

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

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.” Under the legislation, the rules of natural justice are expressly excluded. Though intended as an exceptional safeguard, the power is now being used with increasing frequency, often against long-term residents who had successfully appealed to the AAT (now the ART). Judicial review in the Federal Court has rarely curtailed the use of s 501BA, with intervention limited to cases of material factual error or illogical reasoning.

The CPD, presented by the Association’s Human Rights Committee, will examine the use of s 501BA and the implications for rule-of-law values and public confidence in migration decision-making.

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CPD category: - Substantive Law, Practice and Procedure, and Evidence

## Overview

This CPD examines the growing use of s 501BA of the *Migration Act 1958* (Cth), which allows the Minister personally to set aside a favourable decision of the Administrative Appeals Tribunal (AAT) and re-cancel a visa if satisfied that doing so is in the “national interest.” Although the provision was introduced as an extraordinary safeguard for exceptional cases, it has increasingly become a routine executive tool used to override tribunal decisions. In practice, this development has shifted power away from independent merits review and toward ministerial discretion, raising serious concerns about transparency, accountability, procedural fairness, and the rule of law in migration decision-making.

### Section 501BA and the “National Interest” Power

Section 501BA operates after a person has already had a mandatory visa cancellation revoked by the AAT. If the Minister decides that the person does not pass the character test and that cancellation is in the national interest, the Minister may personally cancel the visa again. A central feature of this power is that natural justice does not apply. This means the Minister is not legally required to give the affected person a fresh hearing, invite new submissions, or otherwise observe ordinary procedural fairness before making the decision. This exclusion of natural justice is one of the most controversial elements of the provision, because it allows the executive to reverse an independent merits outcome without the ordinary safeguards usually associated with administrative justice.

### The Expansion of Ministerial Re-cancellation

Section 501BA is no longer being used only in rare or truly exceptional cases. The power has been invoked with increasing frequency in recent years, especially in circumstances involving long-term residents, former refugees, or people with substantial family and community ties in Australia. In many of these cases, the AAT had revoked the original cancellation after considering evidence of rehabilitation, changed circumstances, family support, low risk of reoffending, or hardship to children. Despite those favourable tribunal findings, the Minister later re-cancelled the visa by invoking broad national interest considerations. Ministerial re-cancellation has become a second, more political layer of decision-making that can displace the tribunal’s careful evaluative function.

### How Section 501BA Decisions Are Made in Practice

The mechanics of s 501BA decision-making as highly executive-driven and largely paper-

based is important to understand. Departmental officers prepare a submission for the Minister summarising the case, attaching the AAT's reasons and other material, and usually identifying options as to whether the Minister should exercise the power. The Minister then makes the decision personally, often without any further engagement with the affected person.

Ministerial reasons commonly emphasise two themes: first, protection of the Australian community from non-citizens with serious criminal histories, and second, the expectation that non-citizens who commit serious offences should not remain in Australia. Even where the AAT has found that the person's risk of reoffending is low, the Minister may still frame the case as one involving unacceptable risk or broader national interest concerns.

### **Typical Reasoning Used by the Minister**

Ministerial reasons under s 501BA tend to be framed in broad and often repetitive terms. The Minister frequently relies on the seriousness of past offending, the protective function of migration law, and general community expectations. The reasons often give decisive weight to the person's criminal history while reducing the significance of more favourable matters such as rehabilitation, family support, mental health improvement, or the views already expressed by the AAT. In this way, the national interest is treated as an expansive and flexible concept that allows the Minister to prioritise public protection and symbolic denunciation over the nuanced factual findings of the tribunal. This broad conception of national interest gives the Minister enormous latitude and makes the power difficult to challenge.

### **Judicial Review as a Limited Constraint**

The Federal Court has imposed only modest limits on the use of s 501BA. While a number of applicants have challenged re-cancellation decisions, most have failed unless they could identify a clear jurisdictional error, such as material irrationality, illogical reasoning, or a significant factual mistake.

Courts have generally shown substantial deference to the Minister's reasoning, especially where the decision is framed in terms of national interest and community protection. Judicial review has not operated as a strong substantive safeguard because it cannot revisit the merits of the decision and instead focuses only on legal error. As a result, even broad or harsh ministerial reasoning will often survive review so long as it remains within legal bounds.

### **The Treatment of Procedural Fairness and the "Hearing Rule"**

Courts have accepted Parliament's deliberate exclusion of procedural fairness in s 501BA

cases. Applicants have attempted to argue, indirectly, that fairness required the Minister to consider updated circumstances, invite further submissions, or re-open the evidentiary process, especially where significant time had elapsed since the AAT hearing. However, the courts have usually rejected those arguments, holding that the Minister is permitted to rely on the material that was before the AAT and is not generally obliged to give the person another opportunity to be heard. This produces an unusual and troubling result: a person may win before the tribunal yet later lose their visa again through a personal ministerial decision made without any fresh hearing, even if their personal circumstances have changed in the meantime.

### **Delay Between the AAT Decision and the Minister's Intervention**

The significance of delay is also noteworthy. In several cases, there was a substantial period between the AAT's decision and the Minister's subsequent re-cancellation. Applicants argued that such delay meant the Minister should not have relied solely on old material, particularly where evidence of rehabilitation or changed family circumstances had emerged after the tribunal hearing. The courts, however, have generally treated delay as relevant only if it exposes a material disconnect between the factual assumptions underlying the Minister's reasoning and the applicant's actual circumstances at the time of decision. In other words, delay by itself does not invalidate the exercise of power. The approach is limiting because it allows important changes in a person's life to go unheard unless the failure to consider them can be characterised as legal error rather than mere unfairness.

### **Material Error and the Narrow Path to Success**

Although most challenges fail, there is one narrow path by which applicants may succeed: demonstrating that the Minister's decision rested on a material factual mistake or an illogical inference. Courts have intervened in some cases where the Minister misunderstood key facts or made conclusions that could not rationally be drawn from the evidence. However, these cases are the exception rather than the rule. More often, even where the Minister's reasoning appears harsh, incomplete, or politically charged, the courts will not intervene unless the error is sufficiently serious to amount to jurisdictional error. Legal review offers only partial protection against the exercise of such a powerful discretionary authority.

### **National Interest as a Broad and Political Concept**

A further concern is the indeterminate nature of the "national interest." This concept is so broad that it permits the Minister to justify re-cancellation on wide policy grounds that are difficult to contest in court. Protection of the Australian community and community expectations are

repeatedly invoked as though they are self-evidently decisive. Yet the breadth of these concepts means they can often absorb or override contrary considerations identified by the AAT, including low future risk, lengthy residence in Australia, or hardship to Australian family members. Once national interest is framed in this expansive way, it becomes less a legal standard constrained by principle and more a vehicle for executive value judgment.

### **Consequences for Administrative Justice and Merits Review**

The growing use of s 501BA has serious implications for Australia's administrative justice system. It weakens the practical value of merits review because even when an applicant persuades the AAT that cancellation should be revoked, that outcome may later be displaced by personal ministerial intervention. This undermines confidence in the independence and finality of tribunal decision-making. The exclusion of natural justice further compounds the problem by denying affected persons the ordinary opportunity to address new concerns or changed circumstances before the Minister acts. This combination of broad discretion, limited fairness protections, and deferential judicial review creates a system in which executive override increasingly overshadows independent adjudication.

Section 501BA has developed into a powerful mechanism through which the Minister can routinely reassert executive control over visa cancellation outcomes in the name of the national interest. Although formally lawful, its operation raises deep concerns about fairness, openness, and institutional balance. The courts have provided some restraint by requiring the absence of material factual or logical error, but those limits are narrow and do not address the broader structural problem created by the exclusion of natural justice and the breadth of the national interest criterion.

Ultimately, unless the use of s 501BA is more tightly constrained—whether by judicial doctrine, legislative amendment, or administrative reform—it will continue to erode the transparency of migration decision-making and public confidence in the integrity of the administrative justice system.

### **Failure to Consider Relevant Considerations and Material Errors of Fact**

One of the recurring ways applicants challenge s 501BA decisions is by arguing that the Minister failed to consider important evidence or proceeded on a material factual mistake. Many applicants had already succeeded before the AAT because the Tribunal had carefully examined evidence of rehabilitation, low risk of reoffending, mental health improvement,

family support, and hardship to children. When the Minister later re-cancelled the visa, applicants often argued that those favourable findings had been selectively ignored. However, the courts usually drew a distinction between a true failure to consider a matter and a mere decision to give that matter less weight.

In cases such as *Moli*, the Court accepted that the Minister had considered the relevant reports and evidence but simply attached greater weight to community protection and broader national interest concerns. Because the Minister is not conducting a merits review like the Tribunal, courts are generally reluctant to intervene merely because the Minister weighed the material differently.

There is a more limited category of cases in which applicants have succeeded, namely where the Minister's reasoning was based on an important factual error or overlooked a real-world consequence central to the decision. In *Tanehohaia*, for example, the Minister proceeded on the mistaken basis that the applicant was still in prison, when in fact he had already been released on parole and was living in the community. That factual mistake mattered because it affected how the Minister assessed current risk, family circumstances, and the supposed national interest in cancellation.

Likewise, in *CRRN*, the Minister cancelled the visa of a person who could not lawfully be removed from Australia but failed to confront the fact that cancellation would cut the person off from NDIS support and thereby potentially worsen the very risk to the community that cancellation was said to address. *CRRN* is a rare but important example of substantive unreasonableness, because the Minister's decision was logically inconsistent with his stated protective objective.

At the same time, not every weakness in the Minister's reasoning will amount to jurisdictional error. In *GRCF*, the Court criticised the Minister's reliance on outdated information and the failure to consider more recent rehabilitation material, but the claim still failed. In *XKTK*, the Court accepted that cancellation could still serve a legitimate purpose, even if the person was not presently removable from Australia, because cancellation might uphold the integrity of the migration system or prevent access to a more secure migration status.

Courts usually uphold s 501BA decisions where the Minister has at least adverted to the relevant evidence and articulated why other considerations, especially community expectations and the seriousness of past offending, were given greater weight. Only where there is a

demonstrable omission, a misunderstanding of present facts, or a clear contradiction between the Minister's objective and the consequences of cancellation will the Court typically intervene.

### **Legal Unreasonableness and the Substantive Limits of the National Interest Power**

The next major theme is legal unreasonableness. Many applicants ultimately frame their challenge as one of irrationality, illogicality, or lack of an intelligible justification, but that this ground is notoriously difficult to establish. Because s 501BA confers a very broad discretion, the courts have repeatedly stressed that judicial review is not a vehicle for re-balancing the merits. A decision is not invalid simply because it is harsh, severe, or politically charged. Rather, it must fall outside the range of lawful outcomes open to the Minister.

Courts often find the Minister's reasons sufficient if they reveal a rational chain of reasoning anchored in community protection, seriousness of offending, and national interest, even where the result appears severe. There is a line of cases in which applicants argued that the Minister attached disproportionate weight to the possibility of serious future harm, despite acknowledging that the actual risk of reoffending was low.

In decisions such as *Kopa* and authorities like *Stretton*, the courts accepted that the Minister may lawfully reason that even a low likelihood of future offending can justify cancellation if the possible harm is grave enough. So long as the Minister has identified the relevant factors and explained the evaluative path taken, the courts will not revisit the balance struck. This approach makes it very difficult to challenge a s 501BA decision on substantive grounds, because the concept of "national interest" is treated as broad, flexible, and highly political.

Importantly, courts have not insisted on any strict requirement that s 501BA be used only in truly exceptional circumstances, even though the power was originally described in that way. Although judges have said the national interest is not unlimited and must rest on a rational legal foundation, they have generally allowed it to overlap heavily with character concerns, seriousness of offending, and public protection. In that sense, the boundaries of review remain narrow: applicants may succeed if the Minister relies on the wrong legal test, proceeds on a mistaken factual premise, or reaches a conclusion that no reasonable decision-maker could reach, but they will usually fail if they simply contend that the Minister's assessment was too harsh or insufficiently attentive to the Tribunal's favourable findings.

### **Undermining Merits Review: Fairness, Transparency, and Institutional Tension**

Expanding use of s 501BA weakens the value of independent merits review. From the visa-

holder's perspective, the AAT process can begin to appear futile: even after persuading an expert tribunal to revoke cancellation, the Minister may later re-cancel the visa on many of the same facts under the rubric of national interest. This undermines finality and creates the appearance of a duplicate process in which the executive is effectively able to nullify the tribunal's work. This sits uneasily with the broader administrative law model, in which executive decisions are ordinarily subject to independent merits review, rather than being displaced by a second personal ministerial decision insulated from the ordinary rules of natural justice. There is limited transparency in this form of decision-making.

Although the Minister usually receives submissions summarising the AAT's reasoning, there is no public hearing, no cross-examination, no direct engagement with the affected person, and no equivalent merits review of the Minister's decision. Published reasons often rely on broad phrases such as "community expectations" and "protection of the Australian community," which may obscure how the competing considerations were truly balanced.

Meaningful engagement with the Tribunal's detailed reasoning can be difficult to assess in practice. Even where the Minister quotes or refers to the AAT's findings, the broader political framing of the national interest may allow the executive to reach the opposite outcome with limited practical accountability beyond narrow judicial review.

The recent increase in reported s 501BA litigation suggests the power may now be moving beyond the rare, truly extraordinary function originally envisaged for it. If so, there is a real risk that merits review becomes a "dead letter" in serious character cases, because a favourable tribunal outcome can be overridden whenever a Minister personally prefers a different evaluative conclusion. While the courts have indicated that the Minister must genuinely consider what the Tribunal decided and why, they have not required strict exceptionality, nor have they imposed a robust doctrine to prevent repeated executive override in ordinary cases. This produces an institutional tension between legality and fairness: the Minister may act lawfully yet still diminish confidence in the administrative justice system.

### **Conclusion: Toward a More Balanced Approach**

The Federal Court's jurisprudence reflects a delicate balance. On one hand, the courts consistently uphold the breadth of the Minister's discretion under s 501BA and reiterate that judicial review is not merits review. On the other hand, the courts do intervene where the Minister makes a material factual mistake, relies on outdated circumstances, or fails to grapple

with an obvious and significant consequence of cancellation. Cases such as *Tanehohaia* and *CRRN* show that the Minister is not above legal limits, but those limits remain narrow and do little to answer the broader structural concern that s 501BA can erode the practical value of Tribunal review.

Recalibration is needed. Section 501BA should either be used more sparingly and confined in practice to truly exceptional public safety cases or be subject to legislative reform designed to improve accountability and fairness. Possible reforms canvassed include imposing a time limit for ministerial override after an AAT or ART decision, requiring new evidence or changed circumstances before the power can be exercised, and introducing greater transparency, such as tabling a statement in Parliament whenever s 501BA is used.

Ultimately, unless the power is more tightly constrained or more openly justified, it will continue to invite criticism that the executive is simply re-litigating the same case under a broader and more political label. In that event, the integrity of merits review in migration law will remain in doubt, and public confidence in fair and consistent decision-making will continue to be undermined.