports, pre-sentence reports for the courts, parole assessments, and similar sources of authoritative information or assessment; and
 - (c) evidence that the person has breached judicial orders, including parole, bail, bonds, suspended sentences and any other relevant undertakings or conditions imposed by the courts.

10.2 Whether the person was a minor when they began living in Australia

- (1) If the person was a minor when they began living in Australia and spent their formative years in Australia, thereby increasing the likelihood of establishment of greater ties and linkages to the Australian community, this is to be given favourable consideration.
- (2) Less weight should be given if the person began living in Australia as a minor but was close to attaining adulthood at that time.

Note: For example, if the person was between 17 and 18 years old on arrival.

10.3 The length of time that a person has been ordinarily resident

- (1) Reflecting the fact that the longer a period of residence in Australia the greater the likelihood of significant ties to the Australian community, more favourable consideration is to be given the longer the person has been ordinarily resident in Australia prior to engaging in criminal activity or activity that bears negatively on their character.

Note: For example, a period of more than 10 years of residence in Australia prior to a person engaging in criminal activity or activity which bears negatively on the person's character would be an important consideration.

10.4 International obligations

- (1) Reflecting Australia's obligations under the CROC, if there is a child in Australia who is potentially affected by a visa refusal or cancellation decision, decision-makers must have regard to the best interests of the child.
- (2) Where relevant, any non-refoulement obligations, including under the Refugees Convention, must be considered.

Note: Notwithstanding international obligations, the power to refuse to grant a visa or cancel a visa must inherently remain a fundamental exercise of Australian sovereignty. The responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies within the discretion of the responsible Minister.

10.4.1 The best interests of the child

- (1) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to refuse to grant or cancel a visa is expected to be made.
- (2) The best interests of any child who is 18 years or older is not a primary consideration but may be considered with other considerations under paragraph 11 of this Direction.
- (3) If there are two or more relevant children, it is not to be assumed that the interests of each child will coincide. It may be that the best interests of one child may indicate that the person should not be refused a visa or have their visa cancelled and be removed from Australia, whereas the best interests of another child may not be adversely affected by visa refusal or cancellation and removal. The best interests of each child should therefore be given individual consideration.

- (4) Under Australian law, it is generally presumed that a child's best interests will be served if the child remains with its parents. Factors, which may indicate that the child's best interests are served by separation from the person include, but are not limited to:
- (a) any evidence that the person has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; or
 - (b) any evidence that the child has suffered or experienced any physical or emotional trauma arising from the person's conduct.
- (5) In considering the best interests of the child, the following factors are to be considered:
- (a) the nature of the relationship between the child and the person, for example, a relationship that has parental rights or regular meaningful contact with a child compared to a relationship with long periods of absence and limited meaningful contact with a child;
 - (b) the duration of the relationship, including the number and length of any separations and reason/s for the separation;
 - (c) the extent to which the person is likely to play a full parental role up to the child's eighteenth birthday;
 - (d) the child's age;
 - (e) whether the child is an Australian citizen, permanent resident or New Zealand citizen;
 - (f) the likely effect that any separation from the person would have on the child;
 - (g) the existence of other persons who already fulfil a parental role in relation to the child;
 - (h) the impact of the person's prior conduct and whether that conduct has, or has had, a negative or positive impact on the child;
 - (i) the time that the child has spent in Australia;
 - (j) any Court orders relating to parental access and care arrangements;
 - (k) any known wishes expressed by the child;
 - (l) whether the child is likely to accompany the person overseas in the event the person is removed from Australia;
 - (m) the circumstances of the probable country of future residence, including the educational facilities and the standard of the health support system (if any) of the country should the person not be permitted to enter or remain in Australia but taking into account that a higher standard of health, educational or other

services in Australia does not of itself mean that a non-citizen child should not be removed to another country;

- (n) any language barriers for the child in the probable country of future residence, but taking into account the relative ease with which younger children acquire new languages; and
- (o) any cultural barriers for the child in the probable country of future residence, but taking into account the relative ease with which younger children generally adapt to new circumstances.

10.4.2 Convention and the Protocol Relating to the Status of Refugees

- (1) In cases where issues of protection pursuant to the Refugees Convention are raised by the person or are clear from the facts of the case, they must be given consideration.
- (2) If Article 33(1) of the Refugees Convention applies, consideration is to be given to whether the benefit of that provision may not be claimed by the person because of Article 33(2) of the Refugees Convention.

Note: An explanation of Article 33(1) and (2) can be found in the Character section 501 Procedures Advice Manual maintained by the Department of Immigration and Citizenship.

10.4.3 Other relevant international obligations

- (1) The following are to be considered:
 - (a) The ICCPR has an implicit non-refoulement obligation where, as a necessary or foreseeable consequence of their removal from Australia, the person would face a real risk of violation of their rights under Article 6 (right to life), or Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment), or face the death penalty, no matter whether lawfully imposed (Second Optional Protocol);
 - (b) The CAT has an explicit prohibition against refoulement where there are substantial grounds for believing the person would be in danger of being subjected to torture; and
 - (c) The prohibition against refoulement under the ICCPR and CAT is absolute. There is no balancing of other factors if the removal of a person from Australia, including if that removal followed as a consequence of the refusal or cancellation of a visa, would amount to refoulement under the ICCPR or the CAT.

11. Other considerations

Note: These are not primary considerations.

- (1) In reaching a decision on whether to refuse or cancel a visa, other considerations, although not primary, may be relevant and, if so, must be considered.
- (2) It is appropriate that these considerations, where relevant, must be taken into account but, generally, they should be given less weight than that given to primary considerations.
- (3) These other considerations include:
 - (a) family ties, the nature and extent of any relationships:
 - (i) the extent of disruption to the person's family, business and other ties to the Australian community;
 - (ii) a genuine marital (including de jure or de facto) relationship with an Australian citizen, permanent resident or eligible New Zealand citizen:
 - (A) to be considered are the nature and duration of the relationship; the degree to which the partner is financially, physically or psychologically dependent on the non-citizen; (if applicable) the impact of separation resulting from the person's removal from Australia; and whether, at the time of entering into or establishing the relationship, the partner knew that the person was of character concern;
 - (b) the person's age: for example, the following circumstances may be considered in the person's favour:
 - (i) if the person is elderly and would be unable to access services such as aged care and income support in the country to which they would be returned;
 - (ii) where they are living with or under the care and control of a parental or care figure, the negative impact that refusal or cancellation (and probable consequential removal from Australia) may have on the person, whether or not they are a minor;
 - (c) the person's health:
 - (i) any health conditions that a person suffers are given appropriate favourable consideration, including:
 - (A) information should be obtained from an appropriately qualified professional that outlines: the nature and extent of the health condition and the extent to which it affects the person; whether the person requires any form

of care or assistance; whether the condition is degenerative or if they will recover; and, for persons onshore, whether the person would have appropriate access to necessary medication or medical treatment if they were removed from Australia, noting the impact including the hardship they would face if this was not available to them;

- (B) any disability that may impair, or has impaired, the person's ability to advocate on their own behalf;
- (d) any links to the country to which they would be removed. For example, where the person has no significant familial ties or support in that country, this may be considered in the person's favour;
- (e) hardship likely to be experienced by the person or their immediate family members lawfully resident in Australia:
 - (i) including whether the immediate family members are able to travel overseas to visit the person; the nature of the relationship between the person and the immediate family members; and whether immediate family members are in some way dependent on the person for support which cannot be obtained elsewhere;
 - (ii) the ability of the person, together with any accompanying family members, to acquire new language skills and their capacity to obtain support. Where possible, this information should be obtained through interviewing the person and their family members;
- (f) level of education, for example the following would be considered in the person's favour:
 - (i) the person's inability, due to a lack of education, to advocate on their behalf or on behalf of any relevant persons who may be adversely affected by a visa refusal or cancellation decision;
 - (ii) any efforts made by the person to improve their education and, therefore, increase their capacity to positively contribute to the Australian community through employment or other activities;
- (g) whether the person has been formally advised in the past by an officer of the Department of Immigration and Citizenship about conduct that brought the person within the deportation provisions of the Act (as in force at that time) or the character (visa refusal and cancellation) provisions of the Act (as in force at that time).