

Pearson v Minister for Home Affairs [2022] FCAFC 203



HAVE THERE BEEN CHANGES TO s 501?

On 22 December 2022, the Full Court of the Federal Court of Australia handed down [Pearson v Minister for Home Affairs \[2022\] FCAFC 203](#).

The Court found that mandatory cancellations based on aggregate sentences are unlawful. If you are affected by this decision, it means your visa cancellation was likely unlawful and that your visa should be reinstated. We understand the Department is taking urgent action regarding people in detention who are affected.

If your visa is reinstated, there remains a risk of future visa cancellation on character grounds. It is also unclear whether the decision will be appealed.

WHO IS AFFECTED?

The decision affects people in detention, in the community, or outside of Australia:

- whose visas were cancelled or refused after failing the character test because they “have been sentenced to a term of imprisonment of 12 months or more” (s 501(7)(c) of the Act);
- on the basis of an **aggregate** (or combined) sentence for 2 or more offences totalling 12 months or more.

If you have been sentenced for 2 or more offences at the same time, a court might impose a separate sentence for each offence, *or* give you an aggregate (or combined) sentence for the offences together. This is different from a concurrent or cumulative sentence. The Court will tell you, and make a written record, if they give you an aggregate sentence.

Pearson-affected	Not Pearson-affected
People who failed the character test because of a “significant criminal record”, having “been sentenced to a term of imprisonment of 12 months or more” (s501(7)(c)), based on an aggregate sentence for 2 or more offences, adding up to 12 months or more.	People who failed the character test <i>other than</i> under s 501(7)(c) – for example, having been “sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more.”
E.g. a 12-month <i>aggregate</i> sentence for theft <i>and</i> possession of cannabis, without quantifying the sentence for each offence.	E.g. 12-month sentence for possession of cannabis.
E.g. “On Counts 1 and 2, you will be convicted and sentenced to an aggregate term of imprisonment of 12 months.”	E.g. 1 x 6-month sentence for theft, 1 x 12-month sentence for possession of cannabis.
	E.g. “On Count 1, you will be convicted and sentenced to be imprisoned for a period of 6 months. On Count 2, you will be convicted and sentenced to be imprisoned for a period of 6 months.”

WHAT SHOULD I DO IF I MIGHT BE AFFECTED?

It is important that you get legal advice about your situation. A lawyer can advise whether you are *Pearson*-affected, and help you with next steps. You should provide your lawyer with a copy of your visa cancellation notice, and your criminal record (including any sentencing remarks).

If you are a refugee or person seeking asylum and you would like to speak with a lawyer at HRLP, you can reach us by phone on (03) 9326 6066 or at our Footscray office between 10am and 12.30pm Monday-Friday.