

# Not only punishment

## When criminal and immigration law intersect

By DAVID PRINCE and JOANNE KINSLOR

Criminal law outcomes can have significant impacts on a non-citizen and solicitors need to be alert to immigration issues when preparing a case.



David Prince and Joanne Kinslor are principals of Kinslor Prince Lawyers and are both Accredited Specialists in immigration law.

Immigration law can significantly impact on outcomes for clients whose primary problem arises within a criminal law context. In some cases, it may be necessary to act urgently to address government action, for example the high-profile case of Dr Mohamed Haneef,<sup>1</sup> and knowledge of the immigration issues arising will be critical.

In most criminal law cases, immigration consequences for clients do not arise until many months after their criminal lawyer has closed their file and their sentence is about to be completed. Yet, the prior running of the criminal law case, the agreed facts, the judge's comments and the sentence can influence outcomes not contemplated at the time of criminal law proceedings. The prospects of a long-term permanent resident being removed from Australia may be critically influenced by agreed facts not important for criminal law outcomes. As another example, a sentencing judge's comments can play an important role in whether a refugee is granted a permanent resident visa or whether they are held in immigration detention indefinitely (see "Protection visas: High Court finds adverse security regulation invalid" on p.46 of this issue).<sup>2</sup>

In our experience, criminal law practitioners are often unaware or have a limited understanding of the risks and difficulties that can arise for their non-citizen clients or the ramifications of decisions taken during criminal law proceedings on immigration outcomes. As a criminal law practitioner would also need to be regis-

tered as a migration agent to practise in this area, unfamiliarity with immigration issues is unsurprising, but problematic.

### Immigration character provisions

Australian courts have held that immigration detention of a non-citizen, even if indefinite, is not punishment, but is permissible administrative action within the executive's power to exclude, admit and deport aliens.<sup>3</sup> This is an exception to the constitutionally entrenched principle that only a court can effect involuntary detention.

Moreover, permanent removal of a long-term resident from Australia solely on the basis of their criminal record<sup>4</sup> has been held not to constitute punishment, but to be permissible executive action for the protection of the Australian community.<sup>5</sup>

Through the operation of Australia's immigration character provisions, a non-citizen who has been convicted of criminal conduct (even if they have served their sentence):

- be incarcerated in immigration detention during any merits review or judicial review appeal against an adverse character decision;<sup>6</sup>
- be incarcerated in immigration detention for an extended, perhaps indefinite, period of detention while the department seeks to remove them from Australia; and
- be permanently excluded from Australia, regardless of the length of time they have lived here or their ties with the

Australian community.<sup>7</sup>

Given "immigration detention" (which may occur in a prison or remand centre)<sup>8</sup> deprives a person of their liberty and that exile from one's home is a traditional form of punishment (the modern nation of Australia being founded as a convict settlement of felons sentenced to removal from their home), it could be suggested that the system effects a double punishment upon a non-citizen for their criminal conduct. The Australian judiciary, however, does not accept this characterisation.

### NEED TO KNOW

#### Immigration and criminal law

- **Seek immigration advice early if the client is a non-citizen.**
- **Immigration detention is not considered punishment, and character decisions are administrative decisions, with judicial review limited to jurisdictional errors.**
- **Any criminal conviction raises the possibility of visa refusal or cancellation on the basis of character.**
- **The offence, agreed facts, mitigating circumstances and judge's comments can impact on later immigration decisions.**

# to fear



Illustration: NIGEL BUCHANAN

### Administrative process

On account of immigration character decisions being administrative decisions rather than decisions about punishment for criminal guilt, the above adverse consequences arise through a process without the checks and balances or safeguards of the Australian criminal justice system. For example:

- Character decisions can be made without a non-citizen being given an opportunity to be heard<sup>9</sup> and, when they are given an opportunity to be heard, it does not include a right to provide oral evidence (regardless of the literacy level of

the non-citizen).

Character decisions can be made by the minister personally, with only evidence of the person's criminal record, and even mitigating sentencing comments from an appeal court are not a mandated relevant consideration.<sup>10</sup>

Character decisions can be made by taking into account 'protected information' excluded from the non-citizen and their legal representative. What is exceptional is that such protected information cannot be shown to a court, even for the purpose of reviewing the decision-maker's conclusion about what is protected information.<sup>11</sup>

Character decisions can (and usually are) made without expert evidence relevant to critical matters. The full Federal Court, while concerned about the decision-making process, found no legal error in the Minister for Immigration assessing the best interests of young Australian citizen children without any expert report or detailed information about the effect upon them of the cancellation of their father's long-term permanent resident visa.<sup>12</sup>

At any stage, the Minister for Immigration can make an unreviewable decision to cancel or refuse a visa on character grounds if that is deemed in the national

interest. This can be the initial decision or it may be to overturn a decision of the department<sup>13</sup> or the Administrative Appeals Tribunal (AAT). Such a decision can be made without prior notice to the non-citizen and cannot be appealed against (except on the basis of jurisdictional error).

In the case of Mr Taufahema, the AAT decided that, despite his serious criminal record, his permanent resident visa should not be cancelled because of mitigating factors, such as evidence of his rehabilitation, his daughter and family ties.<sup>14</sup> The decision was upheld by the Federal Court when the minister appealed.<sup>15</sup> Under continued political pressure,<sup>16</sup> the minister, from a practical perspective, effectively annulled the Federal Court's decision by personally cancelling Mr Taufahema's visa.

#### Scope of the power

Knowing that a client has lived lawfully in Australia for a long time, has received Centrelink payments or has a tax file number is not sufficient to discern whether or not they may be at risk of immigration detention and removal from Australia because of their criminal conduct. Any client with a criminal law problem who does not have proof of Australian citizenship should be advised to seek immigration advice.

The relevant distinction is no longer between those who are integrated or absorbed into the Australian community and those whose home is elsewhere, but instead a distinction arising solely from a formal, legal status of citizenship. To illustrate, Mr Ayan migrated to Australia



*"The adverse consequences [from immigration character decisions] arise through a process without the checks and balances or safeguards of the Australian criminal justice system."*

with his family when he was six months old and lived his entire life in Australia. He had a long criminal record in Australia from the age of 14, which was mainly break and enter in order to support a heroin addiction. While observing that it was "difficult to resist the proposition that in every respect, except citizenship, he is an Australian", Justice Sackville (in agreement with other members of the Federal Court bench) found that Mr Ayan could be permanently removed from Australia as a result of the operation of the immigration character provisions.<sup>17</sup> Mr Ayan's situation is not exceptional.<sup>18</sup>

Therefore, any non-citizen who doesn't meet the character test, regardless of their connections with the Australian community, their length of residence in Australia or whether their criminal conduct arose solely within the context of their life in Australia, may be subject to an immigration character decision and removed from Australia.

#### The character test and the 12-month sentence rule

Any criminal conviction potentially raises the possibility of visa refusal or cancellation on the basis of character.<sup>19</sup> However, a sentence of 12 months or more creates a definite risk. The difference between a sentence of 11 or 12 months for

a non-citizen is much more than the difference of imprisonment for one month, as it is the difference between whether or not they are automatically liable to be permanently removed from Australia. The immigration character test should inform the type of sentences that defence solicitors argue for on behalf of non-citizen clients.

As it stands, if the person has received a sentence of 12 months or more, or sentences adding up to two years or more, the person automatically fails the character test, regardless of whether the sentences are suspended or served.<sup>20</sup> This fact is unchanged despite the length of time which has passed, any evidence of reformation of character or rehabilitation.

Even a sentence passed in a foreign country for conduct not recognised as an offence under Australian law is a sentence for the purpose of the character test. Nelson Mandela would not pass Australia's immigration character test.

The character provisions also operate to bring about the adverse consequences of immigration detention and removal from Australia in circumstances where a non-citizen does not have a criminal record.<sup>21</sup> For example, a person may fail the immigration character test by having an association with someone, or with a group or organisation, which the minister reasonably suspects has been or is involved in

criminal conduct. It is not necessary to establish beyond reasonable doubt that the associate is in fact involved in criminal conduct.

Additionally, a person may fail the immigration character test on account of the minister forming the view that there is a significant risk of the person engaging in criminal conduct in Australia or becoming involved in activities disruptive to or threatening harm to the Australian community.<sup>22</sup>

From an immigration perspective, a client's interests are in a prosecution not succeeding, as well as in evidence against them being challenged and in limiting adverse public perceptions.

#### Clients without visas

Particular considerations arise for a client without any visa (termed an "unlawful non-citizen"<sup>23</sup>). All that will be normally achieved by obtaining bail for an unlawful non-citizen is they will be transferred from a remand centre to one of the limited number of immigration facilities around Australia, which may not be in the same state or territory in which the person was previously being held in criminal custody. It may be a waste of time and money to pursue a bail application when obtaining bail may result in their being moved to an immigration detention centre further

away from their personal contacts or otherwise less favourable to them than the criminal facility where they are.

The first step for an unlawful non-citizen is to obtain immigration advice to find out whether they can lodge an application for a visa and address character issues within that context, and the prospects of their being locked up for the remainder of their stay in Australia.

#### How can a criminal law practitioner help?

It is important that a criminal law practitioner raises immigration consequences with their non-citizen clients<sup>24</sup> and advises them to seek immigration advice at an early opportunity. In our experience, many visa holders/visa applicants with convictions are surprised by and unprepared for the immigration consequences. Even when they are notified that the minister or department is considering their character, they do not realise that their only opportunity to make submissions without being subject to mandatory immigration detention (perhaps their only opportunity at all<sup>25</sup>) is prior to the original decision being made,<sup>26</sup> or that they must take responsibility for presenting evidence to dissuade the decision-maker from cancellation/refusal.

If the minister or their delegate is not

satisfied a person meets the character test, then they have the discretion, but not the obligation, to refuse or cancel a visa. This allows for consideration of the subjective aspects of the case, consideration of what the criminal conduct reveals about the moral qualities of the person, the likelihood of future criminal conduct and compassionate reasons against cancellation.

The decision-maker is unlikely to undertake any investigation, obtain oral evidence from a visa holder or visa applicant, or obtain expert evidence pertaining to relevant considerations. However, agreed facts from a criminal trial and judge's comments may be given great weight in discerning the non-citizen's moral culpability, essential moral qualities and threat to the good order of Australian society. Therefore, when negotiating agreed facts, a criminal law practitioner with a non-citizen client should consider not just the elements of the criminal offence but also how the agreed facts could impact on a consideration of the moral qualities of the client at a later stage. Furthermore, evidence of mitigating circumstances and compassionate factors presented to a court may impact on a judge's comments and, by consequence, a later immigration decision. □

#### ENDNOTES

1. The Minister for Immigration and Citizenship acted to cancel the visa of Dr Mohamed Haneef within hours of a magistrate granting bail. The consequence was that after being released from remand, Dr Haneef was to be administratively detained. See *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273.  
2. Recently, in *Plaintiff M47-2012 v Director General of Security* [2012] FCA 46 (M47), the High Court was asked to find that a person assessed as a refugee who had received an adverse security assessment preventing grant of a protection visa could not be held in immigration detention indefinitely. The High Court decided the case on an alternative basis.  
3. See *Chu Kheng Lim and Ors v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 and *Al-Kateb v Godwin* [2004] HCA 37. This position was not altered by M47 (above n.2).  
4. Even taking into account factors of deterrence and seeking to give effect

to Australian community expectation that the person will obey Australian law.  
5. See *Djalil v Minister for Immigration and Multicultural and Indigenous Affairs* 206 ALR 488 at 504. Special leave to appeal to the High Court was refused.  
6. Detention is required as a matter of law. Any attempt to appeal to the judiciary for release will be futile if the character decision was lawfully made. See *Migration Act 1958*, s.189-196 and ss.501E and 501F.  
7. Australian immigration law operates to ensure that a person whose visa is cancelled on character grounds is never permitted to return to Australia. Refer in particular to Migration Regulations 1994, items 5001 and 5002.  
8. See *Migration Act 1958*, definition "immigration detention" in s.5.  
9. *Migration Act 1958*, s.501(3).  
10. *MIMIA v Huynh* [2004] FCAFC 256.  
11. *Migration Act 1958*, s.503A.  
12. Refer *MIMIA v Lorenzo* [2005] FCAFC 13, [88]-[91].

13. See *Cunliffe v Minister for Immigration and Citizenship* [2012] 129 ALD 233.  
14. *Taufahema v MIC* [2009] AATA 898.  
15. *MIC v Taufahema* [2010] FCA 330.  
16. Political pressure came from a range of sources, including the NSW Police Association, as Mr Taufahema had been involved in criminal conduct during which one of his associates had shot a police officer and caused the officer's death. Mr Taufahema had been convicted of manslaughter.  
17. *Ayan v MIMIA* [2003] FCAFC 7.  
18. See, in particular, Commonwealth and Immigration Ombudsman, *Administration of s.501 of the Migration Act as it applies to long-term residents* (Report No. 01/2006).  
19. *Migration Act 1958*, s.501(6).  
20. *Migration Act 1958*, see s.501(7). A person also automatically fails the character test if they commit an offence while in immigration detention, while an escapee from immigration detention or by escaping from immigration

detention: s.501(6) (aa) (ab).  
21. *Migration Act 1958*, s.501(6).  
22. What was demonstrated in the case of Dr Haneef (above n.1) is that charges insufficient to found a criminal conviction may be sufficient to support the valid formation of a view by the Minister for Immigration that a person does not pass the immigration character test.  
23. There are only three categories of people in Australia under immigration law: (i) Australian citizens, (ii) non-citizens who hold current visas, and (iii) people who are 'illegal' – referred to as unlawful non-citizens.  
24. Noting the constraints of s.276 of the *Migration Act 1958* in terms of giving immigration assistance.  
25. Merits review is not available for a character decision made by the Minister for Immigration personally: *Migration Act 1958*, s.500(1) (b).  
26. If an adverse decision is made and they do have a right of merits review the effect of the adverse decision will be that they must be in immigration detention while this appeal is ongoing. □



THE LAW SOCIETY OF NEW SOUTH WALES

## The Law Society's Costs Guidebook

A practical introduction to legal costs, with a suite of customisable precedents for compulsory costs disclosure and fee agreements.

Review your practice's procedures for engagement, client communication and risk management

- Online version
- Free PDF download
- Hard copy

Help on costs

[www.lawsociety.com.au/Costs](http://www.lawsociety.com.au/Costs)