

## **Forming a statutorily required state of satisfaction: *Bettencourt v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 172<sup>1</sup>**

This decision considered whether a Minister had formed the “required state of satisfaction” before making a decision about whether or not to revoke the, otherwise, automatic cancellation of a permanent resident’s visa. It makes clear that administrative decision makers must properly engage with the material before them and must give considered reasons for their decisions.

### Facts

Mr Bettencourt arrived in Australia when he was eight years old and has never left. Despite this, he lives in Australia as a permanent resident. He has never been an Australian citizen.

In 2015, Mr Bettencourt was convicted of possessing child exploitation material. He was sentenced to a period of imprisonment greater than 12 months. This meant he automatically failed the character test under s501 *Migration Act 1958* (Cth) (“the Act”). The Minister cancelled his visa, as required by s501(3A) of the Act (“the original decision”)([3]).

The Minister, as required by s501CA(3)(b) of the Act, invited Mr Bettencourt to make representations about whether or not he should revoke the original decision. Mr Bettencourt made representations regarding the effect his deportation would have on his children. The representations included academic material on the long-term effects of separation of children from a parent ([4] – [11]).

Section 501CA(4) of the Act provides that the Minister may revoke the original decision if representations are made and the Minister is satisfied that the person either passes the character test or is satisfied that “there is another reason why the original decision should be revoked”. Despite accepting that it was in the best interests of Mr Bettencourt’s children that his visa *not* be cancelled, the Minister did not revoke the original decision (“the non-revocation decision”) ([12]).

Mr Bettencourt sought review of the non-revocation decision on the basis of alleged jurisdictional error. He argued that the Minister failed to give proper consideration to the effect his deportation would have on his children. The primary judge rejected this argument. His Honour accepted the Minister’s reasons regarding the best interests of the children were brief but concluded they were brief because the Minister accepted deportation of the appellant would have detrimental effects on the children. This was implicit in the Minister’s reasons when read as a whole ([14] – ([18]).

Mr Bettencourt appealed the primary judge’s decision to the Full Court of the Federal Court. The basis of the appeal was that the primary judge erred by failing to find that the non-revocation decision was affected by jurisdictional error or that the Minister constructively failed to exercise his discretion as required by the Act. He argued the Minister had failed to give “proper, genuine, and realistic” consideration to the representation that revoking the original decision was in the best interests of his children ([19]).

### Appellant’s primary argument

Mr Bettencourt argued there was no evidence that the Minister had given genuine consideration to his representations including the academic literature relied on. The Minister should have referred to

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<sup>1</sup> Higgins Chambers’ Greg Barns SC appeared for the successful appellant in this case.

Mr Bettencourt's representations regarding his children and the academic literature in his written reasons. These should have been material to his ultimate finding ([20]).

He also argued that the Minister did not properly engage with the representation concerning likely long-term harm to the children. The Minister did not consider the severity of the harm. The reasons indicated the Minister had no more than "generally acknowledged" the submission, without engaging with the gravity or consequences of the harm ([37]).

#### Respondent's primary argument

The Respondent argued that there was nothing in the reasons to suggest the Minister misunderstood Mr Bettencourt's representation regarding his children. The Court should not, readily, find that the Minister failed to consider the material when the material was in fact before him. It was not necessary for the Minister to outline the representation in more detail than he had. The primary judge was correct to conclude the Minister was cognisant of Mr Bettencourt's representation ([38]-[40]).

#### Construction of s501CA(4)

The Court discussed the application of s501CA(4) and in particular how it must be read in the context of the preceding subsections of s501CA. Section 501CA outlines the steps the Minister must take when he has made the decision under s501(3A) to cancel a person's visa, including providing written reasons and requesting representations regarding the decision. The Court explained that, to reach the "required state of satisfaction" to decide whether to revoke the original decision to cancel a person's visa, the Minister must take into account the representations made by the person as a whole. Not every representation will be a relevant consideration that must be taken into account. However, the Minister will not have formed the state of satisfaction required to make the decision if he has not considered a "significant or substantial and clearly expressed claim" made in a representation. There must be "real and genuine consideration of each substantial or significant and clearly expressed claim" ([27]).

This final point was particularly significant in this matter. The Minister, as indicated in his reasons, had clearly considered the interests of Mr Bettencourt's children when making non-revocation decision. He accepted that the decision to cancel the visa was not in their best interests. However, the question in the appeal was not whether the Minister had ignored or disregarded this representation but whether he had properly and genuinely considered it.

#### Decision

The Court found that the Minister failed to "form the required state of satisfaction by reference to the material before him" when making the decision to not revoke the original decision to cancel Mr Bettencourt's visa ([42]). The Court provided six reasons for its conclusion:

1. There was no reference in the Minister's reasons to the terminology used in the representations which described the seriousness of the likely harm to the children ([43]);
2. There was no description of the quality of the likely harm ([44]);
3. The reasons focused on immediate distress to the children rather than long-term harm ([45]);
4. The Minister's conclusion that the best interests of the children would be best served by the revocation of the decision to cancel Mr Bettencourt's visa was not explained or evaluated in a way that demonstrated the Minister considered there was likely harm to the children should the decision not be revoked ([46]);

5. The Minister did not engage in a process where he evaluated the significance of his conclusion that the best interests of the children required revocation of the decision. This indicated he could not have reached the required state of satisfaction to make the decision regarding revocation ([47]);
6. In circumstances where the Executive is exercising a power with the potential consequence of separating a parent from their child and where the Minister is required to give reasons for his decision, it can be expected that a factor as serious as the separation of a child from their parent should be specifically expressed in the reasons ([48]).

A decision maker cannot just acknowledge a representation has been made and then accept or reject it. The decision maker must meaningfully engage with the representations put before him and explain how he has taken the submissions into account to reach the ultimate decision.

#### Outcome

The appeal was allowed, and the matter was remitted to the Minister for determination according to law.

**Grace Devereaux**

**Higgins Chambers**

**25 October 2021**

*Higgins Chambers acknowledges the traditional owners of the lands on which we live and work. We honour their elders past, present and emerging.*