The Rise of Section 501BA Visa Cancellations: National Interest vs Administrative Justice

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Section 501BA of the Migration Act 1958 (Cth) empowers the Minister to personally override a Tribunal decision revoking a mandatory visa cancellation, provided the visa-holder fails the character test and cancellation is in the "national interest". Natural justice is expressly excluded, enabling swift executive action. Though intended as an "exceptional" safeguard, the power is now used with increasing frequency, often against long-term residents who had successfully appealed to the AAT. Judicial review in the Federal Court has rarely curtailed its use, with intervention limited to cases of material factual error or illogical reasoning. While courts emphasise that fairness concerns do not displace Parliament's design, persistent reliance on s 501BA risks eroding the transparency and authority of merits review. The article argues that without restraint or reform, the routine use of this override power undermines rule-of-law values and public confidence in migration decision-making.

Introduction: Section 501BA and the "National Interest" Power

Section 501BA of the *Migration Act 1958* (Cth) empowers the Minister, acting personally, to set aside a decision of the Administrative Review Tribunal (ART)[1] (formerly the Administrative Appeals Tribunal (AAT))[2] or a delegate that revoked a mandatory visa cancellation, and to re-cancel the visa, if two preconditions are met: (1) the Minister is satisfied the person does not pass the character test; and (2) the Minister is satisfied that cancellation is "in the national interest".[3]

Crucially, Parliament expressly excluded natural justice from this process – the Minister "is not bound by the rules of natural justice" when acting under s 501BA(2).[4] The provision, introduced in 2014 reforms, was billed as a personal, "exceptional" power for use where a non-citizen with serious character issues has managed to retain their visa through the usual processes.[5]

The Explanatory Memorandum described s 501BA as ensuring the Minister "retains the ability in exceptional cases, where it is in the national interest, to remove a person who does not pass the character test from the community", notwithstanding a tribunal's decision to the contrary.[6] In practice, s 501BA

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[1] See Matthew Groves and Greg Weeks, "Tribunal Justice and Politics in Australia: The Rise and Fall of the Administrative Appeals Tribunal" (2023) 97(4) ALJ 278.

[2] See *Administrative Appeals Tribunal Act 1975* (Cth) and *Administrative Review Tribunal Act 2024* (Cth).

[3] *Migration Act 1958* (Cth) s 501BA(2). See *Ibardaloza v Minister for Immigration and Multicultural Affairs* [2025] FCA 356, [4]–[5] (Colvin J) summarising the elements of the power. The character test satisfaction typically relies on the applicant's criminal record (see *Migration Act 1958* (Cth) s 501(6) and (7)).

[4] *Migration Act 1958* (Cth) s 501BA(3). In *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [9]–[12], Shariff J notes the exclusion of natural justice but that the Minister acknowledged he could (discretionarily) allow a hearing and chose not to.

[5] Compare *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [96]; [2012] HCA 31, where French CJ and Kiefel J described personal ministerial powers in the *Migration Act 1958* (Cth) as of an "extraordinary" and "exceptional" nature where the rules of procedural fairness were excluded.

[6] Explanatory Memorandum, *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Cth) [85].

has been invoked with increasing frequency in recent years, far beyond the "emergency" or "exceptional" scenarios one might have envisaged.

Dozens of individuals who successfully appealed their visa cancellations before the AAT have later faced a Ministerial "override" cancellation under s 501BA.[7] These cases have in turn led to a wave of applications for judicial review in the Federal Court. This article examines common themes emerging from those challenges – the grounds raised, the Court's approach, and the tension between the national interest power and administrative justice principles. It argues that the persistent and widening use of s 501BA risks undermining the fairness and transparency of the merits review system, even as courts largely defer to the Minister's broad discretion.

THE MECHANICS OF SECTION 501BA DECISIONS

A typical fact pattern will set the stage. Often the non-citizen applicant is a long-term resident (often a New Zealand citizen or former refugee) who had their visa mandatorily cancelled under s 501(3A) due to a substantial criminal sentence or sexual offence (triggering the "character test").[8]

The individual then persuaded the AAT on review to *revoke* that cancellation – meaning their visa was reinstated – based on mitigating factors such as rehabilitation, family ties in Australia, and the low risk of re-offending.

For example, in *Younes v Minister for Immigration and Multicultural Affairs* (*Younes*),[9] the AAT in late 2023 set aside the delegate's non-revocation decision and restored Mr Younes' partner visa, noting factors like his close relationship with his children and the moderate likelihood of re-offending. However, some months later (often without warning to the individual), the Minister personally intervenes under s 501BA to cancel the visa anew, overriding the AAT's decision. The visa-holder is then taken back into immigration detention (or kept there if still imprisoned), and served with the Minister's Statement of Reasons.

These Ministerial reasons typically recite that although natural justice was not required, the Minister "considered the information previously provided by the applicant to the Tribunal" and thus chose not to invite further submissions. The reasons then set out the Minister's consideration of the case under a "national interest" lens – usually emphasising the protection of the Australian community from the individual's offending, and the expectations of the Australian community that non-citizens who commit serious crimes should not hold visas.[10]

For instance, in *Younes*, Ministerial reasons stressed that Mr Younes' sexual offending was "particularly serious" and any "low to moderate" risk of re-offending was "unacceptable", outweighing countervailing factors like his family ties.[11] The Minister concluded that "the national interest in protecting the Australian community" outweighed all other considerations.[12] The visa was thus cancelled notwithstanding the AAT's prior favourable decision.

Procedurally, these decisions reveal a highly executive-driven process. Departmental officers prepare a submission for the Minister summarising the case, attaching the AAT's decision and other materials. The submission typically presents the Minister with options to either exercise the s 501BA power or not, and (if yes) whether to do so with or without offering the person an additional opportunity to be heard.[13]

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[7] See further Jason Donnelly, *Use of a National Interest Criterion in Commonwealth Legislation – Suggested Reforms for Greater Accountability in Executive Decision-making* (PhD Thesis, University of New South Wales, 2018).

[8] For example *XKTK v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 14, where the applicant's visa was mandatorily cancelled after a term of imprisonment of five years for serious offences. Section 501(3A) mandates cancellation if a non-citizen is serving a sentence of 12 months or more or has been convicted of sexually based offences involving a child, among other things.

[9] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236.

[10] *EUD24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1474.

[11] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [13], [15].

[12] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [29].

[13] *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595; [2022] FCAFC 199.

In one case, *Morgan v Minister for Immigration and Multicultural Affairs* (*Morgan*),[14] the Minister's submission included a decision page with multiple choice outcomes: three "non-cancellation" options and one "cancellation" option. The Minister circled the cancellation outcome, recorded that he had considered the submission and attachments for 1 hour 45 minutes, and signed a pre-drafted Statement of Reasons without amendment.[15] The speed and structure of this process – essentially an expedited, paper-based reconsideration with no oral hearing – later became fodder for applicants' arguments that the Minister had not given "proper, genuine" consideration to all aspects of the case.[16]

Across the 27 cases decided in 2025 (as of 24 August 2025), a clear trend is the dominant role of legal unreasonableness challenges, often framed in terms of illogicality or irrationality of the Minister's reasoning. Many applicants argued that the Minister relied on outdated or incorrect factual assumptions (eg, treating someone as still in detention or prison when they were not, as in *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* (*Tanehohaia*)[17] and *Younes*[18]), or that findings on risk of re-offending were unsupported given health or rehabilitation evidence (eg, *Chapman v Minister for Immigration and Multicultural Affairs* (*Chapman*),[19] *BTLD v Minister for Immigration and Multicultural Affairs* (*BTLD*)[20]). While most such claims failed, the Court did in some cases find material error – most notably in *CRRN v Minister for Immigration and Multicultural Affairs* (*CRRN*)[21] and *Tanehohaia*[22]— where the Minister's failure to grapple with critical facts (such as eligibility for NDIS treatment or constructive knowledge of release from prison) rendered the decision unreasonable. This indicates that factual error coupled with materiality is one of the few successful avenues for applicants challenging s 501BA cancellations.

Another striking pattern is the treatment of "national interest" as an expansive and largely political concept, yet one that remains judicially reviewable if applied unreasonably. In nearly all cases, the Minister justified cancellation on the twin pillars of (1) protection of the Australian community and (2) expectations of the Australian community. Cases like *XKTK v Minister for Immigration, Citizenship and Multicultural Affairs* (*XKTK*)[23] and *Po'oi v Minister for Immigration, Citizenship and Multicultural Affairs* [24] show that these factors were given determinative weight even where applicants would remain in the community due to *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (*NZYQ*),[25] illustrating that the "symbolic" dimension of visa cancellation carried significant weight. However, the courts consistently accepted that such reasoning, while broad, did not lack intelligible justification. The exception again lies in cases like *CRRN*,[26] where failure to consider the real consequences of cancellation (loss of NDIS access leading to unmanaged recidivism risk) was fatal.

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[14] *Morgan v Minister for Immigration and Multicultural Affairs* [2025] FCA 266.

[15] *Morgan v Minister for Immigration and Multicultural Affairs* [2025] FCA 266, [14].

[16] See Mark Aronson, "Ministers' Signatures – What Do They Prove?" (2023) 30 AJ Admin L 10, where Aronson examines the evidentiary and legal weight that courts should give to ministerial signatures on decisions and statements of reasons. It highlights case studies to show how ministers often adopt departmental drafts, raising questions about whether they have personally engaged with the material as legally required. Ultimately, the article argues that while ministers may legitimately rely on staff assistance, courts should remain alert to the risks of pretence or insufficient consideration, as unchecked reliance on departmental work undermines accountability in executive decision-making.

[17] *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 106.

[18] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236.

[19] *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24.

[20] *BTLD v Minister for Immigration and Multicultural Affairs* (2025) 310 FCR 606; [2025] FCA 600.

[21] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192.

[22] *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 106.

[23] *XKTK v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 14.

[24] *Po'oi v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 258.

[25] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137; [2023] HCA 37.

[26] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192.

Finally, the cases demonstrate a temporal dimension in the use of s 501BA. Applicants frequently argued that delays between the AAT's decision and the Minister's intervention rendered the exercise unlawful. While most courts rejected these arguments, affirming that s 501BA does not impose a strict time limit (eg, *Morgan*,[27] *XMBQ v Minister for Immigration and Multicultural Affairs* [28]), judges scrutinised whether the passage of time made reliance on past material unreasonable. This reflects a judicial willingness to examine whether decisions are tethered to current realities rather than whether they are timely per se. Thus, while national interest remains a broad and resilient justification, the emerging successful cases reveal that factual misapprehension, outdated assumptions, and unaddressed practical consequences are the pressure points where courts will intervene.

Against this backdrop, affected individuals have turned to the Federal Court, seeking to impugn the Minister's s 501BA decision as jurisdictionally erroneous (since merits review is unavailable).[29] The grounds advanced in these judicial review applications fall into several recurring categories, examined in detail below.

Ground 1: Procedural Fairness and "Hearing Rule" by Another Name

Because s 501BA(3) excludes the hearing rule, an applicant cannot directly allege denial of procedural fairness. Nevertheless, many have tried to indirectly revive fairness arguments, contending that it was *unreasonable* for the Minister not to afford them an opportunity to make fresh representations, especially where a significant time elapsed or circumstances changed between the AAT's decision and the Minister's intervention.[30] This was a prominent theme in *Chapman*,[31] where the applicant succeeded before the AAT in November 2023 but the Minister waited until June 2024 to cancel his visa.[32]

By that time Chapman had been living in the community for seven months. He argued it was unreasonable and irrational for the Minister to have assumed the facts remained the same and to have given him no chance to provide updated information (such as evidence of rehabilitation or changes in personal circumstances in those intervening months).[33]

On its face, this argument appeals to intuitive notions of fairness – why should not a person be heard, especially after a lengthy delay? This question highlights an assumption that underpins the exclusion of fairness in this instance, namely that information drawn from earlier merits review proceedings can provide a full and fair account of the issues to the Minister. As a general rule, the strength of that assumption lessens as the time between the ART and Ministerial decisions grows. But the courts have so far been unpersuaded that such gaps and the omissions they might create cross into jurisdictional error. In *Chapman*, Lee J acknowledged the applicant's predicament but noted that Parliament specifically disapplied natural justice for s 501BA decisions.[34]

The Minister had explicitly adverted in his reasons to the fact he was not obliged to give Chapman a hearing, yet chose to rely on the evidence and representations Chapman had made to the AAT.[35] Justice

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[27] *Morgan v Minister for Immigration and Multicultural Affairs* [2025] FCA 266.

[28] *XMBQ v Minister for Immigration and Multicultural Affairs* [2025] FCA 553.

[29] *Migration Act 1958* (Cth) s 500(1).

[30] See Greg Weeks, "The Expanding Role of Process in Judicial Review" (2008) 15 AJ Admin L 100, where the learned author explores how judicial review has increasingly focused on the adequacy of process, making procedural flaws central to findings of legal error. It shows that courts often treat failures of fairness, rationality, or proper reasoning as procedural defects, thereby avoiding the boundaries of impermissible merits review. Ultimately, the article argues that while process safeguards remain vital, the rise of "process-driven" review has blurred the line between procedural fairness and substantive quality, reinforcing the dominance of process in Australian administrative law.

[31] *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24.

[32] *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24, [5].

[33] *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24, [52].

[34] *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24, [65].

[35] *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24, [23].

Lee held that this approach was neither illogical nor unlawful: the Minister is permitted to "proceed without giving [the person] an opportunity to be heard" so long as he considered the material already on the record.[36] In other words, courts have treated the absence of a fresh hearing not as an error in itself, but as an intended feature of the power – one that can only be challenged if it renders the outcome irrational in the *Wednesbury* sense (a high bar).[37]

Kirk v Minister for Immigration and Multicultural Affairs[38] is illustrative. There, the sole ground of review alleged that the Minister acted unreasonably in relying on Mr Kirk's earlier representations (to the delegate and Tribunal) "without affording the applicant an opportunity to be heard" at the s 501BA stage.[39] This was essentially a repackaged fairness complaint. Justice Charlesworth firmly rejected it. The Minister's reasoning showed he had conscientiously considered Kirk's previous submissions (which covered family ties, rehabilitation, etc), and nothing indicated that circumstances had so radically changed as to mandate a new invitation to comment.[40] In the Court's view, the "discretion not to hear from the person"[41] was lawfully exercised; it did not render the decision beyond "the range of lawful outcomes"[42] simply because another decision-maker might have invited further input.[43]

Notably, even when a factual mistake was made about the applicant's circumstances, the courts have distinguished between immaterial oversight and material unfairness (ie the application of materiality principles).[44] *Younes*, mentioned above, provides an example. The Minister's reasons in Younes referred to the applicant being in immigration detention at the time of decision.[45] In reality, Mr Younes was in the Australian community criminal– not technically "immigration detention".[46] He argued this error led the Minister to undervalue the best interests of his children (Ground 1 and 2).[47] But Shariff J found no jurisdictional error: whether the applicant was in immigration detention or the Australian community, the practical reality was that he was not at liberty to care for his children, a point the Minister had duly noted.[48]

Even if it was an incorrect factual assumption, it did not distort the Minister's reasoning in any material way, and thus did not rise to legal unreasonableness.[49] The Minister had accepted Younes had a loving relationship with his kids and would play a positive role[50] if released – but emphasised that as things stood, his role was limited and the risk to the community took precedence.[51] This reasoning was intelligible and defensible.

In short, arguments that the Minister should have re-opened the evidentiary hearing or solicited new information have not found traction unless tied to a clear failure to consider something crucial (discussed

[36] *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24, [69].

[37] Michael Ramsden, "Future of Wednesbury Unreasonableness in the Substantive Review of Administrative Discretion: A Hong Kong Perspective" (2021) 9(1) *The Chinese Journal of Comparative Law* 51.

[38] *Kirk v Minister for Immigration and Multicultural Affairs* [2025] FCA 150.

[39] *Kirk v Minister for Immigration and Multicultural Affairs* [2025] FCA 150, [13].

[40] *Kirk v Minister for Immigration and Multicultural Affairs* [2025] FCA 150, [25]–[26].

[41] *Kirk v Minister for Immigration and Multicultural Affairs* [2025] FCA 150, [5].

[42] *Kirk v Minister for Immigration and Multicultural Affairs* [2025] FCA 150, [12].

[43] *Kirk v Minister for Immigration and Multicultural Affairs* [2025] FCA 150, [25]–[26].

[44] *EUD24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1474, [18].

[45] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [17].

[46] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [20].

[47] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [16]–[30].

[48] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [25]–[26].

[49] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [28]–[29].

[50] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [18], [26].

[51] *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236, [29].

below). The design of s 501BA pointedly allows the Minister to "act swiftly"[52] – even "without notice", as the 2014 parliamentary debates put it – to prevent someone from remaining in Australia if deemed in the national interest.[53]

The Federal Court has generally accepted that the Minister can make a s 501BA decision on the papers, relying on the existing record, without breaching any implied duty.[54] Only in rare circumstances might this intersect with unreasonableness – for example, if there were a prolonged delay[55] and obvious significant new developments that were wholly ignored by the Minister. In such cases, the difficulty typically lies not in any deliberate disregard by the Minister, but rather in the Minister's unawareness of certain matters, owing to the nature of the material before them, which did not readily permit the incorporation of new issues. We return to this in the context of material factual errors. For the most part, however, applicants have had to shift focus from procedural fairness per se to substantive failings in the Minister's consideration.

Ground 2: Failure to Consider Relevant Considerations and Material Errors of Fact

Another recurrent theme is the allegation that the Minister failed to consider or properly grapple with important evidence or consequences, amounting to jurisdictional error (either as a specific failure to consider a relevant consideration or as an aspect of unreasonableness/irrationality). Given that many AAT decisions in these cases had marshalled substantial evidence of rehabilitation, low risk, family hardship, etc., applicants often argue the Minister selectively ignored or discounted key points that the Tribunal had found persuasive.

One illustration is *Moli v Minister for Immigration and Multicultural Affairs* (*Moli*),[56] where the applicant had a history of violent offending but also a detailed parole assessment report and sentencing remarks suggesting his risk could be managed with proper support. Moli contended the Minister failed to consider favourable findings in those materials – effectively cherry-picking the negative aspects of his record.[57] Colvin J examined this claim closely. The judgment shows the Court's approach: to see if the Minister's reasons, read fairly, engage with the substance of the evidence before him. In *Moli*'s case, Colvin J concluded the Minister had considered the parole report and sentencing remarks, but simply assigned them less weight in light of the primary concern to protect the community.[58] The catchwords note that the grounds included "failing to properly consider sentencing remarks" and an "erroneous view as to the scope of what may be in the national interest", but ultimately no jurisdictional error was established.[59] This reflects a pattern: courts are reluctant to intervene merely because a Minister gave inadequate weight to some aspect,[60] unless it is shown that he wholly overlooked something he was bound in law to consider.

The Minister's position is not analogous to that of a merits review tribunal. A tribunal is expressly tasked by statute with reconsidering the merits of a decision, which necessarily involves weighing evidence afresh and, within lawful bounds, drawing its own inferences. By contrast, the Minister acts within a confined statutory framework, and when exercising exceptional or personal powers, is bound to apply the law according to its terms rather than substitute subjective preferences for an alternative merits assessment. To permit the Minister to mirror the tribunal's evaluative role would conflate review

[52] *Moli v Minister for Immigration and Multicultural Affairs* [2025] FCA 350, [30], [32], [34], [42], [44], [68].

[53] Commonwealth, *Parliamentary Debates*, Senate, 26 November 2014, 9435 (Sarah Hanson-Young).

[54] *EUD24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1474.

[55] *XMBQ v Minister for Immigration and Multicultural Affairs* [2025] FCA 553.

[56] *Moli v Minister for Immigration and Multicultural Affairs* [2025] FCA 350.

[57] *Moli v Minister for Immigration and Multicultural Affairs* [2025] FCA 350, [6].

[58] *Moli v Minister for Immigration and Multicultural Affairs* [2025] FCA 350, [119].

[59] *Moli v Minister for Immigration and Multicultural Affairs* [2025] FCA 350, [139].

[60] *Moli v Minister for Immigration and Multicultural Affairs* [2025] FCA 350, [136].

with original jurisdiction, undermining both the limits Parliament has imposed and the integrity of the statutory scheme.

A contrast can be found in *Tanehohaia*,[61] one of the few cases where the Minister conceded a reviewable error. There, Mr Tanehohaia's visa had been restored by the AAT and he was released on parole in May 2024.[62] When the Assistant Minister cancelled his visa under s 501BA in September 2024, he mistakenly proceeded as if Mr Tanehohaia were still in prison, not realising (or not noting) that the applicant had been living in the community under parole supervision for several months.[63] This mistake was critical: the Minister's reasons failed to take into account that Tanehohaia was no longer separated from his children and was already being managed in the community (facts highly relevant to both the risk assessment and the family impact).[64]

By the time of the Federal Court hearing, the Department accepted that this amounted to jurisdictional error – the Minister had constructive knowledge of the true facts (his department was notified of the parole release in July 2024),[65] so the false premise underpinning the decision (that the applicant remained imprisoned) rendered the decision legally unreasonable.[66] As Colvin J noted, applying the High Court's recent guidance on materiality, this factual error was "material to the decision" because it meant the Minister failed to consider a fundamental aspect of Mr Tanehohaia's current circumstances, which could realistically have affected the outcome.[67] A writ of certiorari was issued quashing the cancellation. The *Tanehohaia* scenario shows that where the Minister plainly overlooks a significant change or proceeds on a wrong factual basis that is central to the balancing exercise, the Court will intervene.

Another striking example is *CRRN*,[68] a case highlighting the legal consequences of cancellation on a refugee applicant. Mr CRRN was an Afghan national owed protection (non-refoulement) by Australia.[69] Because of that, even if his visa were cancelled, he could not lawfully be removed to Afghanistan – and following the High Court's decision in *NZYQ*, he also could not be kept in indefinite immigration detention (since removal was not reasonably practicable).[70]

The Minister cancelled CRRN's visa in the "national interest", focusing on his criminal history and mental illness with a view to protecting the community.[71] However, the Minister failed to address a paradox: without a visa, CRRN would be released into the Australian community anyway on a Bridging visa R (because he could not be removed to his home country), and cancellation would actually cut him off from the support mechanisms (namely, the National Disability Insurance Scheme) that were helping manage his mental health – potentially increasing his risk of recidivism to the community's detriment.[72] Justice Owens found this omission fatal.[73] The Minister had considered community protection and risk of re-offending as key national interest factors, yet did not make the necessary finding or consideration about how cancelling the visa might itself worsen that risk (by excluding CRRN from the NDIS).[74]

[61] *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 106.

[62] *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 106, [1].

[63] *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 106, [2].

[64] *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 106, [3]–[4].

[65] *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 106, [4], [7].

[66] *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 106, [4].

[67] *Tanehohaia v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 106, [4].

[68] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192.

[69] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192, [24].

[70] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192, [58].

[71] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192, [20]–[21].

[72] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192, [11].

[73] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192, [62].

[74] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192, [61].

In other words, the Minister's decision was logically inconsistent with his stated objective: he gave weight to protecting the public from CRRN but ignored the fact that cancelling the visa would leave CRRN in the community without support, undermining that very goal. This was held to be legally unreasonable and the decision was set aside.[75] *CRRN* stands as a rare instance of a successful substantive challenge on unreasonableness grounds – one closely tied to a failure to consider an obviously relevant consequence of the decision.

In *GRCF v Minister for Immigration, Citizenship and Multicultural Affairs*,[76] Bennett J quashed the Minister's personal decision under s 501BA(2) to cancel the applicant's Orphan Relative visa. The Court held that the Minister's reasoning was materially illogical because he relied on an unfounded finding that the applicant showed "little remorse" for incidents in detention, which was incorporated into his national interest analysis and discretionary assessment.[77] The Court also found it unreasonable for the Minister to proceed on the basis of outdated evidence about the applicant's rehabilitation and psychological treatment without any current material.[78] Although other grounds failed, these errors established jurisdictional error and were material because they created a realistic possibility that the decision could have been different. The decision was therefore set aside by certiorari, with costs awarded to the applicant.[79]

In *XKTK v Minister for Immigration, Citizenship and Multicultural Affairs*,[80] the Minister had reasoned that even if the applicant stayed in Australia, it was contrary to community expectations and the integrity of the visa system for him to hold a visa, given his criminal conduct.[81] The Court found the Minister's decision did not lack an intelligible justification: protecting the community and affirming the expectation that serious offenders not enjoy the privileges of a visa were considerations reasonably open to the Minister, even if immediate removal was not possible.[82]

The distinction from *CRRN* is subtle but important – in *CRRN*, the Minister ignored a feedback effect (cancellation actively undermining protection of the community by denying support to the individual), whereas in *XKTK*, the complaint was more that cancellation was *symbolic* or ineffectual. The latter does not readily translate to legal unreasonableness; courts defer to the Minister's prerogative to send a normative message via cancellation, so long as it is not illogical or based on a mistake of fact.

Indeed, Halley J emphasised that the national interest criterion is broad and outcome-focused – it is not rendered invalid simply because the person remains onshore; cancellation might serve other aspects of national interest (eg preventing the grant of a more secure visa, signalling consequences for misconduct).[83]

Finally, many applicants argue the Minister failed to consider specific compassionate circumstances – such as the impact on children, or evidence of rehabilitation – despite those being before him. Often these are couched as part of an unreasonableness argument (that important factors were ignored or given manifestly insufficient weight). The courts respond by closely reading the Minister's reasons to see if those factors got a mention.

For example, in *BFBZ v Minister for Immigration, Citizenship and Multicultural Affairs*,[84] the applicant (a New Zealander) contended the Minister overlooked the fact that she had left her abusive partner (with whom she had offended) and that her rehabilitation efforts were well underway – factors the AAT had found weighed in favour of keeping her visa.[85] Justice Shariff dismissed this, noting the Minister's

[75] *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192, [61]–[62].

[76] *GRCF v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 415.

[77] *GRCF v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 415, [26]–[29], [35]–[36].

[78] *GRCF v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 415, [50]–[54], [61].

[79] *GRCF v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 415, [98].

[80] *XKTK v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 14.

[81] *XKTK v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 14, [19].

[82] *XKTK v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 14, [48], [58].

[83] *XKTK v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 14, [58].

[84] *BFBZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 234.

[85] *BFBZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 234, [11].

reasons explicitly acknowledged that the applicant was no longer with the partner and recited her claims about rehabilitation; the Minister simply was not convinced those points outweighed the seriousness of her violent robbery offence and the government's view on community expectations.[86]

In *Kopa v Minister for Immigration and Multicultural Affairs* (*Kopa*),[87] Derrington J similarly found no arguable error where the Minister's reasons "canvassed somewhat extensively"[88] the applicant's family ties, remorse and rehabilitation. Even if the Minister did not agree with the Tribunal's positive view on those matters, he had demonstrably "averted to all of these matters in the course of his deliberations", defeating any suggestion that they were not taken into account.[89]

The upshot is that courts differentiate between a Minister failing to consider a factor at all (or proceeding on a false assumption about it) – which can be jurisdictional error, if material – and a Minister considering but discounting a factor, which is within lawful authority. As Mortimer J put it in a related context, s 501BA is an "override power" and there is "no basis to import … a requirement that the Minister needs to refute the reasoning of the Tribunal".[90]

The Minister must *consider* the Tribunal's reasoning and the evidence before it;[91] but he is not bound to accept the Tribunal's findings or give them the same weight.[92] Failure to *consider at all* may be an error – for example if a Minister ignored the Tribunal's primary findings – but none of the cases so far have shown a complete omission.

In fact, in most judgments the Court finds it "pellucid"[93] or clear on the face of the Minister's reasons that he did consider the Tribunal's key findings (even if only to explicitly disagree or give them less emphasis). Thus, claims of "selective consideration"[94] have generally failed, unless coupled with a demonstrable factual error or omission as seen in *Tanehohaia* and *CRRN*.

Ground 3: Legal Unreasonableness – Substantive Limits of the National Interest Power

Many of the above arguments ultimately fold into the broad ground of "legal unreasonableness". Given the immense discretion of the Minister under s 501BA, applicants often allege that, taking the decision as a whole, it was so unreasonable or disproportionate as to be beyond power.[95] This invites the Court to look at outcome and logic, rather than any specific procedural misstep. However, the threshold for establishing legal unreasonableness is notoriously high – the decision must lack an "intelligible justification" or be beyond anything that could lie within the Minister's lawful discretion.[96]

The Federal Court has repeatedly cautioned that it cannot overturn a decision merely because it disagrees with its merits, or thinks it harsh; the unreasonableness doctrine in this context is about "boundaries of power", not substantive fairness.[97] Detailed reasons, ordinarily set out within a departmental brief,

[86] *BFBZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 234, [16], [23], [29].

[87] *Kopa v Minister for Immigration and Multicultural Affairs* [2025] FCA 524.

[88] *Kopa v Minister for Immigration and Multicultural Affairs* [2025] FCA 524, [38].

[89] *Kopa v Minister for Immigration and Multicultural Affairs* [2025] FCA 524, [37].

[90] *Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 270, [10], [28]; [2022] FCAFC 142.

[91] *Makasa v Minister for Immigration and Border Protection* (2020) 376 ALR 191, [11]; [2020] FCAFC 22.

[92] *Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 270, [10], [28]; [2022] FCAFC 142.

[93] *Kopa v Minister for Immigration and Multicultural Affairs* [2025] FCA 524, [39].

[94] *CMP25 v Minister for Immigration and Multicultural Affairs* [2025] FCA 480, [90].

[95] *EUD24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1474.

[96] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, [4]–[13]; [2016] FCAFC 11.

[97] *Burgess v Assistant Minister for Home Affairs* (2019) 271 FCR 181, [70]; [2019] FCAFC 152; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, [11]; [2016] FCAFC 11.

generally ensure that allegations of inadequate or unintelligible justification are unlikely to gain traction at this threshold.[98]

In s 501BA cases, the courts have generally found the Minister's decisions *were* supported by logical justification, even if debatable on the merits. For example, in *GFE24 v Minister for Immigration, Citizenship and Multicultural Affairs*,[99] the Minister had cancelled a visa *before even seeing the AAT's written reasons*, because the Tribunal had issued its decision (revoking cancellation) but reserved its reasons for later.[100]

The applicant argued that acting so hastily – not even waiting to read why the Tribunal thought he should keep his visa – was arbitrary and unreasonable.[101] Justice Rangiah disagreed: the Minister knew the gist of the Tribunal's favourable outcome and had the underlying materials; moreover, the law did not compel him to delay action until reasons were published.[102]

The national interest, in the Minister's view, required prompt cancellation given the seriousness of the applicant's rape conviction – a "political" judgment that the Court would not second-guess on timing alone.[103] There was no evidence of bad faith or that the Minister failed to read what was available; indeed, had the Minister entirely ignored the Tribunal's reasoning, that might be problematic, but here he simply did not have the reasons through no fault of his own. Thus, the decision was not logically flawed or manifestly unjustifiable – it reflected a conscious (if stringent) policy choice to err on the side of exclusion in the interim.[104]

Another aspect of unreasonableness often raised is the purported imbalance or disproportionality of the Minister's reasoning. Applicants point out, for instance, that the Minister might acknowledge a "low" risk of re-offending and a range of positive rehabilitation indicators, yet still conclude that any risk at all is unacceptable and cancel the visa.[105] In ordinary parlance, this might seem a draconian or overly cautious approach. But legally, the question is whether that conclusion is one a reasonable Minister could reach. Time and again, the Court has said "yes".

In *Minister for Immigration and Border Protection v Stretton*[106] the Full Court upheld as reasonable a Minister's decision that even a low risk of very serious harm could warrant cancellation – the Minister is entitled to value community protection over the individual's prospects of reform.[107] Likewise, in *Kopa*, Derrington J noted that while the Minister had accepted Mr Kopa's risk of re-offending was low and that he had strong ties in Australia, the Minister was *still* not convinced it was safe or in the national interest for him to remain – and this fell within the area of decisional freedom allowed by law.[108] It was not irrational for the Minister to give decisive weight to the seriousness of past crimes and hypothetical worst-case harm, even against low likelihoods.[109] As long as the Minister's reasons demonstrate that he weighed the relevant factors – even if his weighting is heavily skewed against the visa-holder – the Court will not re-balance them.[110]

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[98] *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2024) 98 ALJR 594; [2024] HCA 11.

[99] *GFE24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 193.

[100] *GFE24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 193, [10]–[11].

[101] *GFE24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 193, [14].

[102] *GFE24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 193, [44]–[46].

[103] *GFE24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 193, [44], [69], [76].

[104] *GFE24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 193, [74]–[79].

[105] *Kopa v Minister for Immigration and Multicultural Affairs* [2025] FCA 524; *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24; *Smith v Minister for Immigration and Multicultural Affairs* [2025] FCA 952.

[106] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11.

[107] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 [17]; [2016] FCAFC 11.

[108] *Kopa v Minister for Immigration and Multicultural Affairs* [2025] FCA 524, [42], [53].

[109] *Kopa v Minister for Immigration and Multicultural Affairs* [2025] FCA 524, [42], [53].

[110] *Kopa v Minister for Immigration and Multicultural Affairs* [2025] FCA 524, [32].

Indeed, many judgments caution against using epithets like "illogical" or "irrational" as a backdoor to merits review.[111] As the Full Court of the Federal Court of Australia held in *MQGT v Minister for Immigration, Citizenship and Multicultural Affairs*,[112] the Court is not concerned with the merits of the Minister's decision or the appropriateness of the outcome, but only with whether the decision is lawful and rationally open on the material.[113]

One boundary that does exist is that the Minister's satisfaction of "national interest" must be formed on a correct understanding of the law and within rational bounds.[114] In other words, if the Minister applied the wrong test for "national interest" or reached a conclusion no reasonable person could arrive at, that would be an error.[115]

Some applicants have argued that the Minister treated "national interest" as a foregone conclusion whenever someone has a criminal record, thereby fettering his discretion or failing to truly ask the right question. So far, courts have not found evidence of such fettering in these cases – Ministers have generally recited the correct broad approach to "national interest" (often citing the High Court's statement that it is largely a "political question" and then explained their specific evaluative judgment.[116] Provided the Minister appreciates that "national interest" is broader than just failing the character test, and considers something beyond the bare fact of offending, the courts have held that the precondition is lawfully met.

For example, in *Re Patterson*; *Ex parte Taylor*,[117] the High Court stressed that national interest considerations are "separate and distinct" from the character test, though they may overlap. In practice, Ministers like in *Chapman* or *Younes* have cited specific national interest considerations (eg sexual offending against women being of particular concern to the Australian community) to justify their satisfaction, rather than simply pointing to the conviction itself. This has insulated their decisions from invalidity on this front.

In sum, legal unreasonableness in s 501BA cases has been established only in exceptional fact scenarios (*Tanehohaia*, *CRRN*) where the Minister's decision-making process broke down – either by ignoring a highly relevant factor or by proceeding on a mistaken basis that undercut the decision's logic. In the mine run of cases, however, the Federal Court has found the Minister's heavy-handed cancellations harsh but rationally explicable given the statutory mandate and the broad discretion to give primacy to national interest factors.

Undermining Merits Review: A Threat to Fairness and Transparency?

A persistent undercurrent in these judicial review challenges – sometimes explicit, sometimes just below the surface – is a sense of injustice at the way s 501BA allows the Minister to override independent merits review. From the visa-holder's perspective, it can appear that the AAT hearing was a futile exercise: even after presenting their case, challenging the government's evidence, and convincing an impartial tribunal member that they deserve to stay, the ultimate result is snatched away by a stroke of the Minister's pen.

The AAT, as a body, existed to provide transparent, fair, and expert review of government decisions[118] – in migration cases, often via lengthy oral hearings considering all circumstances. Yet s 501BA permits the Minister to essentially nullify the AAT's decision (now the ART), without any equivalent hearing,

[111] *Jones v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 285, [24]; *SZQGC v Minister for Immigration and Citizenship* (2012) 128 ALD 338, [32]; [2012] FCA 598.

[112] *MQGT v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 141.

[113] *MQGT v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 141, [43]. See further *Association for Employees with a Disability v Commonwealth* (2021) 283 FCR 561, [137]; [2021] FCAFC 36.

[114] *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75; [2023] HCA 18.

[115] *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75, [106]; [2023] HCA 18.

[116] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 46 [40]; [2014] HCA 22.

[117] *Re Patterson*; *Ex parte Taylor* (2001) 207 CLR 391, [82]; [2001] HCA 51.

[118] *Administrative Appeals Tribunal Act 1975* (Cth) s 2A.

by personally reconsidering the matter on potentially different criteria. The only accountability on the Minister's exercise of this power is through limited judicial review, not through merits-based scrutiny.[119]

Courts have candidly described s 501BA as an "override" or "trump card".[120] It sits uncomfortably with the typical model of executive decision-making: ordinarily, merits review by a tribunal is the final word on facts and policy considerations, subject to only legal error correction by courts. Here, Parliament not only carved out a personal Ministerial exception, but also insulated it from merits review (no ART review of the Minister's act) and from natural justice obligations.[121] This tilts the balance of the system towards the Executive in an extraordinary way.

As Colvin J observed, provisions like s 501BA depart from the normal consequences of the *Migration Act*'s detailed scheme – essentially giving the Minister a "plenary power" to achieve a result "unlimited by the detailed legislative scheme" whenever he invokes a nebulous national interest concern.[122] A logical justification for this, he noted, is if one assumes the power will be used only in exceptional or emergency circumstances (as the extrinsic materials repeatedly emphasised).[123]

Otherwise, there is a risk that the Minister could routinely set aside tribunal decisions *wholesale*, effectively rendering the merits review process a dead letter for any case involving character issues – a prospect that would surely "undermine the detailed legislative scheme" of visa cancellation/revocation criteria established by Parliament.[124]

The recent uptick in s 501BA cancellations suggests that what was once deemed a "last resort" is edging toward a more routine tool. For example, as at the date of writing,[125] 27 judicial review applications have been published by the Federal Court of Australia in 2025. These cases show a notable cluster of s 501BA interventions, far more than in the years immediately after 2014. One might infer that Ministers (across successive governments) have grown more willing to wield this power, perhaps in response to public and political pressures to be "tough on crime" in migration.

Each time the power is used, however, it undercuts the finality of the AAT's decision (now the ART) and raises questions about duplicative processes and unfairness. From a rule-of-law standpoint, there is an argument that frequent Ministerial overrides erode confidence in the impartial review provided by the Tribunal.[126] Why allow a person to spend time and resources on an ART appeal – even be released from detention based on the ART's binding decision – if the Minister can lightly revoke that outcome on essentially the same facts (merely reframed as a national interest concern)?

The Federal Court, constrained by the law, has not invalidated a "s 501BA decision" simply for being an affront to the AAT. But it has signalled that the Minister must at least consider what the Tribunal decided and why. As Mortimer J noted in *Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, "Given the precondition [of a favourable Tribunal decision], it may be an error for the Minister not to consider the Tribunal's reasoning at all".[127]

In practice, Ministers have taken care in their statements of reasons to reference the Tribunal's findings – often to say, in effect, "I have considered the Tribunal's view on X, but I nonetheless conclude Y".[128]

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[119] *EUD24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1474.

[120] *XMBQ v Minister for Immigration and Multicultural Affairs* [2025] FCA 553, [58].

[121] *Migration Act 1958* (Cth) s 500.

[122] *Moli v Minister for Immigration and Multicultural Affairs* [2025] FCA 350, [36].

[123] *Moli v Minister for Immigration and Multicultural Affairs* [2025] FCA 350, [36].

[124] *Moli v Minister for Immigration and Multicultural Affairs* [2025] FCA 350, [23]–[36].

[125] 24 August 2025.

[126] See Jason Donnelly, "Utilisation of National Interest Criteria in the Migration Act 1958 (Cth) – A Threat to Rule of Law Values?" (2017) 7(1) *Victoria University Law and Justice Journal* 94.

[127] *Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 270, [28]; [2022] FCAFC 142.

[128] *EUD24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1474.

For example, in *Kopa*, Derrington J highlighted that the Assistant Minister expressly took into account Mr Kopa's ties to Australia and the AAT's finding that those weighed against cancellation, even quoting the AAT's reasoning; the Minister simply came to a different overall conclusion.[129]

By doing so, the Minister inoculates the decision against the claim that the Tribunal's decision was ignored or that he failed to engage with contrary evidence. However, one might question how meaningfully a Minister can "engage" with a Tribunal's nuanced factual findings in a brief written reason signed on the same day he receives a department summary. Although it is tempting to suggest that referral to the Minister renders an unfavourable outcome inevitable, the law insists that the Minister must personally and genuinely exercise discretion. The real concern lies not in formal pre-determination, but in the way departmental briefing and political context can so heavily structure the choice that meaningful Ministerial engagement is, in practice, doubtful.

The process is inherently less transparent – the Minister is not subject to cross-examination or rigorous probing of claims as a Tribunal member was. There is also no public hearing; the Minister's considerations occur behind closed doors. The reasons published are often formulaic and use broad language of national interest and community expectations, which can obscure the true motivations or any political factors at play. In contrast, Tribunal decisions are typically detailed and public, giving the individual (and the community) a window into why a decision was made. Ministerial decisions, even with reasons, do not afford the same level of procedural or substantive transparency.

From a policy perspective, many commentators (and indeed some judges in obiter) have expressed discomfort with broad national interest cancellation powers for these reasons.[130] If used frequently, such powers risk arbitrariness and undermine uniform application of the law – essentially sidestepping the structured Decision-Making Direction (eg Direction No 110) that binds delegates and the Tribunal in ordinary character cancellation cases.[131]

The Tribunal's task is to apply that policy framework to individual facts;[132] the Minister under s 501BA is not so bound and may give weight to undefined "national interest" factors beyond those considerations.[133] This can lead to inconsistency: one person might win in the Tribunal on identical facts as another, yet only one faces a Ministerial cancellation (perhaps due to media attention or political priorities). Such discrepancies are invisible in the legal analysis (because national interest is subjective), but they affect perceptions of fairness.

It is notable that the Federal Court has begun to impose at least some logical checks on the national interest concept. In Colvin J's decisions (*Moli*, *Ibardaloza v Minister for Immigration and Multicultural Affairs*), his Honour reiterates that while "national interest" is broad, it is "not unbounded" – the Minister's satisfaction must be formed on a reasonable foundation and correct legal understanding.

In the High Court, Gaudron and Kirby JJ in *Re Patterson*; *Ex parte Taylor* long ago posited that something "more" than the mere facts making up the character test failure is required to found a national interest cancellation – "something in the nature or seriousness of that conduct"[134] that elevates it to a matter of national interest. Kirby J even warned against using the national interest power absent "a significant

[129] *Kopa v Minister for Immigration and Multicultural Affairs* [2025] FCA 524, [53].

[130] Joanne Kinslor and James English, "Decision-Making in the National Interest" (2015) 79 *AIAL Forum* 35; Jason Donnelly, "Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door" (2017) 24 AJ Admin L 99; Samuel C Duckett White, "God-like Powers: The Character Test and Unfettered Ministerial Discretion" (2020) 41(1) *Adelaide Law Review* 1; Peter Billings, "Getting Rid of Risky Foreigners: Promoting Community Protection at the Expense of Administrative Justice?" (2019) 47(2) *Federal Law Review* 231; Michelle Foster, "'An "Alien" by the Barest Threads' - The Legality of the Deportation of Long-term Residents from Australia" (2009) 33(2) *Melbourne University Law Review* 483; Khanh Hoang and Sudrishti Reich, "Managing Crime through Migration Law in Australia and the United States: A Comparative Analysis" (2017) 12(5) *Comparative Migration Studies* 12.

[131] *Migration Act 1958* (Cth) s 499(2A).

[132] *Administrative Review Tribunal Act 2024* (Cth) s 9.

[133] *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75, [11], [13]; [2023] HCA 18.

[134] *Re Patterson*; *Ex parte Taylor* (2001) 207 CLR 391, [86] ; [2001] HCA 51.

threat to the nation as a whole or the community of the nation", lest the power be misused in non-emergencies.[135] Those views were not majority holdings, but they resonate as a call for restraint.

The current jurisprudence does not enforce a strict "exceptionality" requirement – but if the "exceptional" becomes the norm, one wonders if courts might grow less patient with boilerplate invocations of national interest that lack clear justification. The seeds of that can be seen in *CRRN* and *Tanehohaia*, where judges effectively said: *if you're going to override the Tribunal, you had better do your homework on all the implications of that decision*. A Minister cannot simply cancel and assume "job done"; if, in doing so, he ignores how the decision actually plays out (eg leaving an unreleasable refugee in limbo, or worsening the risk to the community), the courts will step in.

Conclusion: Toward a Balanced Approach

The Federal Court's s 501BA jurisprudence reveals a delicate balance. On one hand, the courts uphold the Minister's wide discretion to protect what he perceives as the national interest, even if that undermines the outcome of an independent merits review. The consistent message is that judicial review is not merits review: many applicants have been essentially re-arguing the merits (why they pose minimal risk, how unfair cancellation is to their family, etc), and the courts have rightly confined themselves to checking legal errors and reasoning integrity, not re-evaluating those merits.

On the other hand, the cases also underscore that the Minister is not above the law. He must base his satisfaction on evidence and reason, consider what the AAT or ART had decided (even if to depart from it), and not misstate critical facts. When the Minister falls short – as in proceeding on an outdated view of facts (*Tanehohaia*) or failing to account for the real-world effect of cancellation (*CRRN*) – the courts have not hesitated to quash the decisions as unreasonable or legally flawed.

Do the Minister's frequent overrides "undermine fair and transparent decisions" of the Tribunal? Legally, the Minister is empowered to override – so in a technical sense, one cannot say a lawfully exercised power "undermines" the Tribunal, since the Act itself allows it. Yet from a broader administrative justice perspective, there is a genuine concern that persistent use of s 501BA erodes the integrity and purpose of merits review. The Tribunal's role is to ensure correct and preferable decisions;[136] if ministers habitually reverse those decisions due to political considerations (cloaked as national interest), it invites cynicism about the neutrality and finality of the process. Each case of course turns on its facts, and one could argue that ministers use s 501BA only in high-stakes cases (serious criminals) where they believe the Tribunal got it wrong. But the trend of increasing invocations suggests a lowering threshold for what is considered "exceptional".

The replacement of the AAT with a new ART underlines the timeliness of evaluating s 501BA's role. Will the ART's decisions be any more insulated from ministerial override? Unless the legislative settings change, the answer is no – s 501BA will apply equally. One potential reform could be to amend s 501BA to incorporate some requirement of new evidence or change of circumstances, or at least a time limit (eg Minister must act within 60 days of the Tribunal decision).

Notably, in some Federal Court cases applicants argued for an *implied* time limit on exercising s 501BA, citing the long delays in certain instances.[137] Those arguments did not prevail – the Act sets no deadline, and the courts would not read one in without textual support.[138] Nonetheless, policy-wise, unreasonable delay combined with no hearing does strike at fairness, and a statutory timeframe could mitigate that.

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[135] *Re Patterson*; *Ex parte Taylor* (2001) 207 CLR 391, [335]; [2001] HCA 51.

[136] *Keen v Telstra Corp Ltd* (2006) 153 FCR 28, [16]; [2006] FCA 834.

[137] *Po'oi v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 258; *Eswaran v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 496; *Archer v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 471; *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24.

[138] With the exception of *XMBQ v Minister for Immigration and Multicultural Affairs* [2025] FCA 553, where Justice Horan held that s 501BA must be exercised within reasonable time (finding that 3+ years was excessive and unlawful).

Another idea is to require the Minister to table a statement to Parliament whenever s 501BA is used (similar to some other ministerial public interest powers),[139] ensuring democratic accountability for frequent use – currently, while decisions are published in court challenges, there is no routine public reporting of how often or why the Minister invokes s 501BA.

Requiring the tabling of statements in such cases would enhance transparency by disclosing how frequently the power is exercised and the reasons for its use. At the very least, it would better inform the public about the scope of the power and give those potentially affected clearer insight into the Minister's approach.

In the meantime, practitioners should note the lessons from the case law: a successful judicial review of a s 501BA decision is exceptionally difficult, but not impossible. It will likely require pinpointing a material error in the Minister's process – a clear failure to consider an important matter or an absurd inconsistency in the reasoning – rather than a mere disagreement on the balancing of factors. If the Minister's decision is comprehensive on its face, addresses the person's key arguments, and articulates a plausible national interest rationale (however severe), the courts will uphold it.

Ultimately, the tension between individual justice and the political imperative of removing non-citizen offenders remains front and centre. Section 501BA embodies that tension: it allows the Executive to prevail over the judgment of an independent tribunal in the name of national interest. While courts will enforce the minimal legal constraints on this power, the broader question is one of policy and principle. Is it appropriate that after an individual has *won* on the merits before a tribunal, the "goalposts" can be shifted by a Minister invoking essentially the same facts under a different rubric? Many would argue this tends to undermine the rule-of-law values of consistency and transparency.

Labels like "genuine consideration" or "national interest" should not be used to disguise what is really a challenge to the merits. A recalibration is needed: either by using s 501BA more sparingly, consistent with its original purpose of true exceptional cases, or by legislative refinement to safeguard against its routine use. Otherwise, the integrity of merits review in migration law will continue to be called into question – a scenario that benefits neither the individuals involved nor the public interest in consistent, fair decision-making.[140]

[139] *Migration Act 1958* (Cth) ss 501(3) and 501(4A).

[140] The author of this article appeared as counsel in *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75; [2023] HCA 18 in the High Court of Australia and *EUD24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1474 in the Federal Court of Australia.