EXPULSION: A COMPARATIVE STUDY OF AUSTRALIA AND FRANCE

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In liberal democratic States, the decision to remove long-term residents who have committed crimes involves a challenging balancing act. On the one hand, States must do their utmost to protect everyone within their territory, yet, on the other, States must also act in accordance with their core values and principles, such as equality before the law and non-discrimination. In this article, I explore how these objectives are reconciled in two States: Australia and France. My primary focus is on Australia because, as Professor Juss recently noted, '[w]hen it comes to immigration and asylum policy, Australia is the laboratory of the world'.[1]

I explore two aspects of Australia's system which are highly problematic and have come under fierce criticism from within Australia and internationally. I begin by reviewing the legal framework, namely s 501 of the *Migration Act 1958* (Cth), under which the Minister for Immigration or a delegate may cancel visas on the grounds of character. In late 2014, further dramatic changes were introduced, which provide for mandatory visa cancellation in circumstances where a non-citizen has a substantial criminal record and is serving a sentence of imprisonment.[2] This change in the law has resulted in an exponential increase in visa cancellations.[3] In this context, I explore how the visas of long-term residents, some of whom have lived in Australia for more than 50 years, may be cancelled under s 501 and explain why this is a problem.[4] I then examine the visa cancellation process and the review rights flowing on from visa cancellation, again highlighting concerns.

In the second part of the article, I explore expulsion — the process and review rights in France. France is a fruitful source of comparison because, like Australia, it is a diverse, multicultural society with a strong liberal democratic tradition but, unlike Australia, has been the target of many violent terrorist attacks.[5] In this article I do not look at the treatment of non-citizens who have committed terrorism or other related offences. However, the fact that France has been the victim of multiple terrorist attacks informs its approach to immigration in general. How it balances the competing interests is therefore of particular interest and offers a different perspective on how a liberal democratic state deals with long-term residents who have been convicted of crimes. In the final, substantive part of the article, I look at what we can learn in Australia from the French system.

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The Australian system

Visa cancellation under section 501

In Australia, the law and process underpinning visa cancellations under s 501 sit within a broader system of strict immigration control, no doubt facilitated by the fact that Australia is an island. The relevant law is principally contained in the *Migration Act 1958*, which provides that all non-citizens must hold a visa.[6] The Migration Act contains various powers that may be used to cancel visas, including a specific provision that provides that the deportation provision cannot apply to non-citizens who have resided as permanent residents in Australia for more than 10 years.[7] The key provision relied upon to remove non-citizens who have committed crimes, however, is s 501 of the Migration Act.[8] Section 501 is potentially applicable to all non-citizens, regardless of the length of their residence and their level of absorption into the Australian community.[9] Non-citizens whose visas are cancelled under s 501 are subject to immigration detention, removal and exclusion from Australia.[10]

Prior to the recent changes, which I discuss shortly, s 501(2) was regularly invoked to cancel a visa. This provision permits the Minister, or a delegate, to cancel the non-citizen's visa when not satisfied that the non-citizen passes the character test.[11] The character test itself sets out a series of grounds upon which a person may fail the character test, including if the person has 'a substantial criminal record'.[12] In turn, 'substantial criminal record' is defined, amongst other things, to include if the person has been sentenced to a term of imprisonment of 12 months or more or two or more terms of imprisonment, where the total of those terms is 12 months or more.[13] Visa cancellation under s 501(2) involves two steps. The non-citizen is served with a Notice of Intention to Cancel a Visa and given an opportunity to put forward information, including further evidence. If the non-citizen does not satisfy the Minister or the delegate that he or she passes the character test, the decision-maker must then consider whether to exercise the discretion to cancel the visa.

Section 501 was amended in 2014 in order 'to strengthen the character and general visa cancellation provisions in the Migration Act to ensure that non-citizens who commit crimes in Australia, pose a risk to the Australian community or represent an integrity concern are appropriately considered for visa refusal or cancellation'.[14] Significantly, the 2014 amendments inserted a new, mandatory visa cancellation ground — namely, s 501(3A), which provides that the Minister or a delegate must cancel the non-citizen's visa if satisfied that the person does not pass the character test because the non-citizen has a substantial criminal record and is serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the Commonwealth or a state or territory.[15] The purpose of the new provision was explained by the Department of Immigration as follows:

> Under existing provisions non-citizens in prison who do not pass the character test can be released from prison prior to the character visa cancellation or refusal process being finalised. This has meant that criminals who may potentially present a risk to the community can reside lawfully in the community while this consideration takes place. The proposed mandatory cancellation process assists in ameliorating this risk.[16]

Once the Minister or the delegate has made a decision under s 501(3A), he or she must, as soon as practicable, give the person a written notice, setting out the decision and the reasons for the decision and inviting the person to make representations.[17] Under s 501CA of the Migration Act, the Minister or the delegate may revoke the visa cancellation if the person makes representations in accordance with the invitation and the Minister or the delegate is satisfied that the person passes the character test or 'there is another reason why the original decision should be revoked'.[18]

When exercising the discretion to cancel a visa under s 501(2) or considering the revocation of a decision made under s 501(3A), delegates must consider the direction in force made under s 499 of the Migration Act.[19] While personally not bound,[20] directions enable 'Ministers of State to dictate the exercise of discretion by non-Ministers of State, a fetter otherwise not permissible'.[21] Directions are thus designed to promote 'consistency between decisions of non-Ministers of State'.[22]

Direction No 65, the direction currently in force, provides that its purpose 'is to guide decision-makers performing functions or exercising powers under s 501 of the Act, to refuse to grant a visa or to cancel a visa of a non-citizen who does not satisfy the decision-maker that the non-citizen passes the character test, or to revoke a mandatory cancellation under s 501CA of the Act'.[23] Direction No 65 provides 'a framework within which decision-makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under s 501, or whether to revoke a mandatory cancellation under s 501CA'.[24] The direction provides that Australia has 'a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia', as it is 'a privilege'.[25]

The direction contains parts relating to visa holders, visa applicants and revocation requests, each of which contains 'primary' and 'other' considerations. The direction provides that 'primary considerations should generally be given greater weight than other considerations' and that 'one or more primary considerations may outweigh other primary considerations'.[26] Part A, which relates to visa holders, and Part C, which relates to revocation requests, contain the same primary and other considerations. Under the heading of primary considerations, decision-makers must consider the protection of the Australian community from criminal or other serious conduct, the best interests of minor children in Australia and the expectations of the Australian community.[27] The factors listed in the 'other' considerations are international non-refoulement obligations; strength, nature and duration of ties; impact on Australian business interests; impact on victims; and extent of impediments if removed.[28] The 'primary' and 'other' considerations must 'be considered in accordance with the significance placed upon them by the Direction'.[29]

The cancellation of visas and subsequent removal of long-term residents is highly problematic. Long-term residents are essentially Australian 'by upbringing and long residence'.[30] Many arrive in Australia as children, attend school and, as adults, create their own families. They work and pay taxes, their children attend school and they participate in local 'cultural and recreational activities'.[31] This active participation in civil society leads to the creation of 'a wide range of human ties and social attachments that affect their lives in many ways'.[32] The building of these profound social connections occurs as soon as a person starts living in a community.[33] These long-term permanent residents 'are members of the society where they have lived their entire lives, the society whose language they speak and whose culture they share'.[34] In effect, they are 'Australian in all but law'.[35]

In addition to serving their term of imprisonment, they are subject to visa cancellation and removal, thereby receiving 'double punishment'.[36] Although they have character flaws, they are 'Australia's responsibility'[37] and removing them is seen as 'cleansing' Australian society.[38] Severing these ties, particularly familial and social ties, can have devastating consequences for non-citizens, not least of which is their prospect of rehabilitation. As Allsop CJ recently held in relation to a 54-year-old long-term resident:

> the removal of someone from Australia who has spent much of his life here (arriving as a child of six years) itself has a quality of harshness that might, in other statutory contexts, together with the effect on him and his family, bespeak unjustness, arbitrariness or disproportion of response. Whilst not a citizen of Australia, Mr Stretton has lived here since he was a small boy. His human frailties are of someone who has lived his life here, as part of the Australian community.[39]

The effects of visa cancellation and removal are exacerbated when the non-citizen has few, if any, connections, to their country of citizenship. In some cases, long-term residents do not speak the language of their country of citizenship and have no family, social or other connections. Non-citizens may also suffer poor physical and mental health as well as drug and alcohol addictions. Yet non-citizens may be returned to 'developing and strife-torn countries with rudimentary mental health and drug rehabilitation services',[40] such as Sudan, Vietnam, Iraq, Lebanon and Afghanistan.[41] An added, important dimension of visa cancellation and removal is the impact on family members, who may be forced to choose either to remain in Australia without the non-citizen or to leave Australia as a family.

A recent case study played out in the media exemplifies these issues. Maryanne, also known as Mirjana, Caric, a 'long-term drug user', left the former Republic of Yugoslavia and arrived in Australia at the age of two, where she has lived for almost 50 years.[42] Caric was sentenced to various terms of imprisonment for drug offences and as a result, her visa was cancelled under s 501(3A).[43] The intended country of removal was Croatia, where Caric has no connections and does not speak the language.[44] Her family, including her daughter and grandchildren, would remain in Australia.[45] The Parliamentary Secretary accepted that she had 'been away from her country of origin for close to 50 years and having no personal support network there together with her health and substance abuse issues, that it would be extremely difficult for her to make the necessary adjustments to life there' but nevertheless decided to not revoke the decision.[46] While her judicial review application was successful and her request for revocation has been remitted for reconsideration according to the law, there is no guarantee that her visa cancellation will be revoked.[47]

These unjust effects of visa cancellation and subsequent removal on non-citizens and their families have been widely recognised and resulted in significant criticism for many years from many quarters, including the Commonwealth Ombudsman, the Australian Human Rights Commission, judges, academics and the community. For example, following a review of the s 501 system, in his 2006 report, the then Commonwealth Ombudsman recommended that the application of s 501 to long-term residents should be reviewed. He questioned whether s 501 should be applied to a person who met a number of criteria, including those who had arrived in Australia as minors, spent their formative years in Australia, had been absorbed within and had strong ties to the Australian community and could not be removed under the deportation provision.[48] Other relevant factors included the degree of hardship upon return to the receiving country, the presence in Australia of family members and whether the non-citizen would constitute a significant risk to the Australian community if released from detention.[49] Instead, the mandatory visa cancellation scheme under s 501(3A) was introduced. The new scheme is even more controversial, considered to be, at a minimum, deeply unfair [50] if not unlawful, prior to the recent High Court decision in *Falzon v Minister for Immigration and Border Protection*.[51]

The visa cancellation process

As previously mentioned, under s 501(2), non-citizens are served with a Notice of Intention to Cancel a Visa before a decision is made, while, in contrast, decisions made under s 501(3A) are made and subsequently served on non-citizens. The non-citizen must then seek revocation under s 501CA within 28 days[52] — a process which effectively reverses the onus of proof.[53] The decision to cancel a visa or to not revoke a visa cancellation may be made by a delegate of the Minister or the Minister personally. When delegates cancel a visa or decide to not revoke a visa cancellation, non-citizens may seek review before the Administrative Appeals Tribunal within nine days of the date of notification of the decision.[54] Policy provides that applicants with a merits review application on foot are not removed.[55] The Tribunal stands in the shoes of the original decision-maker and is tasked with making

'the correct or preferable decision' in each individual case.[56] It has the power to affirm or set aside the delegate's decision.[57]

If the Tribunal sets aside the delegate's decision to cancel the visa or to refuse to revoke the visa cancellation, however, the Minister may overturn the Tribunal's decision on the grounds of national interest, as it was considered 'appropriate that the Minister have the power to be the final decision-maker'.[58]

Where the Minister personally makes the decision under s 501(2) or s 501(CA), as is generally the case, there is no right of review to the Tribunal.[59] Non-citizens may seek judicial review and are generally permitted to remain in Australia during the course of the proceedings.[60] The role of the courts, however, is 'necessarily limited' to supervising legality.[61]

Decision-making under ss 501(2), 501(3A) and 501CA is also highly problematic, principally because of the lack of procedural fairness. It goes without saying that procedural fairness is the cornerstone of administrative decision-making. Fair procedures ensure respect for the dignity of the affected person, enabling and fostering their participation in a process, which directly affects them and increases the chances of the correct or preferable decision being made precisely because of their participation.[62] In the processes described earlier, however, the ability of non-citizens to participate is seriously compromised. As publicly-funded legal representation is limited and many cannot afford lawyers, numerous non-citizens are not represented throughout the process,[63] thereby reducing their chances of a successful review or appeal.[64] Many have poor levels of education, which reduces their ability to understand the complex law and procedures and to know what material is relevant to their case and how to obtain it.[65] Their ability to present their case by, for example, giving instructions to their lawyers or contacting family and friends to obtain further evidence is further compromised by their incarceration, often in remote places like Christmas Island, where access to telecommunications and to the outside world is difficult.[66]

Given the limited ability of non-citizens to participate, it is unfortunate that the Department's fact-finding processes have also been shown to be deficient. In a 2006 report relating to the application of s 501(2), the then Commonwealth Ombudsman was highly critical of the Department. He noted that the Department's issues papers which are submitted to final decision-makers, contained information about the visa holder that was 'incorrect or of doubtful relevance'.[67] He observed that 'the currency of information is important in assessing the rehabilitation of the visa holder and prospects of recidivism' yet 'in many of the Issues Papers reviewed, little effort seem[ed] to have been made to ensure that up-to-date information about the visa holder [was] used'.[68] Ten years later, while acknowledging improvements in 'the quality of information given to the Minister in the revocation decision process', the current Ombudsman noted that the process for obtaining criminal histories and sentencing remarks could be 'problematic' and also recommended 'improving processes'.[69]

The ability of non-citizens to understand the issues and provide further, probative material, through either their legal representative or on their own initiative is critical, if seeking to avert, or revoke, a visa cancellation or to appeal a decision. As the Federal Court noted, 'it is not the content of the Direction which determines the outcome of the exercise of the s 501 discretion, but rather its application by a particular decision-maker to the evidence and material in an individual case'.[70]

Whether the non-citizen has a right of review before the Tribunal depends on whether the Minister or a delegate made the decision. Decisions made by the Minister are not reviewable by the Tribunal and, as a result, non-citizens are seriously disadvantaged. While non-citizens have access to judicial review, the role of the court differs markedly from the Tribunal. The

Tribunal stands in the stead of the primary decision-maker and must undertake the balancing exercise set out in the direction. However, the Minister may overturn any decision made by the Tribunal which favours the non-citizen — another serious concern. As the Australian Human Rights Commission observed, these ministerial powers to set aside Tribunal decisions gives 'the Minister power, without holding a hearing, to overturn a finding of fact made after a full hearing by an independent appellate tribunal'.[71] It questioned whether the Minister was indeed 'better qualified to make findings of fact than an independent tribunal':[72]

> Placing powers such as these in the hands of an elected representative risks decisions with serious human rights implications being made for politicized purposes, rather than being made on the merits of the individual case.[73]

In addition, as Wilcox J noted, if the outcome of the review process is not accepted by the Minister, 'the decisions of the Tribunal fall into disrepute'.[74] The Tribunal review process requires time and effort and imposes costs on the non-citizen and his or her family and the taxpayer:

> Unless the decisions of the Tribunal are customarily accepted, all of this effort and expense is wasted.[75]

Furthermore, as Murphy and Burley JJ recently observed, given the Minister's admitted practice that, 'in every refusal and cancellation decision' over a 15-month period, 'his draft reasons for decision were prepared by somebody else and he had signed them without alteration':[76]

> One might reasonably ask why Parliament would provide the Minister for Immigration and Border Protection with a personal power to cancel a visa (as an alternative to having the decision made by a delegate), and oblige the Minister to give reasons for doing so, if Parliament understood or intended that in every case the Minister would adopt, without change, the draft reasons prepared by departmental officers. Such a practice has a tendency to undercut Parliament's intention to provide a right to merits review where a visa cancellation decision is made by a delegate rather than by the Minister personally.[77]

As indicated, there are thus serious concerns with the substantive law and the procedural aspects of the existing s 501 system.

The French system

The law of expulsion

France also has multiple mechanisms in order to remove non-citizens from the country, including the imposition of bans from the territory ordered by criminal judges following the non-citizen's criminal conviction (*interdiction du territoire français*). France's immigration law is principally contained in the code of entry and stay of foreigners and of asylum law (*le Code de l'entrée et du séjour des étrangers et du droit d'asile)* (the Code). Non-citizens must also have permission to be present or residing in French territory.[78] Like Australia, the Code also contains various, different powers under which non-citizens may be removed. The vast majority of non-citizens, including those living in France without authority or in breach of visa conditions, are removed, after having received a notice called 'requirement to leave French territory' ('*l'obligation de quitter le territoire français*').[79] In this article, however, I focus on another article found in the Code (*expulsion*) because it is used to remove non-citizens lawfully resident in France. I note at this point that I have not considered the removal of European Union citizens, who are subject to special rules as a result of their status.

Article L521-1 of the Code provides that non-citizens may be removed if their presence constitutes a serious threat to public order (‘*une menace grave pour l’ordre public*’) — a phrase not defined in the Code.[80] While the phrase is interpreted in a ‘flexible’ manner, the *Conseil d’Etat*, the highest administrative court in France, held that it is intended to ‘protect public order and security’ and not act as a sanction.[81] Therefore, criminal convictions do not necessarily amount to a serious threat to public order.[82] The phrase requires an evaluation, in all the circumstances of the case, of ‘whether the person’s presence constitutes a threat to public order’.[83]

Articles L521-2 and L521-3 of the Code provide two categories of non-citizens who are protected from removal. The first category of ‘relative protection’ provides that certain categories of non-citizens, such as those who have lived for more than 10 years in France,[84] those married and living with a French spouse for at least three years[85] or raising their French children[86] cannot be removed unless sentenced to a term of imprisonment of at least equal to five years or their removal constitutes an absolute necessity for the security interests of the State or public safety (‘*une nécessité impérieuse pour la sûreté de l'Etat ou la sécurité publique*’).[87] While this expression is also not defined in the Code, ‘it implies a level of seriousness, additional to the requirement of a serious threat to public order’.[88] Examples include terrorist-related offences,[89] serious drug offences[90] and gang rape of a minor.[91]

The Code sets out a second category of non-citizens who benefit from even greater protection from removal, called ‘quasi-absolute protection’.[92] Non-citizens falling within this type of protection include non-citizens who arrived in France before the age of 13,[93] those who have resided in France for more than 20 years[94] or more than 10 years where they have been married to a French citizen or long-term French resident for more than four years, [95] or are raising their French children.[96] These protected categories cannot be removed even when sentenced to a term of imprisonment of more than five years unless their behaviour ‘harms’ the fundamental interests of the State, is linked to terrorist activities or constitutes explicit and deliberate acts of incitement to discrimination, hatred or violence against a particular individual or a group of people.[97] Cases falling under this rubric must be ‘particularly serious’ and ‘exceptional’,[98] such as non-citizens travelling to Syria to fight in the international jihad.[99] Finally, the law provides that minor children cannot be deported.[100]

The current two categories of protection were introduced in 2003 as a result of a widespread, NGO-led public campaign to end double punishment (‘*la double peine*’) in both the criminal and immigration context. Recognising that the removal of long-term residents from all their familial, friendship, professional and cultural ties in France had ‘serious consequences’ for residents and their families, the then Minister of the Interior, Nicholas Sarkozy, convened a commission, which was tasked with reviewing the law and making any necessary law reform proposals.[101] The commission made three overarching observations relating to deportation law. First, it was inconsistent with the notion of rehabilitation, and thus contrary to the fundamental philosophical underpinnings of criminal law, which was to punish and rehabilitate.[102] It noted that the prospects of rehabilitation in the country of removal were minimal for people separated from their family and social environment and removed to a country where they knew neither the language nor the culture.[103] Secondly, deportation was harsh and perpetual.[104] It observed that, for those who spent their childhood in France, deportation meant leaving a country with which they shared everything, except nationality, to go to a country with which they shared nothing, except nationality.[105] While non-citizens could in principle seek revocation of the deportation order, in practice it was very difficult, thus resulting in the punishment of the non-citizen ‘for life’.[106] Deportation also resulted in the punishment of family members of the non-citizen being deported.[107] Finally, the commission observed that authorities had great difficulty executing deportations, for example, because the non-citizen’s home country would not issue travel documents, the non-citizen’s identity

could not be established or because removal to the country of citizenship would breach international obligations — for example, those contained in the *European Convention on Human Rights*.[108] In any event, as the commission observed, a certain number of those removed secretly returned to France.[109] It therefore made sense to amend the law in order to reduce the number of cases that were 'practically and actually impossible to remove from France'.[110]

The commission therefore proposed the categories of non-citizens who should be prima facie protected from deportation. These categories are now found in the current law.[111] The commission's objective was to prevent two situations: first, the banishment of non-citizens who had lived in France since childhood; and, secondly, those who had lived in France for a certain period and who had established a stable family.[112] In suggesting these reforms, the commission was also motivated by a number of other considerations. It noted that, given the importance of law reform to sectors of the migrant community, only the introduction of protected categories would demonstrate that the law had been substantially reformed.[113] In addition, the protected categories would promote legal certainty, as the legislature clearly expressed its will by defining the protected categories.[114] Finally, the categories reflected the jurisprudence of the European Court of Human Rights.[115] As one French commentator noted, 'behind the different types of relative protection, we can see the shadow of Articles 2, 3, and 8 of the ECHR'.[116]

The expulsion process

The Code sets out certain procedures that must be followed before the decision to deport is made. The Prefect must summon the non-citizen to attend a hearing before the Commission of Expulsion ('*la Commission d'Expulsion*') 15 days prior to the hearing.[117] The Commission is composed of three judges, namely the President (or delegate) and another judge of the *Tribunal de Grand Instance* and a judge of the *Tribunal Administratif*.[118] The non-citizen must be informed of his or her right to have assistance, including legal aid, and an interpreter before the Commission.[119] The Commission must hold a public hearing, during which the non-citizen is able to provide reasons against deportation.[120] The Commission must then decide whether the presence of the non-citizen constitutes a serious threat to public order and whether or not it is in favour of the non-citizen's deportation.[121]

Within one month of the date upon which the non-citizen is summonsed to appear, the Commission must set out the non-citizen's case and its reasons for its decision and serve it on the authorities and the non-citizen.[122] Failure to comply with these procedural requirements may result in a successful appeal.[123] The Code stipulates, however, that the procedural requirements relating to the Commission of Expulsion may be dispensed with on the grounds of absolute emergency — a term not defined in the Code but, in practice, broad.[124] In such cases, there are no procedural requirements before the making of the deportation order.

While there are strict procedural requirements set out in the Code, it is important to note that the Commission's decision is not binding on the Prefect. While no statistics are available, it is known that the Commission's opinion is not always followed.

In the event that a deportation order is made, the non-citizen has two months from date of notification of decision in which to lodge an appeal to the administrative tribunal.[125] The administrative court must then review the decision, including whether the deportation is necessary to protect public order, if art 8 of the *European Convention of Human Rights* is invoked.[126] If unsuccessful before the administrative court, non-citizens may appeal to the administrative court of appeal and ultimately, on error of law alone, to the *Conseil d'Etat*.

The Prefect's decision to deport is immediately effective, regardless of whether an appeal has lodged. If the non-citizen, however, has lodged an appeal, he or she may apply to the *juge des référés* seeking a stay of the deportation order.[127] A stay may be granted in urgent cases, where there is 'serious doubt' relating to the legality of the decision.[128] In deportation cases, urgency is presumed.[129] Where the deportation has been carried out, if the *juge des référés* grants the stay, the non-citizen is permitted to return to France pending final determination of the appeal.[130]

Discussion

What has become evident is that similar concerns relating to the effect of removal on non-citizens and their families have been expressed in both Australia and France. Yet the result of recent law reform has culminated in two quite different legal approaches to criminal non-citizens.

Section 501 is unjust because it may be applied to long-term residents, who are members of the Australian community. Ministerial directions set out factors that must be considered by decision-makers. Directions regularly change, reflecting the broader social objectives of the government of the day.[131] Sometimes, factors such as length of residence and the strength of ties constitute primary considerations, while at other times they are merely 'other' considerations.[132] The different weight accorded to the considerations will have significant implications for long-term residents wishing to remain in their community.[133] Because of the Minister's ability to change the weight accorded to the various considerations, the directions do not adequately safeguard the interests of long-term residents. In France, arts 521-2 and 521-3 of the Code provide that certain categories of non-citizens, including those with long periods of residence in France and those with strong, established family ties to France, are generally protected from removal. There is thus legal recognition that these factors are powerful indices that the non-citizen has become a member of the French community and, for that reason, should not be removed. Only where the behaviour of the non-citizen 'harms' the fundamental interests of the State, is linked to terrorist activities or constitutes explicit and deliberate acts of incitement to discrimination, hatred or violence against a particular individual or a group of people may the non-citizen be removed.[134] As the French law reform commission indicated, the categories of protection reflect the will of legislators, setting up a filtering mechanism by which certain non-citizens are protected from deportation, subject to the derogations within the law.[135] While this approach is not without its flaws, I would nevertheless argue that it is preferable to the Australian approach.[136] In its current state, s 501 is too broad. It should, at the very least, set out factors relating to the non-citizen, which ought to be considered by the Minister and delegated decision-makers before cancelling a visa.

The visa cancellation processes under s 501 are procedurally unfair because the ability of non-citizens to participate in the processes is seriously compromised given their lack of legal assistance, their incarceration and the complexity of the law and procedures. Departmental fact-finding processes have been found to be wanting. The position of non-citizens under s 501(3A) is of particular concern because their visas have already been cancelled and they are thus liable to detention, removal and exclusion unless they are able to satisfy decision-makers that the decision should be revoked.

In France, the Code sets out numerous, compulsory, pre-deportation procedures, including a public hearing before a panel of three independent judges, during which the non-citizen is able to argue against removal. At first glance, the French system is a model of procedural fairness. However, it has a major flaw — namely, the opinion of the Commission of Expulsion does not bind decision-makers. While the opinion of the Commission may be considered by the administrative court in relation to any appeal brought by the non-citizen,

the costs, time and effort involved in convening the Commission begs the question whether the procedures leading to the opinion are worthwhile. Secondly, the procedures do not apply in the cases of absolute urgency. Like other terms in the Code, this term is broadly defined, thus allowing decision-makers to bypass the procedural requirements set out in the Code.

In Australia, decisions made by the Minister under ss 501(2), 501(3A) and 501(CA) are not reviewable by the Tribunal — a serious deficiency. Merits review is critically important because an independent Tribunal considers the factors under the directions and undertakes the balancing exercise. In France, decisions of the Minister and the Prefects are subject to the same appeal mechanisms — namely, review by the administrative courts. Unlike Australia, there is no differentiation of review rights according to the decision-maker. While there is no system of merits review in France, when art 8 of the ECHR is invoked, the administrative court also reviews the proportionality of the deportation, thus also providing another set of independent eyes on the balancing act.[137] While this independent review provides an important safeguard, again, there is a significant fault with the French system. Unlike the Australian system, the lodgment of appeals does not halt deportation proceedings and, unless a stay of execution is granted, non-citizens may be removed while awaiting the outcome of review by the administrative court.

Conclusion

Carens argues that once non-citizens become members of society, the state's right to deport them should be 'greatly constrain[ed]':[138]

> In brief, people who live in a society over an extended period of time become members of that society and moral claims to legal status follow from that membership. Thus, the allocation of legal rights by the state should not be regarded as a morally unfettered political choice. The relationships established in civil society significantly limit and constrain the kinds of allocations of rights that a political society can properly make.[139]

In Australia, provisions under the Migration Act specifically dealing with the removal of long-term residents who commit crimes are bypassed, and powers under s 501 have been expanded, allowing the Minister or decision-makers to unjustly cancel the visas of long-term residents, who are members of the Australian community. Under the law, decision-makers must consider and accord weight to factors set out in ministerial directions, which frequently change according to the objectives of the government of the day. This approach is dissatisfying as it fails adequately to safeguard the interests of long-term residents. In contrast, French law specifically provides that certain categories of non-citizens, including those with lengthy periods of residence in, and strong family connections to, France, cannot be deported unless in the circumstances set out in the law. In this regard, the French approach is preferable, because it recognises the non-citizen's profound personal, familial, social and other ties to the French community and provides that they should not be removed as a result. Section 501 should also be amended — for example, by setting out factors relating to the non-citizen that ought to be considered by the Minister and delegated decision-makers before cancelling a visa.

Discretionary, and in particular mandatory, visa cancellation under s 501 is highly problematic because of the unfair manner in which it is undertaken and given the grave consequences for non-citizens and their families. The lack of merits review for decisions made by the Minister is questionable given the importance of independent review, while the power of the Minister to set aside Tribunal decisions in favour of non-citizens is disturbing and lends itself to the politicisation of decision-making. At first glance, the French system has gold-standard procedures leading up to the deportation order, which Australia would do well to follow. Unfortunately, the opinion of the Commission of Expulsion is not binding on authorities. Thus, both the Australian and French systems have significant flaws when it

comes to the decision-making process. Finally, in Australia, we take for granted that applicants will not be removed while awaiting the outcome of review/appeal proceedings, but in France an appeal does not suspend the decision to deport — an extraordinary shortcoming of the system. While the s 501 system gives rise to legitimate and grave concerns and ought to be amended, there are other aspects of the Australian system that should be retained.

Endnotes

1 Satvinder Juss, 'Detention and Delusion in Australia's Kafkaesque Refugee Law' (2017) 36 *Refugee Survey Quarterly* 146, 146.

2 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

3 Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958*, Report No 08/2016, Commonwealth of Australia (2016) [1.4]: 'Since the passage of the new legislation the number of people who have had their visas cancelled under s 501 has grown from 76 in 2013–14 to 580 in 2014–15 and 983 in 2015–16'.

4 See, for example, *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; and *Caric v Minister for Immigration and Border Protection* [2017] FCA 1391. I note at the outset that this article does not deal with 'crimmigration' — namely, 'the criminalisation of immigration law': Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56 *American University Law Review* 367, 376. For relevant articles relating to s 501 in the crimmigration context, please see the following: Michael Grewcock, 'Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners under Section 501 *Migration Act 1958*' (2011) 44 *Australian and New Zealand Journal of Criminology* 56; Peter Billings, 'Crimmigration Law in Australia: Exploring the Operation and Effects of Mandatory Visa Cancellation, Immcarceration and Exclusion' *SSRN Electronic Journal*, January 2017; Khanh Hoang and Sudrishti Reich, 'Managing Crime through Migration Law in Australia and the United States: A Comparative Analysis (2017) 5 *Comparative Migration Studies* 12.

5 See, for example, Human Rights Watch, *France: In the Name of Prevention: Insufficient Safeguards in National Security Removals* (June 2007) [6].

6 *Migration Act 1958* (Cth) s 13.

7 Section 200 of the Migration Act provides that '[t]he Minister may order the deportation of a non-citizen to whom this Division applies'. Section 201 of the Migration Act provides as follows:
'Deportation of non-citizens in Australia for less than 10 years who are convicted of crimes
Where:
(a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;
(b) when the offence was committed the person was a non-citizen who:
(i) had been in Australia as a permanent resident:
(A) for a period of less than 10 years; or
(B) for periods that, when added together, total less than 10 years; or
(ii) was a citizen of New Zealand who had been in Australia as an exempt non-citizen or a special category visa holder:
(A) for a period of less than 10 years as an exempt non-citizen or a special category visa holder; or
(B) for periods that, when added together, total less than 10 years, as an exempt non-citizen or a special category visa holder or in any combination of those capacities; and
(c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year; section 200 applies to the person.'

8 Parliament of Australia, Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958* (2006) [9.30]. Section 501 of the *Migration Act 1958* has been amended many times: see my abovementioned thesis, which charts its amendments.

9 See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

10 *Migration Act 1958* (Cth) ss 189, 198; and *Migration Regulations 1994* (Cth) sch 5.

11 Section 501(2) of the Migration Act provides as follows: '[t]he Minister may cancel a visa that has been granted to a person if:
(a) the Minister reasonably suspects that the person does not pass the character test; and
(b) (b) the person does not satisfy the Minister that the person passes the character test'.

12 Section 501(7) of the Migration Act provides as follows:
'(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.'

13 *Migration Act 1958* (Cth) s 501(7)(c) and (d).
14 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014, 2 (Scott Morrison).
15 Section 501(3A) of the Migration Act provides as follows:
'The Minister must cancel a visa that has been granted to a person if: (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.'
16 Parliament of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Character and General Visa Cancellation) Bill 2014 [Provisions]* (2014) [2.32].
17 *Migration Act 1958* (Cth) s 501CA(3).
18 *Migration Act 1958* (Cth) s 501CA(4).
19 Section 499 of the Migration Act 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.
(1A) For example, a direction under subsection (1) could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply.
(2) Subsection (1) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations.
(2A) A person or body must comply with a direction under subsection (1).
(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 …'
20 *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 4.
21 *Bochenski v Minister for Immigration and Border Protection* [2017] FCAFC 68 [77]. Bromwich J further held at [77] as follows: 'Viewed in this way, s 499 may be seen at most to reflect or recognise a hierarchy which recognises or places the Parliament at the apex (of course subject to the powers of the Governor-General under the *Constitution*), then the Ministers of State appointed to administer the Department and allocated responsibility for administering the Migration Act, and then any other persons or bodies performing functions or exercising powers under the Migration Act (being delegates and the Tribunal).'
22 Ibid [72].
23 Direction No 65 — *Migration Act 1958* — Direction under Section 499 — *Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (22 December 2014) [6.1(4)].
24 Ibid [6.2(3)].
25 Ibid [6.3(1)].
26 Ibid [8(4)]–[(5)].
27 Ibid [9(1)], [13(2)].
28 Ibid [10(1)], [14(1)].
29 *Minister for Immigration v Taufahema* (2010) 114 ALD 537, 546.
30 Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (University of New South Wales Press, 2007) 159.
31 Joseph Carens, 'Citizenship and Civil Society: What rights for Residents' in Randall Hansen and Patrick Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 100, 103.
32 Ibid 103.
33 Ibid 102–103.
34 Ibid 103.
35 *Minister for Immigration, Local Government and Ethnic Affairs v Roberts* (1993) 41 FCR 82, 86.
36 The argument is legally untenable: see *Djalic v Minister for Immigration and Multicultural Affairs* (2004) 139 FCR 292.
37 Glenn Nicholls, 'Detention and Deportation: A Continuing Scandal' (2007–2008) *Arena* 40, 42.
38 David Wood, 'Deportation, the Immigration Power and Absorption into the Australian Community' (1986) 16 *Federal Law Review* 288, 298.
39 *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 [15].
40 Nicholls, above n 30, 8.
41 Commonwealth Ombudsman, above n 3, [3.8].
42 Damien Carrick, *The Law Report*, ABC, 14 March 2017 <http://www.abc.net.au/radionational/programs/lawreport/deportation-of-foreign-nationals-with-criminal-records/8349692#transcript>.
43 *Caric v Minister for Immigration and Border Protection* [2017] FCA 1391.

44 Carrick, above n 42.
45 Ibid.
46 *Caric v Minister for Immigration and Border Protection* [2017] FCA 1391.
47 Ibid.
48 Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to Long Term Residents 01/2006* (2006) [4.8].
49 Ibid.
50 As Lloyd QC explained to the High Court in *Falzon v Minister for Immigration and Border Protection*, 'You could have had a substantial criminal record in 1975, be in prison for two days for fine defaulting and then the cancellation is mandatory': transcript.
51 In *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2, the applicant, who had lived in Australia for 61 years, argued that s 501(3A) authorised the Minister to impose punishment for a breach of the law, thus purporting to 'confer judicial power of the Commonwealth on the Minister': *Falzon v Minister for Immigration and Border Protection*, Short Particulars <http://www.hcourt.gov.au/cases/case_s31-2017>. The High Court dismissed the application.
52 *Migration Regulations 1994* (Cth) r. 2.52.
53 Australian Human Rights Commission, *Inquiry Into the Migration Amendment (Character and General Visa Cancellation) Bill 2014: Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Legislation Committee*, 28 October 2014 [67].
54 *Migration Act 1958* (Cth) s 500.
55 See PAM3: Act — Compliance and Case Resolution — Case resolution — Returns and removals — Removal from Australia. The Procedures Advice Manual provides as follows: 'Section 198 of the Act (with the exception of s 198(1) which relates to removal on request) does not authorise removal of an unlawful non-citizen who has unfinalised merits review entitlements relating to a substantive visa application. This includes both circumstances where a person has a valid unfinalised merits review application and circumstances where they are still within relevant eligibility periods for lodgement.'
56 *Re Drake and Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589 (Bowen CJ and Deane J). For a recent decision relating to the role of the Tribunal, see *Singh (Migration)* [2017] AATA 850 (16 June 2017).
57 *Administrative Appeals Act 1975* (Cth) s 43.
58 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [42]. See also Joanne Kinslor and James English, 'Decision-Making in the National Interest?' (2015) 79 *AIAL Forum* 35–51.
59 Commonwealth Ombudsman, above n 3, [4.16]: As at April 2016, 75 per cent of cases were assigned to the Minister, while 12 per cent were assigned to the Assistant Minister.
60 PAM3: Act — Compliance and Case Resolution — Case resolution — Returns and removals — Removal from Australia. The Procedures Advice Manual provides as follows: 'The Act does not preclude involuntary removal of unlawful non-citizens who are entitled to seek judicial review or who are seeking judicial review of a decision in relation to a substantive visa. However, as a matter of policy, persons in this cohort usually should not be removed because:
    - the person should be given adequate time after a negative tribunal decision to consider their legal options to seek judicial review;
    - the court may ultimately overturn the substantive visa decision; and
    - the court may grant an injunction to prevent removal of the person.'
61 *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 [8]. While beyond the scope of this article, for a recent, significant case, see *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, which deals with the legislative limitations on the evidence available to a judicial review court which is called to enforce an implied 'reasonableness' requirement to be observed by the Minister when determining to cancel a visa.
62 See, for example, Denis Galligan, *Due Process and Legal Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996); and Jerry Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985) 171.
63 Justice John Griffiths, 'Keynote Address: Developments in Judicial Review Affecting Migration' (Paper presented at the Law Council Immigration Law Conference, Sydney, 24–25 February 2017) 18. See also, for example, *Vivi v Minister for Immigration and Border Protection* [2017] FCA 1341 at [5]–[6], where the applicant, who arrived as a one-year-old in Australia, was unsuccessful in obtaining legal representation.
64 See Chantal Bostock, 'Procedural Fairness and the AAT's Review of Visa Cancellation Decisions on Character Grounds' (2010) 17 *Australian Journal of Administrative Law* 77, 87.
65 Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to Long Term Residents 01/2006* (2006) [3.63]. See also Commonwealth Ombudsman, above n 3, [5.9].
66 See, for example, Commonwealth Ombudsman, above n 3 [6.3], [5.4]. The Commonwealth Ombudsman found at [1.4] that '[c]urrently 66% of persons who have their visa cancelled under s 501(3A) apply for revocation with the average time to process and decide a s 501(3A) revocation request being 153 days although 21 cases have taken more than 12 months'.

67 Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to Long Term Residents 01/2006* (2006) [3.12]. See also Commonwealth Ombudsman, above n 3, 4.24, 'Case study'.
68 Ibid [3.18].
69 Commonwealth Ombudsman, above n 3, [6.10], [4.13], [4.14].
70 *Jagroop v Minister for Immigration and Border Protection* [2016] FCAFC 48 [78].
71 Australian Human Rights Commission, *Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014: Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Legislation Committee*, 28 October 2014 [80].
72 Ibid [82].
73 Ibid.
74 *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65, 84.
75 Ibid.
76 *Folau v Minister for Immigration and Border Protection* [2017] FCAFC 214 [74], [81].
77 Ibid [89].
78 The Code, Article L211-2-1. Under French law, citizens over the age of 18 years may obtain citizenship after five years of lawful residence and subject to character, language and other requirements. For a summary of the requirements in French, see France Diplomatie, *L'acquisition de la nationalité française* (March 2016) <https://www.diplomatie.gouv.fr/fr/services-aux-citoyens/etat-civil-et-nationalite-francaise/nationalite-francaise/article/l-acquisition-de-la-nationalite-francaise>.
79 *'L'obligation de quitter le territoire français*' (OQTF) is the principal method by which non-citizens are removed. There are many grounds upon which an OQTF may be served, including unlawful residence and breach of visa conditions. See 'Le Juge Administratif et le Droit des Etrangers', *Les Dossiers Thématiques du Conseil d'Etat*, Conseil d'Etat, 15 June 2015.
80 The Code, art 521-1.
81 CE 20 Janvier 1988, no 87036.
82 CE 21 Janvier 1977, no 01333.
83 CE 11 Juin 1982, no 32292.
84 Article L521-2 (4°) of the Code provides as follows: 'The non-citizen, who has regularly resided in France for more than 10 years, except if, throughout this period, he has held a student temporary residence card.' The French is as follows: '*L'étranger qui réside régulièrement en France depuis plus de dix ans, sauf s'il a été, pendant toute cette période, titulaire d'une carte de séjour temporaire portant la mention "étudiant".*'
85 Article L521-2 (2°) of the Code provides as follows: 'The non-citizen married for at least three years to a French spouse, on the condition that their relationship has not ceased since marriage and the spouse has conserved French nationality.' The French is as follows: '*L'étranger marié depuis au moins trois ans avec un conjoint de nationalité française, à condition que la communauté de vie n'ait pas cessé depuis le mariage et que le conjoint ait conservé la nationalité française*.'
86 Article L521-2 (1°) of the Code provides as follows: 'The non-citizen, not living in a state of polygamy, who is father or mother of a French minor child living in France, on the condition that he or she effectively contributes to the maintenance and education of the child … since the child's birth or for at least one year.' The French is as follows: '*L'étranger, ne vivant pas en état de polygamie, qui est père ou mère d'un enfant français mineur résidant en France, à condition qu'il établisse contribuer effectivement à l'entretien et à l'éducation de l'enfant dans les conditions prévues par l'article 371-2 du code civil depuis la naissance de celui-ci ou depuis au moins un an*.'
87 The Code, art L521-2.
88 Dictionnaire Permanent, 'L'Expulsion', *Editions Législatives*, Chapitre 1 [25].
89 CE 6 Mai 1988, no 79375.
90 CE 24 Juin 1988, no 74547.
91 CE 22 Septembre 1997, no 165434.
92 The Code, art L521-3.
93 Article 521-3(1°) of the Code provides as follows: 'The non-citizen, who proves using whatever means, having habitually resided in France since having attained the age of 13.' The French is as follows: 'L'étranger qui justifie par tous moyens résider habituellement en France depuis qu'il a atteint au plus l'âge de treize ans.'
94 Article L521-3(2°) of the Code provides as follows: 'The non-citizen who has regularly resided in France for more than 20 years.' The French is as follows: '*L'étranger qui réside régulièrement en France depuis plus de vingt ans*.'
95 Article L521-3(3°) of the Code provides as follows: 'The non-citizen, who having regularly resided in France for more than 10 years, and who, not living in a state of polygamy, has been married for at least four years to either a French resident who has retained French nationality or a non-citizen, who meets the condition in (1°), on the condition that their relationship has not ceased since marriage.' The French is as follows: '*L'étranger qui réside régulièrement en France depuis plus de dix ans et qui, ne vivant pas en état de polygamie, est marié depuis au moins quatre ans soit avec un ressortissant français ayant conservé la nationalité française, soit avec un ressortissant étranger relevant du 1°, à condition que la communauté de vie n'ait pas cessé depuis le mariage*.'
96 Article L521-3(4°) of the Code provides as follows: 'The non-citizen who having regularly resided in France for more than 10 years and who, not living in a state of polygamy, is father or mother of a French minor child

living in France, on the condition that he or she establishes that he or she effectively contributes to the maintenance and education of the child … since the child's birth or for more than one year.' The French is as follows: '*L'étranger qui réside régulièrement en France depuis plus de dix ans et qui, ne vivant pas en état de polygamie, est père ou mère d'un enfant français mineur résidant en France, à condition qu'il établisse contribuer effectivement à l'entretien et à l'éducation de l'enfant dans les conditions prévues par l'article 371-2 du code civil depuis la naissance de celui-ci ou depuis au moins un an*.'

97 The Code, art L521-3.
98 Dictionnaire Permanent, 'L'Expulsion: *Le champ d'application de l'expulsion*', *Editions Législatives*, section 5 [31].
99 CAA de Paris, 9eme chambre, 7 Mars 2016, no 15PA02906.
100 The Code, art L 521-4.
101 Rapport du Groupe de Travail institué par M Nicolas Sarkozy, ministre de l'intérieur de la sécurité intérieure et des libertés locales, *La 'Double Peine': Propositions de Réforme* (Mars 2003) 3.
102 Ibid 24. At the same page, the Commission also noted that there was no incentive for the non-citizen facing removal to rehabilitate, knowing that he or she faced deportation upon leaving prison. In addition, deportation did not take into account any improvements in the behaviour of non-citizens whilst incarcerated and, finally, impending deportation was a barrier to accessing training and work programs offered whilst in prison because of the shortage of these programs and a view amongst prison officials that it was pointless to propose training to those facing removal.
103 Ibid 25.
104 Ibid.
105 Ibid.
106 Ibid 27.
107 Ibid 26.
108 Ibid 28.
109 Ibid 29.
110 Stéphane Maugendre, 'Double Peine: Une Réforme de Dupes' 2004/1 (59–60) *Plein Droit* 23, 24.
111 Rapport du Groupe de Travail, above n 101, 48–51.
112 Ibid 49.
113 Ibid 48.
114 Ibid. The Commission was particularly concerned to propose criteria which were easily verified — for example, marriage rather than de facto relationships.
115 See Chloe Peyronnet, 'Undesirable and Unreturnable Migrants under French Law: Between Legal Uncertainty and Legal Limbo' (2017) 36 *Refugee Survey Quarterly* 36.
116 Ibid 49.
117 The Code, arts L522-1 and 522-2.
118 The Code, art L522-2.
119 The Code, art L522-2. Applicants may obtain publicly funded legal representation throughout the expulsion process: see GISTI, *Comment bénéficier de l'aide juridictionnelle?* (GISTI, 2nd ed, 2017).
120 The Code, art L522-2.
121 Dictionnaire Permanent, 'L'Expulsion: *Les procédures d'expulsion*', *Editions Législatives*, Chapitre 2, Section 3 [73].
122 The Code, art L522-2.
123 Dictionnaire Permanent, 'L'Expulsion: *Les procédures d'expulsion*', *Editions Législatives*, Chapitre 1 [64].
124 See Decision no 2016-580 QPC, 5 Octobre 2016.
125 *Code de Justice Administrative*, Article R421-1.
126 Article 8 of the *European Convention on Human Rights* provides as follows:
'Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'
As one French commentator observed, 'the European Convention of Human Rights has become a particularly important source of French law': Gustave Peiser, *Droit Administratif Général* (Dalloz, 26th ed, 2014) 31. See also Elisabeth Lambert Abdelgawad and Anne Weber, 'The Reception Process in France and Germany' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP Publisher, 2008) 107.
127 *Code de Justice Administrative*, art L521-1. Under art L521-2 of the *Code de Justice Administrative*, an applicant may also appeal to the *juge des référés* arguing the deportation constitutes a serious and manifestly illegal breach of a fundament right. The judge, who must rule within 48 hours, may take all necessary measures to safeguard that fundamental right.
128 Ibid.
129 CE 26 Septembre 2001, no 231204.
130 GISTI, *Les Etrangers Face à l'administration: Droits, Démarches, Recours* (Editions La Découverte, 2013) 130.
131 *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356.

132 See, for example, Direction No 41 — *Visa Refusal and Cancellation under Section 501 of the Migration Act 1958* (3 June 2009).
133 See, for example, Chantal Bostock, 'The Effect of Ministerial Directions on Tribunal Independence' (2011) 18 *Australian Journal of Administrative Law* 161.
134 The Code, art L521-3.
135 In 2016, 149 non-citizens were subject to expulsion: see Rapport commun sur les centres de rétention administrative par l'Assfam, Forum Réfugiés, France terre d'asile, La Cimade, l'Ordre de Malte et Solidarité Mayotte, *Rapport 2016 sur les centres et locaux de rétention administrative* (27 Juin 2017) 13.
136 One flaw of the revised approach, however, is that the term 'serious threat to public order' is not defined in the law. As one commentator recently noted, the authorities in France enjoy a very wide 'margin of appreciation' in determining who poses a serious threat to public order: see Peyronnet, above n 115.
137 See Conseil d'Etat, *Le Juge Administratif et le Droit des Etrangers: Les Dossiers Thématiques du Conseil d'Etat* (15 June 2015).
138 Joseph Carens, 'Immigration, Democracy and Citizenship' in Oliver Schmidtke and Saime Ozcurumez (eds), *Of States, Rights and Social Closure* (Palgrave Macmillan, 2008) 27.
139 Ibid 28.