HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

and

10 **Alex VIANE**
Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. The appellant (**Minister**) certifies that this reply is in a form suitable for publication on the internet.

PART II: CONCISE REPLY TO THE ARGUMENT OF THE RESPONDENT

2. Mr Viane's submissions (**RS**) address a number of arguments not made by the Minister and also join issue with various factual propositions.

20 3. *Firstly,* the Minister does not argue that there is a statutory presumption that he has acted upon specialised knowledge (RS [8]). Rather, on the facts of this case:

   (a) the general knowledge of conditions in Samoa and American Samoa were within the field of knowledge that s 501CA assumes the Minister will have (AS [22] - [26]); and

   (b) in any event, Mr Viane did not discharge his onus to prove that the Minister had no such knowledge (AS [27] – [34]).

4. While Mr Viane seeks to put the question of onus at issue (RS [29]), he overstates the effect of *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969. That case stands for the proposition that evidence is *to be weighed* according to the capacity of each party to
30 provide proof of the relevant fact. Slight evidence might therefore have been sufficient to cast a persuasive onus on to the Minister; but Mr Viane did not offer any evidence on the point.

5. *Second*, there is a factual contest between the parties about whether the Minister's findings to the effect that English was widely spoken and that education, health and welfare services were not entirely absent are "general" findings or matters of "granular detail" (RS [26]). Contrary to RS [26](b), there was no evidence or argument before the Minister that the respondent's wife and child were not citizens or entitled to citizenship in Samoa or American Samoa and would not be able access such services as were available (see Dr Donnelly's representations to the Minister at RFM 136 [7]).

6. *Third*, the Minister does not argue that his Department's knowledge should be "attributed" to him (RS [27]). Rather, as a matter of common sense, the Department has accumulated knowledge which is used to inform the Minister about matters relevant to his (or her) portfolio.

7. *Fourth,* the Minister does not rely here on a distinction between "legislative" and "adjudicative" facts (RS [33]). Rather, the Minister argues that, as a matter of statutory construction, the specialised knowledge presumed under s 501CA would include conditions in countries to which persons whose visas are cancelled might be removed, but could not include facts particular to individual visa holders (AS [22] – [25]). Ultimately, Mr Viane's argument appears to rely upon the Minister's findings in this case being characterised as about "relatively more obscure" subject matter than that permitted by s 501CA (RS [36]).

8. *Fifth,* Mr Viane seeks to sustain the reasoning of the majority by arguing that errors in individual fact finding are a basis to impugn the ultimate decision of the Minister that he was not satisfied that there was "another reason" to revoke the cancellation decision. In particular, he argues that there is an implied precondition in s 501CA that every factual finding made by the Minister must be based on probative evidence (RS [41], [43]). Mr Viane's argument impermissibly elides the need for probative evidence to sustain the ultimate decision with the need for evidence for each and every finding of fact. In this regard, statements drawn from cases on materiality (RS [41]) must be applied with caution. The issue here involves the nature of the implied statutory requirement rather than the gravity of a breach. The requirement – whether understood as applying to so-called "critical findings" or only the ultimate decision itself – is one of those which, "of their nature, incorporate an element of materiality" (*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 at [33]).

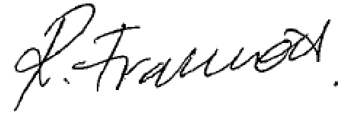
9. Mr Viane does not otherwise address the Minister's argument and thus presumably accepts that, if he is wrong about the implied precondition, there is no answer to the Minister's argument that the decision was open to a rational decision-maker on the material before the Minister (AS [41]).

10. *Sixth,* Mr Viane overstates the effect of the majority judgment in *Applicant S270 v Minister for Immigration and Border Protection* [2020] HCA 32; 94 ALJR 897 at [36] per Nettle, Gordon and Edelman JJ. Their Honours were not suggesting that *all* claims and material submitted by an applicant were mandatory relevant considerations. That would obviously be incorrect. Rather, their Honours were highlighting the contrast between the width of the matters the Minister might consider and the submissions actually made. A substantial body of authority in the Federal Court recognises a duty under s 501CA(4) to "consider" the claims advanced in representations made by the person affected, but only in the sense of engaging with those claims and considering whether they indicate "another reason" for revoking the cancellation (eg *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at [34](e), (g) & (i) and [45] per Allsop CJ and Bromberg, Robertson, Griffiths & Perry JJ). The Minister clearly did that in this case.

11. The claims by Mr Viane for which he provided no evidence (identified at RS [49]) were, in the Minister's assessment, somewhat exaggerated, and not determinative of the existence of "another reason" in circumstances where Mr Viane's family could readily avoid those outcomes by choosing to live in New Zealand rather than Samoa or American Samoa.

12. *Seventh*, Mr Viane now seeks to argue for the first time that he was denied procedural fairness (RS [55] to [62]). The first answer to that new claim is that, in so far as the Minister was unpersuaded by Mr Viane's factual claims, that did not require any further comment to be invited from him: *Kioa v West* (1985) 159 CLR 550 at 587 per Mason CJ. The second is that there was no practical injustice: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1. The only available inference on the evidence in this case, noting the expert assistance provided to Mr Viane, is that Mr Viane provided no evidence to the Minister to support his rejected claims because there is none.

Dated: 18 June 2021



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