HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
Appellant

and

Alex VIANE
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. The appellant (**Minister**) certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. This appeal concerns the validity of the Minister's decision under s 501CA(4) of the *Migration Act 1958* (Cth) (**the Act**) not to revoke the cancellation of the respondent's Class TY Subclass 444 Special Category (Temporary) visa. In his reasons for that decision, the Minister expressed certain conclusions about conditions in American Samoa and Samoa for which no evidence was cited (**the impugned findings**).

3. The two grounds of appeal raise the following issues:

   (a) whether the Full Court (Kerr and Charlesworth JJ, Besanko J dissenting) erred by holding that the impugned findings amounted to findings of fact for which there was no evidence, on the basis of its own finding of fact that the Minister did not have any relevant personal or specialised knowledge; and

   (b) whether the Full Court erred by holding that, because there was no evidence for the impugned findings, the Minister's decision was affected by jurisdictional error.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: CITATION OF JUDGMENTS OF PRIMARY AND INTERMEDIATE COURT

5. The reasons of the primary judge are reported as *Viane v Minister for Home Affairs* [2020] FCA 152 (**PJ**). The judgment of the Full Court is reported as *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 144 (**FC**).

PART V: STATEMENT OF RELEVANT FACTS

6. Mr Viane was born in American Samoa and was raised, until the age of 14, in Samoa (formerly Western Samoa). He is also a citizen of New Zealand, as a result of being adopted by his uncle, although he has not been to that country (PJ 1[1]).

7. Mr Viane arrived in Australia as a 14-year-old and has accumulated a long criminal history since that time. On 10 November 2015, Mr Viane was sentenced to 12 months imprisonment upon being convicted of a charge of assault occasioning bodily harm to his partner and mother of his child. This led to the mandatory cancellation of his visa under s 501(3A) of the Act on 6 July 2016 (FC [16] – [18][2]).

8. In accordance with an invitation issued pursuant to s 501CA(3)(b) of the Act, Mr Viane made representations as to why the cancellation decision should be revoked. On 2 August 2018, a Full Court set aside the first decision not to revoke the cancellation: *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531. Mr Viane then made further representations to the Minister (FC [19] - [20]).

9. Relevantly to this appeal, Mr Viane asserted that if he was removed to American Samoa he "would likely be homeless, with no job, social ties, welfare or healthcare services in American Samoa".[3] His representative also submitted to the Minister that there was "problematic healthcare and no social welfare by the governments in either American Samoa or Western Samoa" (FC [26]). This was potentially relevant to the Minister's exercise of power because Mr Viane had also submitted that he would

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[1] See also Appellant's Further Material (**AFM**) at 78 [3].

[2] See also AFM at 25-28 (National Police Certificate) and at 36-38 (sentencing transcript).

[3] AFM at 125 [33].

choose to move to American Samoa, and face these hardships, rather than go to New Zealand (a country of which he is a citizen) where there was no suggestion he would face such impediments.[4]

10. The Minister's Department prepared for him a submission[5] and draft reasons for decision (FC [46]).

11. In making his decision under s 501CA(4) as to whether there was "another reason" to revoke the cancellation decision, the Minister considered a range of factors including the best interests of Mr Viane's youngest child as a primary consideration and the extent of the impediments Mr Viane faced if he was removed from Australia.

12. In assessing the best interests of Mr Viane's child, the Minister found that she and the family as a whole would be "significantly impacted" by moving to American Samoa or Samoa; but that (at [23] cited at FC [28]):

> "English, however, is widely spoken in American Samoa and Samoa and healthcare, education and some welfare support are available in either location"

and also accepted that

> "the services available in American Samoa and Samoa may not be of the same standard those available in Australia, and/or may be more expensive to access, and there may be differences in services between American Samoa and Samoa".

13. The Minister also made findings to similar effect with respect to healthcare and welfare services when considering the issue of the impediments Mr Viane would face if removed (at [64] cited at FC [29]). The findings that English is spoken and that "healthcare, education and some welfare support are available" are the impugned findings referred to above.

14. The Minister's overall conclusion about any move to American Samoa or Samoa was that it would involve *significant* hardship and would *significantly* impact Mr Viane's child (FC [28] – [29]). This was treated as weighing in favour of revoking the cancellation of the visa.

PART VI: ARGUMENT

15. In his amended originating application before the primary judge, Mr Viane pleaded four grounds of review.[6] Relevantly, the first ground pleaded that the Minister had

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[4] AFM 125 at [31], 136 [4].

[5] AFM at 1-19.

made certain findings for which there was "no evidence" and that those findings were "critical steps" in the Minister's reasons. The primary judge (Flick J) rejected that ground on the basis that the Minister did not require specific evidence before him (at [18]) and that, if the Minister had relied upon specialised knowledge, it had not been procedurally unfair as the potential hardship to Mr Viane and his family had been weighed by the Minister in Mr Viane's favour (at [11] – [13]).

16. In Mr Viane's amended appeal to the Full Court,[7] he contended, among other things, that the primary judge had erred by failing to hold that the Minister "made findings without evidence resulting in jurisdictional error".[8]

10 17. The majority of the Full Court (Kerr and Charlesworth JJ) held that (FC [43] to [46], [61] to [62]):

(a) *first*, the Court was entitled to conclude tentatively that the Minister had no personal or specialised knowledge relevant to the impugned findings, because the Minister's reasons were silent as to that matter;

(b) *second*, the facts stated by the Minister were not commonly known, unlike the facts in two single Judge decisions concerning New Zealand;[9]

(c) *third*, there was no other evidence before the Court that the Minister had any specialised or personal knowledge of these facts;

(d) *fourth*, the Minister's reasons were not drafted by him personally, and the
20 "proper" inference was therefore that the Minister "adopted the suggested findings in the draft reasons as his own in the absence of any evidentiary foundation for them"; and

(e) *fifth*, this lack of evidence was material to the Minister's decision as the relevant findings may have affected the "degree" of hardship Mr Viane's child might have experienced in Samoa or American Samoa and thus the weight given to the relevant factors. Further, as *the Minister* had not adduced any

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[6] AFM at 147-150.

[7] Core Appeal Book (**CAB**)at 48.

[8] The amended notice of appeal clearly had a proof reading error in relation to ground 1(a) and should be read as "failing to hold that…".

[9] Referring to *Uelese v Minister for Immigration & Border Protection* [2016] FCA 348; 248 FCR 296 at [69] per Robertson J; *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 at [37] per McKerracher J.

evidence that a future factual inquiry would end in the same result, Mr Viane succeeded.

18. The presiding judge, Besanko J, dissented, agreeing with the primary judge that the Minister did not require specific evidence for these findings, and they were not in any event critical steps in the Minister's reasoning, as the Minister had accepted that being removed to American Samoa or Samoa would involve significant hardship to Mr Viane and his family (FC [13] – [14]).

The errors in the approach of the majority of the Full Court

(i) Findings without evidence

19. *First*, the content and context of the impugned findings need to be kept steadily in mind.

20. As to their content, while they related to two countries that may not be well known to many Australians, they expressed understandings about those countries that were unsurprising and very general: that English is spoken; and that education, health and welfare services are not absent. Mr Viane has never contended that he was taken by surprise by those findings or that, given an opportunity, he would have submitted evidence to contradict them.

21. As to their context, the findings responded to a representation by Mr Viane (itself not supported by any evidence) that he would "likely be homeless, with no job, social ties, welfare or healthcare services in American Samoa". The Minister went a long way towards agreeing with that proposition (concluding that moving to American Samoa or Samoa would involve "significant hardship") but not all the way: he was not persuaded that Mr Viane and his family would have *no* access to education, healthcare or welfare services or that they would be completely socially isolated. The Minister did not need specific evidence to justify that lack of persuasion.

22. *Second*, it is well established that an administrative decision-maker can properly rely on the specialized knowledge that he or she accumulates: eg *Muin v Refugee Review* Tribunal (2002) 190 ALR 601 at [7], [12] per Gleeson CJ, [116] per McHugh J, [263]-[264 per Hayne J, [300] per Callinan J; *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507 at [180] per Hayne J; *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223 at [40]-[45] per Rares and Jagot JJ. (The position is different for a tribunal that is bound by the rules of evidence: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [47]).

23. The authority to proceed on the basis of accumulated knowledge of matters of general fact, within an identified area of expertise or experience, arises by implication – as a matter of statutory construction – from the vesting of decision-making power in an expert body. In *Spurling v Development Underwriting* (Vic) Pty Ltd [1973] VR 1 Stephen J observed (at 11) that the issues arose in an area "in which members of the Tribunal have special expertise and experience which the legislation plainly intends them to employ".[10] In *Minister for Health v Thomson* (1985) 8 FCR 213 Fox J said (at 217) that the "intention of the Act" was that a committee exercise its own judgment "using its own collective knowledge".[11]

10 24. In this case, the decision-making power under s 501CA is vested in the "Minister", which means the Minister, or any of the Ministers, administering the provision in accordance with an Administrative Arrangements Order : see s 19(1) item 1 and s 20 of the *Acts Interpretation Act 1901* (Cth). In so doing, the Parliament envisaged that the Minister (and his or her Department)[12] would have or build up a body of general knowledge in that portfolio relevant to the considerations that would arise in deciding revocation requests, and empowered the Minister to act on that knowledge. That body of knowledge would include conditions in countries to which persons whose visas are cancelled might be removed, but would not include facts particular to individual visa holders.

20 25. There is no floating standard whereby the Court might have to ascertain as a matter of fact what particular expertise an expert tribunal or decision maker actually had.

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[10] *Spurling* has been cited with approval in many cases including by Flick J at first instance: *Tidsall v Health Insurance Commission* [2002] FCA 97 at [97] per Tamberlin J; *Roads Corporation v Dacakis* [1952] 2 VR 508 at 529 – 530 per Batt J; *Minister for Health v Thomson* (1985) 8 FCR 213 per Beaumont J; *McIntosh v Minister for Health* (1987) 17 FCR 463 per Davies J; *Telstra Corporation Ltd v Warren* (unreported, Federal Court of Australia NG 016 of 1996, 26 February 1997) per Tamberlin J.

[11] Cited with approval by Morling and Neaves JJ in *Romeo v Asher* (1991) 29 FCR 343 at 349.

[12] Ministers of State are the officers appointed by the Governor-General to administer the Departments of State of the Commonwealth (*Constitution*, s 64). The Minister who administers a provision of the Act will usually be identified, for the purposes of s 19 of the *Acts Interpretation Act 1901* (Cth), by consulting the current Administrative Arrangements Order (**AAO**) (s 19(2)(a)). Those Orders are made by the Governor-General (see the definition in s 2B) and, since the early days of the Commonwealth, have allocated the administration of particular legislation to specified Departments (see eg *Administrative Arrangements Order: Third Report of the Joint Committee of Public Accounts* in the Commonwealth Parliamentary Papers, 1951-53, vol. 2, p. 507-530). The AAO that was in force at the time of the Minister's decision in August 2019 can be seen at https://www.legislation.gov.au/Details/C2019Q00006. It follows that the *Minister* "administering the provision" (under s 19) has that status because he or she has been appointed to administer the *Department* that (under the AAO) has responsibility for matters arising under the provision. Thus, when vesting a power in "the Minister", s 501CA designates a person who administers the Department responsible for matters arising under the Act, and therefore has the support of the Department in exercising the power. See also *Bochenski v Minister for Immigration and Border Protection* (2017) 250 FCR 2019 at [37]-[49] per Bromwich J (Bromberg and Charlesworth JJ agreeing).

Rather, what controls the potential for abuse of the statutory assumption of specialised knowledge is whether that knowledge has been deployed in circumstances which are procedurally fair and legally reasonable.

26. Accordingly, the majority erred at FC [41]-[46] in regarding the possession of relevant accumulated knowledge by the Minister as a matter for factual contest. General knowledge of the conditions in Samoa and American Samoa was within the field of knowledge that s 501CA assumes the Minister will have. The impugned assertions did not contradict any *evidence* put forward on Mr Viane's behalf, and no complaint was made that they involved a denial of procedural fairness.

27. *Third*, even if an administrative decision-maker's possession of accumulated knowledge is a matter for evidence in individual cases, Mr Viane did not discharge the onus that fell on him.

28. Ground 1 at first instance alleged that there was "no evidence" for the impugned assertions. To make that good, and have the decisions set aside, Mr Viane had to prove that the Minister had neither specific evidence for the assertions nor a body of relevant knowledge on which he could draw. Mr Viane did not attempt the second part of that task; and there was therefore no evidentiary contest about the extent of the Minister's knowledge.

29. It was only in the Full Court (and on the initiative of the Court) that any factual question arose as to whether the Minister had personal or specialised knowledge about Samoa and American Samoa. The way that the majority framed the issue at FC [42] suggests an assumption that the Minister bore the onus on the point. Even assuming that the point was one calling for proof, that was wrong: *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561 at 565; cf *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [46].

30. Aside from the question of onus, the majority relied on four factors for its finding that the Minister did not have relevant specialised knowledge (at FC [43]-[46]). The first of these factors was, as their Honours apparently accepted, not sufficient in itself and was, with respect, a neutral factor in the absence of other evidence. The reliance on the second, third and fourth factors (at FC [44]-[46]) involved error.

31. Whether the impugned findings were "common knowledge" (at FC [44]) is not, strictly, to the point; the question (if any issue of fact arose) was whether one would

infer that the Minister knew these things. It can be accepted that "the more obscure the subject matter, the less likely it will be that a court … will draw the inference that the Minister has in fact acted upon 'evidence' in the form of common or specialised knowledge". However, there was no evidence as to what was or was not "common knowledge" (or "obscure"), and the relevance of tests for judicial notice was disavowed.

32. Contrary to FC [45], there were grounds for an inference that the Minister had sufficient knowledge about conditions in Samoa and American Samoa as a result of the performance of his duties as Minister. The decision maker was the Hon Peter Dutton MP, Minister for Home Affairs, who as a matter of public record had served in the portfolio since 2014. There is good reason to think that, in performing his duties in that time, he would have acquired some basic knowledge about the nations of the Pacific. There should also be no doubt that his Department had accumulated that knowledge.

33. As noted earlier, the impugned findings are very general statements which one might think would be uncontroversial (save that Mr Viane, without supporting evidence, had suggested a different position). The Minister would not need to claim a particularly deep understanding of Samoan history and culture in order to make them: that English is widely spoken; that welfare and health care services exist; and that Mr Viane (who was born in American Samoa and grew up in Samoa) and his immediate family would be able to gain access on the same terms as other Samoans. (The second and third of these propositions are not inconsistent with Mr Viane's submission as qualified by his representative).[13]

34. As to FC [46], it can be accepted that the Minister's reasons were written in advance by the Department and proposed for his adoption. At worst, the reasons tell the reader nothing about the Minister's state of knowledge. To the extent that any inference arises, it is that the drafter of the reasons had some basis for thinking that these statements accorded with the Minister's existing understanding[14] (and it can clearly be inferred that they reflected the Department's understanding).

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[13] At AFM 137 [7].

[14] Noting that it is well established that the fact the Minister does not personally draft his reasons does not detract from the fact that upon signing those reasons become the Minister's reasons unless there is *actual evidence* indicating otherwise: *Minister for Immigration & Multicultural Affairs v W157/00A* (2002) 125 FCR 433 at [39] per Branson J (Goldberg and Allsop JJ agreeing); *Maxwell v Minister for Immigration and*

(ii) Jurisdictional error?

35. *First,* the majority reasoned that the impugned findings affected a "critical aspect" of the Minister's decision (FC [61]). The concept of error in a "critical" step, employed in several Federal Court decisions,[15] to some extent echoes language used by Gummow ACJ and Kiefel J, in dissent, in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; but it elides an important difference between their Honours' approach and that of Crennan and Bell JJ. In *SZMDS* the complaint was that the Tribunal had made a finding (that the respondent was not homosexual) on the basis of an illogical or irrational process of reasoning. At [53] Gummow ACJ and Kiefel J described the Tribunal as having made a "critical finding by inference not supported by logical grounds". That was considered sufficient to mean that the Tribunal's state of satisfaction (upon which jurisdiction depended) was not reached lawfully and its decision should be set aside (based on reasoning set out at [37]-[42]).

36. However, Crennan and Bell JJ regarded the question as being whether the Tribunal's state of satisfaction was one which a rational decision-maker could reach on the material, and held that a decision depending on that state of satisfaction would not be vitiated by irrationality if there was room for a logical or rational person to reach the same state of satisfaction (at [130]-[131], [135]). Heydon J (the other member of the majority) did not reach these issues because he found no irrationality in the Tribunal's reasoning.

37. The reasoning of Crennan and Bell JJ is, with respect, to be preferred.

38. Judicial review on an application for the constitutional writs involves a search for jurisdictional error. "Jurisdiction", in this sense, refers to "the scope of authority which a statute confers", and involves both the preconditions which must exist for the decision-making process to be embarked upon and the conditions required to be observed in relation to that process: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [23]. Both of these sets of constraints are (and must be) found in the statute.

Border Protection (2016) 249 FCR 275 at [31] per Perry J approved in *Folou v Minister for Immigration and Border Protection* (2017) 256 FCR 455 at [88] – [92]) per Murphy and Burley JJ.

[15] For example*: BZD17 v Minister for Immigration and Border Protection* (2018) 263 FCR 292at [34]; *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; (2003) 77 ALD 402 at [19]; *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at [32]; *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at [23]; cf *Navoto v Minister for Home Affairs* [2019] FCAFC 135 at [63] to [66].

39. Where, as in s 501CA(4), a grant of decision-making power is conditioned on the repository of the power holding a particular state of satisfaction, the relevant inquiry is as to whether the repository had the state of satisfaction that the provision calls for. That will not be so if the applicable legal test has been misconstrued or irrelevant considerations taken into account: eg *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 per Latham J. It will also not be so if the opinion reached is not "such that it *can be formed* by a reasonable man who correctly understands the meaning of the law under which he acts": *R v Connell* at 430 (emphasis added). That goes to whether the opinion is rationally defensible in light of the material before the decision-maker; not to the actual reasoning process of the decision-maker; and certainly not to the particular findings of fact supporting that reasoning.

40. To find a jurisdictional limitation operating upon individual findings of fact, it is necessary to imply into the spare statutory language ("if the Minister is satisfied that there is another reason why the original decision should be revoked") an additional precondition that each of the conclusions of fact relied on in forming the Minister's opinion must be based on probative material. There is no foundation for such an implication; and, despite the reassurance of Gummow ACJ and Kiefel J in *SZMDS* (at [38]-[39] and [42]), that invites a slide into merits review. Crennan and Bell JJ were therefore correct to note that, in so far as the formation of an opinion can be impugned for irrationality, the test must be "at least related" to the implied standard in discretionary contexts referred to as *Wednesbury* unreasonableness (at [127]), and must be applied to the opinion expressed rather than the findings underpinning it.

41. The task of the Minister here was to decide whether he was satisfied that there was "another reason" to revoke the visa cancellation – a necessarily evaluative judgment involving giving weight to potentially competing factors. Even assuming that there was no proper basis for the impugned findings about Samoa and American Samoa, it would not follow that the overall conclusion (that there was not "another reason") was one that was not open to a rational decision-maker on the material before the Minister. That is so at least because, even if in fact life in those countries was completely untenable, on the evidence Mr Viane had the option of going to New Zealand.

42. *Second*, if the question depends on whether the impugned assertions were "critical" steps in the Minister's reasoning (in the sense referred to by Gummow ACJ and

Kiefel J), they were not so. First, none was a point upon which jurisdiction depended. Secondly, so far as the actual reasoning of the Minister is concerned, each was articulated in partial mitigation of a factor, advanced by Mr Viane, which the Minister accepted and accorded weight. Nothing in the reasons suggests that the Minister's decision turns on these specific points (in that it would be different if these points had been omitted or decided differently). That is very unlikely to be the case in circumstances where, as noted earlier, Mr Viane had the option of living in New Zealand. The reasoning of Besanko J at FC [14] is, with respect, persuasive in this regard.

43. The possibility can be accepted that, if different findings were made about the matters traversed in the impugned assertions, the Minister might have given more weight to the impact of the decision on the child and the impediments to the family relocating. That could perhaps be relevant to materiality (although, given the option of going to New Zealand, it raises only the faintest of possibilities that the decision would have been different); but it does not follow that these were "critical" steps. If that were the position, every finding of fact that was relevant to the decision under review would be "critical". Accordingly, the majority at FC [48]-[52] erred by running together the questions of "critical step" and materiality.

44. For completeness, the majority also erred in the *obiter* suggestion (at FC [60]) that the Minister was bound to decide to what extent English was spoken in American Samoa or Samoa as a result of representations made by Mr Viane that raised that issue. The duty to consider Mr Viane's representations, established in the earlier proceeding, did not elevate each of his arguments into mandatory considerations that the Minister was obliged to make findings about.

PART VII: PRECISE FORM OF ORDERS SOUGHT BY THE APPELLANT

45. Appeal allowed.

46. Orders 4 and 5(a) & (b) of the Full Court of the Federal Court of Australia (**Full Court**) made on 24 August 2020 be set aside, and in lieu thereof, order that the appeal to the Full Court be dismissed.

PART VIII: ESTIMATED TIME FOR ORAL ARGUMENT

47. The Minister estimates that he will require 1.5 hours for oral argument.

Dated: 30 April 2021

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**

Appellant

and

Alex VIANE

Respondent

ANNEXURE OF STATUTORY PROVISIONS

1. *Acts Interpretation Act 1901* (Cth), ss 2B, 19, 20 (Compilation 36, 20 December 2018 to present).

2. *Administrative Arrangements Order – 29/5/2019* (as amended, 8 August 2019 to 31 August 2019).

3. *Constitution*, s 64.

4. *Migration Act 1958* (Cth), ss 501(3A), 501CA (Compilation 144, 17 April 2019 to 29 August 2019).