HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

Respondent's outline of oral submissions

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. Ground 1

2. The dispositive finding of the majority in the Full Federal Court as to the "language finding" and the "welfare finding" was that the appellant (the **Minister**) did not base those findings on any personal or specialised knowledge: J[41], [42] CAB 112. That is a question of fact to be determined in light of all of the circumstances of the case. In determining that question, one does not apply some form of "statutory assumption" that specialised general knowledge has in fact been applied by the repository of power.

   2.1. RS [7]-[19]

   2.2. *Spurling* [1973] VR 1 at 9-10.

3. The reasoning of the majority in the Full Federal Court on that issue at J[41]-[46] displayed no error. Upon making the decision not to revoke the decision to cancel the respondent's visa under s 501CA(4) of the *Migration Act 1958* (Cth) (**the Act**) the Minister was required to provide reasons for that decision: ss501G(1)(ba) and (e) of the Act. That, in turn, engaged the requirement to set out findings on material questions of

fact and to refer to the evidence or other material on which those findings were based: s25D *Acts Interpretation Act 1901* (Cth). In circumstances where the reasons identified no such evidence or other material on which the "language finding" and the "welfare finding" were based, the Court was entitled to infer that there was none: J [43]. That inference was more readily drawn in the circumstances in which the reasons came to be adopted by the Minister: J [46]. The obscurity of the subject matter and the nature of the repository of power were further circumstances that supported the drawing of such an inference: J[44], [45].

3.1. RS [20]-[29]

3.2. *Muin* (2002) 190 ALR 601 at [7].

B. Ground 2

4. In the case of a jurisdictional fact dependent upon the formation of a state of satisfaction, the court will, in the absence of a contrary intention, imply a requirement that it be based on findings or inferences of fact which are supported by some probative material. The implication of that requirement takes place by reference to common law principles informing the construction of statutes conferring decision making authority.

4.1. RS [38]-[39].

4.2. *Eshetu* (1999) 197 CLR 611 at [145], [147].

4.3. *SZMDS* (2010) 240 CLR 611 at [23]-[24], [103], [124].

5. The notion that a state of satisfaction will be vitiated if it is "based on" findings that are not supported by probative evidence aligns with the Federal Court authorities to the effect that a finding made with no evidence will amount to jurisdictional error where the affected finding is a "critical step" in the decision-maker's path of reasoning. Each of those formulations is an expression of the gravity or extent of the error. A state of satisfaction that fails to comply with that requirement to that extent is not one to which the Act then attaches legal consequences.

5.1. RS [39]-[41]

5.2. *Hands* (2018) 267 FCR 628 at [45]-[47], [54] and [55]

6. The majority correctly applied those principles to the construction of s 501CA(4): J [47]-[48], RS [42]-46]. Further, the findings in issue were of sufficient importance to the ultimate conclusion to be regarded as "critical": RS [47]-[54].

C. Notice of contention ground 1

7. While it is admittedly difficult to formulate a precise test, there are limits upon the circumstances in which it is permissible for a decision maker to rely on general knowledge or accumulated specialist knowledge in the context of s 501CA of the Act. Amongst other things, the question of whether such reliance is permissible will depend upon the extent and character of the decision-maker's specialisation, the form of the particular knowledge relied upon by the decision-maker and the specific matter requiring determination.

7.1. RS [30]-[35]

7.2. *Navoto* [2019] FCAFC 135 [77], [78].

7.3. *Dekker* [2014] WASCA 216 at [50], [73], [74]

8. Those limits were exceeded here. The subject matter in question is particular and not aptly characterised as basic knowledge about country conditions, which one may expect the Minister to have acquired in the course of performing his duties.

8.1. RS [36]

D. Notice of contention ground 2

9. Procedural fairness requires that there be disclosure of the nature and content of knowledge relied upon by the Minister, at least to the extent that knowledge comprised adverse material that is particular or specific and is not known to the former visa holder. Any knowledge applied by the Minister in this case to the formation of the requisite state of satisfaction was of that nature. It was not disclosed. The failure to do so denied the respondent a fair opportunity to be heard and satisfied the threshold of materiality.

9.1. Aronson et al at JBA, vol 5, p1002-1003

9.2. *Chiropractors Association of Australia* [1999] SASC 120 at [87].

9.3. *SZBEL* (2006) 238 CLR 152 at [32].

Dated: 9 September 2021

Craig Lenehan **Dr Jason Donnelly** **Kevin Tang**

Counsel for the Respondent