

## DEPORTATION AND SENTENCING

### Recent amendments to the *Migration Act 1958* and the impact that those amendments will have on the manner in which deportation can be taken into account as a mitigating circumstance

1. In *Guden v The Queen* (“*Guden*”),<sup>1</sup> the Court of Appeal held that the prospect of deportation of an offender “is a proper matter for consideration in determining an appropriate sentence”.<sup>2</sup> The Court identified two ways in which that prospect could be relevant in mitigation:<sup>3</sup>

*[T]he fact that an offender will serve his/her term of imprisonment in expectation of being deported following release may well mean that the burden of imprisonment will be greater for that person than for someone who faces no such risk. Moreover, ..., in an appropriate case, it will be proper to take into account the fact that a sentence of imprisonment will result in the offender losing the opportunity of settling permanently in Australia. Taking a practical approach, ..., this may well be viewed as a serious “punishing consequence” of the offending.*

2. The Court made it clear that an offender bears the burden of establishing that the prospect of deportation is more than a speculative possibility before it can be taken into account, because:<sup>4</sup>

*the sentencing court cannot be asked to speculate. If defence counsel on a plea in mitigation can say no more than that a term of imprisonment of more than 12 months will, upon its expiry, enliven the power of the Minister for Immigration either to revoke an existing visa or to decline to renew one, then deportation may properly be viewed ... as “a completely speculative possibility”.*

3. The *Migration Act 1958* (“the Act”) has been amended since *Guden* was decided. Relevantly, section 501(3A) has been inserted into the Act. That section states (emphasis added):

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

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<sup>1</sup> (2010) 28 VR 288.

<sup>2</sup> (2010) 28 VR 288, 295 ([26]).

<sup>3</sup> (2010) 28 VR 288, 295 ([27]).

<sup>4</sup> (2010) 28 VR 288, 295 ([28]).

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

4. That provision came into effect on 11 December 2014.<sup>5</sup>

5. A person does not pass the character test if that person has a ‘substantial criminal record’.<sup>6</sup> Section 501(7) of the Act states (emphasis added):

- (7) *For the purposes of the character test, a person has a substantial criminal record if:*
  - (a) ***the person has been sentenced to death; or***
  - (b) ***the person has been sentenced to imprisonment for life; or***
  - (c) ***the person has been sentenced to a term of imprisonment of 12 months or more; or***
  - (d) *the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or*
  - (e) *the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or*
  - (f) *the person has:*
    - (i) *been found by a court to not be fit to plead, in relation to an offence; and*
    - (ii) *the court has nonetheless found that on the evidence available the person committed the offence; and*
    - (iii) *as a result, the person has been detained in a facility or institution.*

<sup>5</sup> *Migration Amendment (Character and General Visa Cancellation) Act 2014.*

<sup>6</sup> *Migration Act 1958*, s 501(6)(a).

6. The Minister must, by virtue of the combined operation of sections 501(3A), 501(6) and 501(7)(a), (b) and (c) of the Act, cancel an offender's visa if the offender has been sentenced to death, imprisonment for life, or a term of imprisonment of 12 months or more.
7. An offender who is in Australia on a visa therefore falls to be sentenced on the basis that they will be deported if they are sentenced to a term of imprisonment of 12 months or more. In those circumstances, one need look no further than the provisions of the Act (as amended) to meet the burden of establishing that the prospect of deportation is more than a speculative possibility. Further evidence, beyond the provisions of the Act itself, is no longer required.<sup>7</sup>
8. The Minister can revoke a decision made pursuant to section 501(3A) of the Act.<sup>8</sup> However any such revocation depends upon executive action that cannot, by virtue of that fact, be taken into account when the offender is sentenced. To sentence an offender (to whom section 501(3A) applies) on that basis that the mandatory decision to cancel their visa might be revoked would be to speculate in an impermissible way.<sup>9</sup>
9. This change in the legislative landscape might change the way that deportation is to be taken into account in mitigation. Its impact on sentencing in criminal cases is yet to be litigated. *Guden* will, at some point and in the appropriate case, need to be re-visited by the Court of Appeal. Until that occurs, lawyers acting for an offender who is in Australia on a visa and who is facing a sentence of imprisonment of 12 months or more might wish to refer the sentencing judge to section 501(3A) of the Act and make submissions, supported by appropriate evidence, about whether the offender's deportation (which ought be treated for the purpose of sentencing as a certain outcome) will:
  - a. impact upon the burden of imprisonment; and/or
  - b. constitute, of itself, a punishing consequence;

and, if so, how.

**P. J. Smallwood**  
Aickin Chambers  
3 May 2015

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<sup>7</sup> c.f. *Director of Public Prosecutions v Yildirim* [2011] VSCA 219, [28]-[29] (which was decided before the Act was amended).

<sup>8</sup> *Migration Act 1958*, s 501CA.

<sup>9</sup> This is the author's opinion.