

Criminal deportation under section 200 of the Migration Act 1958

General Direction - Criminal Deportation - No.9
TRANSITIONAL PROVISIONS

PREAMBLE:

This General Direction provides guidance to decision makers in considering the making of deportation decisions under sections 200 and 201 of the Migration Act (the Act).

The object of the Act is to regulate, in the national interest, the coming into and presence in Australia of non-citizens. To facilitate this object the Minister has been given a discretion to deport from Australia those non-citizens who have abused the privilege of residence accorded to them by the Australian community. In exercising this power the Minister has a responsibility to the Parliament and to the Australian community to protect the community from the possibility of further criminal behaviour and to remove from the community those persons whose actions are so abhorrent to the community that they should not be allowed to remain within it.

For the purposes of this direction, a potential deportee is any person who is not an Australian citizen and who has been convicted in Australia of an offence for which the person was sentenced to imprisonment for life or to imprisonment for a period of not less than one year, but only if:

- (a) the person had been in Australia as a permanent resident either for a period of less than 10 years, or for periods which (when added together) total less than ten years, at the time when the offence was committed; or
- (b) the person is a New Zealand citizen who has been in Australia as an exempt non-citizen or as the holder of a special category visa for a period of less than 10 years, or for periods which (when added together) total less than ten years, when the offence was committed.

For the purpose of determining whether the person is a potential deportee, all of the following considerations are irrelevant:

- the length of time that the person had spent in Australia at the time when the sentence was imposed;
- whether the person is actually imprisoned for a year;
- whether a non-parole period is set at less than one year if the sentence of imprisonment is one year or more.

For the purposes of this direction, family is as defined in regulation 1.12 of the Migration Regulations.

The Australian Government, on behalf of the Australian community, has the right to decide who will reside permanently in Australia, and on what terms. The Parliament has entrusted the Minister for Immigration and Multicultural Affairs with the discretion to determine whether potential deportees will be deported from Australia. In exercising that discretion, the Minister is exercising the right of the Australian community to protect itself and to choose who will be permitted to remain in Australia as a permanent resident.

The Government takes very seriously its obligation to protect all elements of the Australian community and in particular the most vulnerable people within it. The Government bears a special responsibility to protect children. A deportation decision will not be made until all the information that is reasonably necessary for making the decision is at hand. In normal circumstances, the decision will be made towards the end of the potential deportee's sentence and will allow time for a decision and appeal prior to release from custody. A potential deportee has a right to appeal to the Administrative Appeals Tribunal against a deportation decision, provided their sponsor is an Australian citizen or permanent resident, except where the circumstances set out in the next paragraph below exist. Where the right of appeal exists, the Administrative Appeals Tribunal is empowered to review the merits of the decision.

The right of appeal to the Administrative Appeals Tribunal is not open to a person where the Minister has personally made the deportation decision and at the same time has declared the deportee to be an excluded person. Such a declaration can only be made where the circumstances are so serious that the Minister acting personally decides that it is in the national interest to do so. Where the Minister makes such a declaration, the Minister must table notice of the decision before both Houses of Parliament within 15 sitting days of each House after the day on which the decision is made.

THEREFORE I, Philip Maxwell Ruddock, the Minister for Immigration and Multicultural Affairs, hereby give the following General Direction pursuant to section 499 of the Act to any person or body having functions or powers in relation to the deportation of a non-citizen under section 200 of the Act:

1. This General Direction may be cited as General Direction - Criminal Deportation - No.9.
2. Deportation decisions are made without any form of discrimination with respect to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. A person's cultural background should not result in differing applications of the law. While our multicultural society encourages all persons to practise their cultures and pursue their ideals, this practice should fall within a

respect for and adherence to the laws of Australia. Contrary cultural values should not provide any excuse to persons who offend against Australian society.

4. The purpose of deporting a person from Australia is to protect the safety and welfare of the Australian community and to exercise a choice on behalf of the Australian community as a whole as to who should be allowed to remain in the community.

PRIMARY CONSIDERATIONS

5. The Government is mindful of the need to balance a number of important factors in reaching a decision whether or not to deport a potential deportee. In making such a decision, a decision maker should have regard to two primary considerations and a number of other considerations. The primary considerations are set out at paragraph six (6), and two other common considerations are set out in paragraph seven (7). A decision maker should have due regard to the importance placed by the Government on the two primary considerations, but should also adopt a balancing process which takes into account all relevant considerations.

6. In making a decision whether or not to deport a non-citizen, there are two primary considerations:

(a) the expectations of the Australian community; and

(b) in all cases involving a parental relationship between a child or children and the potential deportee, the best interests of the child or children.

7. In addition, there will be other considerations that will be relevant in individual cases. Two of the most common are:

(a) the degree of hardship which may reasonably be expected to be suffered by the potential deportee; and

(b) the degree of hardship to Australian citizens or permanent residents that would reasonably be expected to flow from deportation.

COMMUNITY EXPECTATIONS

8. It is the Government's view that the expectations of the Australian community are a primary consideration in determining whether a potential deportee should be deported. Decision makers should have due regard to the Government's view in this respect. There are two aspects to community expectations:

(a) the expectation that the community will be protected and not put at risk;

and

(b) the expectation that non-citizens who commit/are convicted of crimes that are abhorrent to the Australian community will be removed from Australia.

Protection of the Australian Community

9. It is the Government's view that the Australian community expects the Government to protect it from the actions of criminals and to take action to remove unacceptable levels of risk of crime. In particular, it is the Government's view that the Australian community expects that the Government will take necessary action to ensure the safety of the more vulnerable members of the community. The Government considers that children and young people are especially at risk in this area. The Government acknowledges that it has a heavy responsibility to ensure that the rights of the community are carefully considered when making decisions relating to the criminal deportation of offenders. This is of particular importance when the offences in question are in relation to drugs and crimes of violence. A decision maker should have due regard to the Government's view in this respect.

10. It is the Government's view that the following factors are relevant to an assessment of the level of risk to the community and the need for its protection:

(a) the seriousness and nature of the crime;

(b) the risk of recidivism; and

(c) the likelihood that deportation of the potential deportee would be likely to prevent or discourage similar offences by other persons.

Decision makers should have due regard to the Government's view in this respect.

The seriousness and nature of the offence

11. It is the Government's view that the following are examples of offences which are considered by the Government to be very serious:

(a) the production, importation, distribution, trafficking (including possession for this purpose), commercial dealing, or selling of illicit drugs.

- Persons who embark upon drug-related crime for financial gain have shown a callous disregard for the insidious effects of illicit drugs on the health and welfare of Australia's young people.

- The Government views potential deportees who have sought to profit from the import or supply of drugs, whether or not motivated by their own need for illicit drugs, as extremely serious offenders. It is important both as a deterrent to other criminals and to protect Australian society that it is clearly understood that crimes involving drug trafficking, which puts the lives of young Australians at risk should be viewed as completely unacceptable to the community.

THE BEST INTERESTS OF THE CHILD

16. It is the Government's view that the decision maker must determine the best interests of any children aged less than 18 years who are in a parent-child or other close relationship with the potential deportee.

- The potential deportee's children who are aged 18 years or more have attained the age of legal majority. The interests of these children are not considered under this heading but are considered under the heading of "The degree of hardship to other Australian citizens or permanent residents, including the potential deportee's family" at page 10. Decision makers should have due regard to the Government's view in this respect.

17. It is the Government's view that where there are two or more relevant children, the best interests of each child should be considered separately and also together with each other and with other members of the family. It should not be assumed that the interests of each child will coincide, and it may be that the best interests of one child may indicate that the potential deportee should not be deported, but that the best interests of another child may point towards deportation. Decision makers should have due regard to the Government's view in this respect.

18. It is the Government's view that, in general, the starting point for any consideration of the best interests of the child would be that the child's best interests will be served if the child remains with its parents. Countervailing considerations, which may point to the child's best interests being served by separation from the potential deportee, include, but are not limited to:

- (a) any evidence that the potential deportee has abused or neglected the child in anyway, including physical, sexual and/or mental abuse; or
- (b) any evidence that the child has suffered or experienced any physical or emotional trauma arising from the potential deportee's unlawful conduct.

Decision makers should have due regard to the Government's view in this respect.

19. It is the Government's view that when considering what are the best interests of the child or children, regard should be had to:

- (a) the nature of the relationship to potential deportee;
- (b) whether the child is an Australian citizen or permanent resident;
- (c) the likely effect that any separation from the potential deportee would have on the child or children;
- (d) the likely effect on the child or children of leaving Australia if the parents decided to take the child or children with them from Australia; and
- (e) the impact of the potential deportee's prior conduct on the child.

Decision makers should have due regard to the Government's view in this respect.

20. It is the Government's view that considerations which aid in assessing the above factors include:

- (a) the age of the child;
- (b) the time that the child has spent in Australia;
- (c) any language barriers for the child in the likely country of future residence, but taking into account the relative ease with which younger children acquire new languages;
- (d) any cultural barriers for the child in the likely country of future residence, but taking into account the relative ease with which younger children adapt to new circumstances;
- (e) any medical problems of the child and the likely access to relevant facilities in the likely country of future residence;
- (f) the child's degree of emotional and psychological dependence on the potential deportee; and
- (g) the amount of time that the potential deportee has actually spent with the child.

Decision makers should have due regard to the Government's view in this respect.

OTHER CONSIDERATIONS

21. It is the Government's view that in considering the issue of deportation other matters, although not primary considerations, will be relevant. It is appropriate that these matters be taken into account but given less weight than the primary considerations. These matters include:

- (a) the degree of hardship which may be suffered by the potential deportee; and
- (b) the degree of hardship to any Australian citizens or permanent residents, including the potential deportee's family (other than children whose best interests are a primary consideration).

Decision makers should have due regard to the Government's view in this respect.

The degree of hardship which may be suffered by the deportee

22. It is the Government's view that factors to be considered here include:

- (a) whether the offender has an ongoing marital or defacto relationship with an Australian citizen or Australian resident including an assessment of whether that person would leave with the potential deportee;
- (b) while it is less likely that potential deportees who have spent the greater proportion of their formative years in Australia will be deported, it is not the Government's intention that such people will never be deported.
- (c) the degree and extent of the potential deportee's ties with the likely country of return;
- (d) the strength of other family, social or business ties in Australia;

- Offences involving heroin and other illicit drugs of dependency or addiction are of particular concern to the

Government and the community.

(b) organised criminal activity resulting in a conviction in Australia;

(c) sexual assaults, whether or not accompanied by other violence, and especially where there has been more than one sexual offence;

(d) armed robbery (including robbery involving the use of imitation weapons);

(e) murder, manslaughter, assault or any other form of violence against persons;

(f) terrorist activity;

(g) kidnapping;

(h) blackmail;

(i) extortion;

(j) serious theft (including "white collar" crimes);

. Such crimes are of concern because of the amounts of money involved and/or the disruption caused to individuals, business and Government.

(k) crimes against children;

- Because of their vulnerability as victims and potential victims, crimes against children take on a special significance, especially crimes involving inducing children to take illicit drugs, sexual assaults on children, child prostitution, violence to children, kidnapping and crimes taking advantage of children.

(l) any other crimes involving violence or the threat of violence;

- Such crimes are of special concern to the welfare and safety of the Australian community.

(m) ancillary offences in respect to any of the above offences, including:

- convictions for attempting to commit any of the above offences;

- convictions for conspiracy to commit any of the above offences;

- convictions for being an accessory before or after the fact in any of the above offences.

Decision makers should have due regard to the Government's view in this respect.

12. It is the Government's view that the sentence imposed for a crime is an indication also of the seriousness of the offender's conduct against the community. Decision makers should have due regard to the Government's view in this respect.

The risk of recidivism

13. It is the Government's view that the person's previous general conduct and total criminal history are highly relevant to assessing the risk of recidivism. Decision makers should have due regard to the Government's view in this respect. In particular the following factors will be relevant to the assessment:

(a) the person commits a further offence after having been warned previously about the risk of deportation. They should expect that the warning will be given significant weight in consideration of his or her case;

(b) a person with several previous convictions in Australia should be considered as an increased risk in the light of that past behaviour. In cases where there is a gap or gaps between convictions, the inference may be open that the potential deportee has demonstrated that a substantial period since an earlier conviction is not a reliable indicator that future offences will not be committed;

(c) the extent of rehabilitation already achieved, the prospect of further rehabilitation and the positive contribution to the community the person may reasonably be expected to make.

The likelihood that deportation of the potential deportee would prevent (or inhibit the commission to) like offences by other persons

14. It is the Government's view that this factor may be relevant to protecting the Australian community in various ways:

(a) the nature of the offence is such that deportation is expected to deter other non-citizens from committing similar offences; and

(b) the deportation of a potential deportee who has been involved in a criminal scheme or schemes may discourage or prevent another person or persons from committing new offences. For example, the potential deportee may be a ringleader whose deportation may reduce the likelihood that his or her associates will commit other offences.

Decision makers should have due regard to the Government's view in this respect.

Community expectation that non-citizen perpetrators of crimes abhorrent to the community should not be allowed to remain in the community

15. It is the Government's view that the Australian community trusts non-citizen residents to obey Australian laws. Where a potential deportee has betrayed this trust and been convicted of offences in Australia, it may be appropriate to deport such a person even if there is no serious likelihood that the person is a continuing threat, or will be a future threat, to the community. Deportation will be appropriate simply because the nature of the offence or offences is such that the Australian community would expect that the person would be deported. Weight should be given to this factor in proportion to the decision maker's understanding of the community's attitude to the potential deportee's offences. Decision makers should have due regard to the Government's view in this respect.

- (e) social ties developed after the liability for deportation arose, especially after the liability had been brought to the notice of the offender, may be given less weight; and
- (t) the situation in the country of proposed return, including the overall environment, job opportunities, or the possibility of additional criminal sanctions. Civil or military hostilities are more likely to affect the timing of a deportation than to constitute a reason that the offender should continue to live permanently in Australia. Alternative places of return should be considered if the situation warrants such consideration. Decision makers should have due regard to the Government's view in this respect.
- The degree of hardship to any Australian citizens or permanent residents, including the potential deportee's family
23. The best interests of any relevant children are a primary consideration and are not considered under this heading.
24. It is the Government's view that factors to be considered here include:
- (a) the effect deportation would have on any marital or de facto partner, including whether he or she would leave Australia with the deportee and whether this would impose undue hardship on the non-deportee partner;
- (b) the effect deportation would have on other family members, social ties and business associates and whether deportation would impose hardship on them;
- (c) social ties developed after the liability for deportation arose, especially after the liability had been brought to the notice of the offender, may be given less weight; and
- (d) the views (if any) of the victim or victims of the crimes committed by the potential deportee. Decision makers should have due regard to the Government's view in this respect.

INTERNATIONAL OBLIGATIONS

25. Decision makers are to consider the international obligations contained in this section.
26. The International Convention on Civil and Political Rights (ICCPR) has an implicit non-refoulement obligation where as a necessary or foreseeable consequence of expulsion, the person would face a real risk of violation of his or her human rights, such as being subjected to torture or the death penalty (no matter whether lawfully imposed). For further assistance on this point contact Legal Policy Section in Central Office.
27. The Convention Against Torture (CAT) has an explicit prohibition against expulsion 'where there are substantial grounds for believing the [the person] would be in danger of being subject to torture'. The prohibition is absolute: there is no balancing of other factors if deportation would amount to refoulement within the meaning of the CAT. For further assistance on this point, contact Legal Policy Section in Central Office.
28. In cases where issues of protection pursuant to the Convention and the Protocols Relating to the Status of Refugees (the Refugees Convention) are raised, they must be given consideration by the Minister as part of the exercise of the discretion to deport.
29. The critical issue is whether the life or freedom of a person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion pursuant to Article 33(1) of the Refugees Convention. This issue must be determined at the time the deportation decision is made. It should be noted that prior recognition of refugee status, while relevant, does not determine this issue. In other words, international law allows for the possibility that the person's refugee status may have ceased by the time deportation is considered. 30. If Article 33(1) does not apply to the person, there is no obligation on Australia to provide the person with protection under the Refugees Convention. If Article 33(1) applies, then the question is whether the person, having been convicted by a final judgment of a particularly serious crime, is a danger to the community, in which case the person cannot claim the benefit of article 33(1).
31. Notwithstanding International obligations, the deportation power must inherently remain a fundamental exercise of Australian sovereignty. The responsibility to determine who should be deported in the interests of the Australian community ultimately lies within the discretion of the responsible Minister.

CUSTODIAL SENTENCE TO BE COMPLETED BEFORE DEPORTATION

32. It is the Government's view that deportation for criminal offences should normally only occur after the custodial portion of the person's sentence has been completed. Decision makers should have due regard to the Government's view in this respect. It is for the appropriate State authorities, or the Governor-General in the case of Commonwealth prisoners, to decide the conditions under which a prisoner is to serve a sentence, the extent of remission of any part of a sentence, or the release of a potential deportee on licence, or on parole, for the purpose of deportation.
33. It is the Government's view that whenever possible, a deportee's departure from Australia should be arranged to coincide with the deportee's release from prison. A deportee may continue be held in custody pursuant to the Migration Act pending finalisation of appropriate deportation arrangements and cannot expect to enjoy any period at liberty within the Australian community between the expiration of their penal servitude and deportation from Australia. Decision makers should have due regard to the Government's view in this respect.

DATE OF EFFECT

34. This direction has effect on and from the date of signing.

Dated 21st December 1998

PHILIP RUDDOCK

Minister for Immigration and Multicultural Affairs