FEDERAL COURT OF AUSTRALIA

Viane v Minister for Immigration and Border Protection [2018] FCA 3

File number:	NSD 1037 of 2017
Judge:	**BROMWICH J**
Date of judgment:	12 January 2018
Catchwords:	**MIGRATION** – visa cancellation on character grounds under s 501 of *Migration Act 1958* (Cth) – application for judicial review of decision not to revoke visa cancellation under s 501CA(4) of *Migration Act 1958* (Cth) – alleged denial of procedural fairness, legal unreasonableness and legally insufficient consideration constituting jurisdictional error – whether substantial claim made by applicant as to impediments of removal to birth country – whether Parliamentary Secretary failed to consider that substantial claim – held: no substantial claim advanced by applicant – held: no failure to consider and therefore no question of jurisdictional error – application dismissed
Legislation:	*Constitution* ss 64, 65 *Evidence Act 1995* (Cth) s 150(3), (4)(e) *Migration Act 1958* (Cth) ss 5, 198(2B), 501, 501CA(4) *Ministers of State Act 1952* (Cth) s 4
Cases cited:	*Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562 *Ayoub v Minister for Immigration & Border Protection* [2015] FCAFC 83; 231 FCR 513 *Bochenski v Minister for Immigration and Border Protection* [2017] FCAFC 68; 347 ALR 45 *Minister for Immigration and Border Protection v Le* [2016] FCAFC 120; 244 FCR 56 *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; 220 FCR 1
Dates of hearing:	7 December 2017
Registry:	New South Wales
Division:	General
National Practice Area:	Administrative and Constitutional Law and Human Rights

Category:	Catchwords
Number of paragraphs:	30
Counsel for the Applicant:	Mr J Donnelly and Mr K Tang
Solicitor for the Applicant:	D’Agostino Solicitors
Counsel for the Respondent:	Ms R Francois
Solicitor for the Respondent:	HWL Ebsworth

ORDERS

NSD 1037 of 2017

BETWEEN:	**ALEX VIANE** Applicant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** Respondent
JUDGE:	**BROMWICH J**
DATE OF ORDER:	**12 JANUARY 2018**

THE COURT ORDERS THAT:

1. The name of the respondent be changed from "Assistant Minister for Immigration and Border Protection" to "Minister for Immigration and Border Protection".
2. The amended originating application be dismissed.
3. The applicant pay the respondent's costs, including those incurred when the named respondent was the "Assistant Minister for Immigration and Border Protection", as taxed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

1 This is an application for judicial review of a decision made by the Parliamentary Secretary to the Minister for Immigration and Border Protection. The Parliamentary Secretary used the title of "*Assistant Minister for Immigration and Border Protection*", which is not provided for by statute. That title was also used by the applicant to name the respondent when these proceedings were commenced, and thereafter until the hearing in this Court. The use of that title by the Parliamentary Secretary and by the applicant is addressed below.

2 The applicant was born in American **Samoa**. He became a citizen of New Zealand when he was a child and subsequently came to Australia as an adolescent on a Class TY Subclass 444 Special Category (temporary) visa. That temporary visa is available to New Zealand citizens. He is now 40 years of age and has never held any other visa. Despite being a New Zealand citizen, he has never been there. Over the more than 25 years that the applicant has been in Australia, he has been convicted and, in some cases, imprisoned for a number of criminal offences, the details of which are not challenged and are not otherwise material.

3 The applicant is in a relationship with an Australian woman, with whom he has an infant daughter who is also Australian. He also has an adult daughter from a prior relationship and a grandson born to his adult daughter, both of whom are Australian. He has an extensive network of extended family members in Australia, numbering over 200. Many of his most immediate family members are Australian.

4 On 6 July 2016, a delegate of the Minister for Immigration and Border Protection cancelled the applicant's visa that had until then allowed the applicant to remain in Australia. The cancellation was mandatory upon the delegate being satisfied that the applicant did not pass the character test set out in s 501 of the *Migration Act 1958* (Cth). Given the nature of the applicant's criminal convictions, the most recent of which was in 2015, there was, understandably, no suggestion made on behalf of the applicant that he was capable of passing the character test. He therefore had to rely upon another reason for being permitted to retain his visa and therefore have its cancellation revoked.

5 On 13 July 2016, the applicant requested a revocation of the delegate's visa cancellation decision under s 501CA(4) of the *Migration Act*, based on his personal circumstances and those of his family. On 1 June 2017, the Parliamentary Secretary decided that he was not

satisfied that the applicant passed the character test in s 501 of the *Migration Act*, and was also not satisfied that there was another reason to revoke the delegate's visa cancellation decision. Accordingly, the Parliamentary Secretary considered that the revocation power was not enlivened. The practical effect of the non-revocation decision, if not overturned, will be the applicant's removal from Australia, because he will then not have any visa permitting him to remain here.

Overview of the applicant's case

6 The applicant seeks to have the Parliamentary Secretary's decision set aside on the basis of asserted jurisdictional error in concluding that there was not another reason to revoke the delegate's decision. The applicant's case for judicial review, pleaded by way of three grounds in an amended originating application for review, alleges a denial of procedural fairness, legal unreasonableness and legally insufficient consideration, each to the extent that they constituted jurisdictional error.

7 The amended originating application requires this Court to determine two critical issues:

(1) whether the applicant advanced a substantial claim, calling for express consideration by the Parliamentary Secretary, as to the impediments he would face if he were removed from Australia and sent directly to his country of birth, Samoa, rather than to his country of citizenship, New Zealand, if the cancellation decision was not revoked; and, if so,

(2) whether the Parliamentary Secretary failed to carry out the necessary express consideration of that claim in deciding not to revoke the cancellation decision.

8 It was common ground, albeit with some nuanced differences in expression, that a failure to consider a substantial claim of the kind asserted by the applicant is capable of amounting to jurisdictional error on the part of the Parliamentary Secretary by one of the three pathways alleged. However, for the reasons that follow, while it has been established that consideration was not given by the Parliamentary Secretary to the impediments that the applicant would face if removed from Australia and sent directly to Samoa, it has not been established that this was in contemplation by either the Parliamentary Secretary or by the applicant, at least in the material that was furnished to the Parliamentary Secretary. Accordingly, it has not been established that there was any claim, let alone a substantial claim, as to the impediments the applicant would face if removed from Australia and sent

directly to Samoa. It follows that no failure by the Parliamentary Secretary to carry out express consideration of such a claim has been made out. Consideration of the question of jurisdictional error therefore does not arise, and the amended originating application for review must be dismissed.

The proper respondent

9 The practice of suing federal Ministers of State, or senior federal officials such as departmental secretaries, by name in relation to official activities and decisions was dispensed with in favour of using officially designated titles many years ago. This practice better accommodates changes in office holders and continuity of litigation. Departments of State cannot be sued because they are not legal entities.

10 Sections 64 and 65 of the *Constitution* provide for the appointment and number of Ministers of State to administer departments of State, be members of the Federal Executive Council and be the Queen's Ministers of State for the Commonwealth. The number was originally fixed in the *Constitution* at seven, until such time as it was changed by the Parliament. Section 4 of the *Ministers of State Act 1952* (Cth) provides, for the purposes of s 65 of the *Constitution*, as follows:

> **4 Number of Ministers**
>
> The number of the Ministers of State must not exceed:
>
> (a) in the case of those designated, when appointed by the Governor-General, as Parliamentary Secretary—12; and
>
> (b) in the case of those not so designated—30.

11 The *Ministers of State Act* makes no provision for any title of "*Assistant Minister*" for any federal Minister of State: see ***Bochenski*** *v Minister for Immigration and Border Protection* [2017] FCAFC 68; 347 ALR 45 at [3], [42]. Accordingly, an application for judicial review of the Parliamentary Secretary's revocation decision had to be brought by the applicant against either the "*Minister for Immigration and Border Protection*" for whom the delegate acted in cancelling the visa, or against the "*Parliamentary Secretary to the Minister for Immigration and Border Protection*", who made the decision in relation to revocation. Counsel appearing to oppose the application opted, on instructions, for "*Minister for Immigration and Border Protection*" as the appropriate designated title for the respondent. The applicant had no objection to that change and an order will be made accordingly.

12 While there is no apparent legal issue arising in this case from the Parliamentary Secretary using the title of "*Assistant Minister*" when making decisions, which is not a title provided for by the *Ministers of State Act* for the purposes of s 65 of the *Constitution*, that may not always be the case, especially if delegated power is being exercised and any presumption of regularity is sought to be relied upon. It may also have a bearing on whether a document can be presumed, without evidence, to have been signed by a Parliamentary Secretary acting in his or her official capacity: see s 150(3) and the definition of "*office holder*" in s 150(4)(e) of the *Evidence Act 1995* (Cth). In this case, the Parliamentary Secretary was considering whether to use direct Ministerial power, rather than delegated power: see *Bochenski* at [43]-[49].

The material before the Parliamentary Secretary and the reasons for non-revocation

13 The material that was placed before the Parliamentary Secretary included the following documents, which were relied upon in this application to demonstrate that a claim had been made of the detriment that would arise from the applicant being removed from Australia and sent directly to Samoa:

(1) an application for revocation form completed by hand by the applicant, prior to him having legal or migration agent assistance, dated 13 July 2016;

(2) a personal circumstances form, also completed by hand by the applicant prior to him having legal or migration agent assistance, dated 3 August 2016;

(3) a subset of a large number of letters of support for the applicant, dating between July 2016 and February 2017;

(4) a statutory declaration made by the applicant, dated 1 March 2017; and

(5) submissions in the form of a letter from the applicant's solicitor addressed to the Department, dated 2 March 2017.

There was also a large volume of other material before the Parliamentary Secretary, which does not require further consideration in relation to these proceedings.

14 Counsel for the applicant relied upon certain extracts from the material listed in the preceding paragraph, as set out below, to make good his contention that a claim had been made that the applicant would suffer detriment by reason of being removed from Australia and sent to Samoa, rather than being sent to New Zealand. The Minister relied upon additional extracts from the same documents, as well as upon a number of extracts from other documents.

Similarly, the applicant relied upon parts of the Parliamentary Secretary's reasons, while the Minister sought to rely upon additional parts of those reasons to give a different complexion to the overall effect of the reasons given for non-revocation. To understand and assess the competing arguments, it is necessary to reproduce extracts from those documents.

The applicant's request for revocation form and personal circumstances form

15 The Minister relied upon the following passages transcribed from the applicant's request for revocation form and personal circumstances form, both of which were completed by the applicant by hand:

(1) The request for revocation form:

> …
>
> [Handwritten response within a table headed "*PERSONAL DETAILS*"]
>
> …
>
> Country of Citizenship New Zealand
>
> …
>
> [Handwritten response within a box headed "*Reasons for Revocation*"]
>
> I have two daughters, 20 old + 1 old, who are both born in Australia, they are Australian Citizens. My Parents are Australian Citizens and I came to Australia with them in 1990 from Samoa. I have never lived in New Zealand. All my family are in Australia and I want to remain in Australia with them. I have no family or supportive networks in NZ.
>
> I completed my schooling in the Liverpool and Campbelltown areas. I have been employed for the vast majority of my adult life and contributed to my communities and played sport locally. I have only burdened social services for a period of less than 6 months when I was unable to find work.
>
> I believe that I can be a benefit to Australia and my family by working and contributing to both in a positive way.
>
> …

(2) The personal circumstances form:

> …
>
> [Handwritten response under the heading "*BASIC PERSONAL DATA*"]
>
> …
>
> Place of Birth (Town and Country): Fagaalu America Samoa
>
> …
>
> Current Citizenship(s): Permanent Resident of Australia
>
> …

RETURN TO YOUR COUNTRY OF CITIZENSHIP

Do you face any criminal charges/convictions in your country of citizenship?

[Box titled "*No*" ticked in response]

If yes, what would happen about these matters on your return?

[Handwritten response] I have never been there.

Do you have any concerns or fears about what would happen to you on return to your country of citizenship?

[Box titled "*Yes*" ticked in response]

If yes, please describe your concerns and what you think will happen to you if you return.

[Handwritten response] I have never been to New Zealand, I have no immediate family or support. I will have no hope of contributing positively to their society.

Are there any other problems you would face if you have to return to your country of citizenship?

[Handwritten response] I just don't know anyone there I would have nowhere to go or anything.

ANY OTHER INFORMATION

Please outline any other information you would like to [sic] Minister or delegate to consider when making their decision.

[Handwritten response] I am a 38 old male who came to Australia from America Samoa for a better life. I worked hard at school and have held jobs when I could. I have a 20 year old daughter who has a child and has never been in trouble. I have a partner who is employed and a young daughter.

I have had an alcohol dependence that has caused all my troubles and I regret acting in a way that has impacted on the community in a negative way. I have worked hard to address this in custody.

I am ashamed of my actions that have reflected on me, my family and the community.

I have never set foot in New Zealand and I am extremely concerned that if I am sent there I will not be able to contribute to my daughters or partners lives.

Submitted for your humble consideration.

…

16 Neither of the two forms reproduced in part above and completed by the applicant make any reference to him being sent directly to Samoa upon being removed from Australia. The applicant's position was that the particular parts of those forms relied upon by the Minister

had been overtaken by subsequent material and, in any event, were written prior to obtaining legal or migration advice.

The applicant's statutory declaration

17 The passages of the applicant's typed statutory declaration relied upon by him are emphasised in **bold**; the remaining parts were either relied upon by the Minister, or are reproduced because they are relevant to the question of whether being sent directly to Samoa upon removal from Australia was in contemplation or was otherwise raised as an issue:

> …
>
> 16. There was never an occasion in my life where a father figure did not beat me; whether it was in Samoa or Australia, the men I looked up to – those who were supposed to be role models – would hit me. My memories of growing up in Western Samoa are not fond ones, my childhood can only be described as one of misery and fear.
>
> …
>
> 51. If I am to depart Australia, my children – particularly my fifteen (15) month old daughter – will be made to suffer. My partner and daughter will be left in Australia whilst I return to Samoa.
>
> …
>
> **65. As Australian citizens, and never having known any other life, I cannot expect my partner and fifteen (15) month old daughter to move overseas should I be forced to depart; the lives they would have in either New Zealand or Samoa, depending upon where I move to, would be extremely difficult. Although we may be a family once more, we would be so in an unfamiliar setting, with no ties, job prospects or home. Further, they would be separated from their immediate and extended family and friends, as well as the life they know in Australia. In short, the move would cause a negative impact on my partners and daughter's overall advancement and progression through life.**
>
> …
>
> 70. Although some would have you believe the relocation across the Tasman Sea would be smooth and easy, the reality is that it would be hard and difficult, wrought with upset and uncertainty, especially for my young family should they be forced to relocate with me. As all of our immediate family reside in Australia, I therefore have no ties or bonds with New Zealand, in effect there is nothing in that country for my family and I.
>
> …

The letters of support

18 The applicant relied upon the following letters of support:

(1) A letter from a family friend in which she said:

> As a pacific islander that has grown up in Australia like Alex, I have

> travelled to New Zealand and Samoa I have seen how families struggle and live in poverty and lack of job prospects and future hopes. To send Alex there would ruin and not only separate him from the only family he knows, you will tear him apart from his children his partner Sarah and his family. If Alex Viane is granted stay her [sic] in Australia I will continue to support him and Sarah and ensure he maintains grounded and continue being the loving supporting father, partner and son he is.

(2) A letter from a social worker in which she said:

> The impact of Alex being deported will leave two children without a father and his grandson without an elder as he is growing up. This will have a devastating impact on his family. He has no support in his birth country and if he is returned there, his children, grandson and partner all suffer a loss which will result in emotional issues and pain for all concerned for many years to come. I am aware that his aunt and uncle from Glen Alpine who have been supportive to him over the years have agreed to provide Alex with accommodation and support through these major life changes in the coming months.

19 The Minister relied upon the following letters of support:

(1) A letter from an aunt of the applicant in which she said:

> Alex has a dedicated partner and two daughters including a grandson who deserves to better their lives by having him be part of it daily. Australia is home for all of us including Alex and his family, here is where his support network is. To send him back to New Zealand will impact my family severely and will be distressing not only myself and my sons but for his elderly grandparents who are still here in Sydney.

(2) A letter from another aunt of the applicant in which she said:

> We would like to appeal for him to stay in Australia as this is his home, this is where he grew up, this is where all his family is. We understand he has made mistakes in his life but as we are all human we do make mistakes in our life one way of another. All of his family and loved ones reside in Australia, We have no family or friends that reside in New Zealand at all.

(3) A letter from the applicant's partner and mother of his infant daughter in which she said:

> Alex has never ever been to New Zealand, he has no accommodation there, no friends or even family ties and I fear he wont have the support that he needs and gets from his family here to help him get on the right path and to maintain it.

(4) A letter from a cousin of the applicant in which she said:

> To have him sent back to New Zealand will devastate my family as well as cause a lot of heartache for my family.

The submissions made by a letter from the applicant's solicitor

20 The portions of the submissions made by way of a letter from the applicant's solicitor, and relied upon by the applicant in these proceedings, are emphasised in **bold**; the remaining parts provide context, or were relied upon by the Minister, or are reproduced because they are relevant to the question of whether being sent directly to Samoa upon removal from Australia was in contemplation or was otherwise raised as an issue:

> …
>
> **In the event the cancellation decision stands, Jaylee will lose the close proximity to her father; further, as a struggling, younger mother, she will be unable to accommodate costs to make international travel to visit her father in New Zealand or Samoa which will only compound matters further.**
>
> …
>
> **Best Interest of an Australian Citizen Child**
>
> As per 13.2(1) of Ministerial Direction No. 65 of the Directions, it is abundantly clear that the "*…decision makers must make a determination about whether revocation is, or is not* [sic]*, in the best interest of the child…*".
>
> Indeed, Article 3.1 of the United Nations Conventions on the Rights of the Child, states that "*…in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration…*".
>
> We note that Article 6.1 confirms that the role of the State is to "*…ensure to the maximum extent possible the survival and development of the child…*". As will be discussed, it is abundantly clear that in order to facilitate the "*…survival and development…*" of Mr. Viane's child, including one (1) grandchild and another on the way, it would be prudent of the Department of Immigration to permit Mr. Viane to remain in Australia, thus ensuring Article 6.1 is upheld. Further, such actions of the Department will be alignment with Article 3.1 as per the above.
>
> As noted in the above submissions, Mr. Viane has a fifteen (15) month old daughter; it is strongly militated that if Mr. Viane's visa cancellation is not revoked, he will need to relocate to New Zealand **or return to Samoa**. This will have an adverse effect on his minor child, particularly as her lifestyle in Australia would not be able to be sustained solely by their mother's income; further, the child will suffer psychologically should her father and role-model be force [sic] to depart Australia.
>
> The Reverend Nove Vailaau notes that "*…the way forward is for us [Samoans] to develop a better appreciation of human rights. The UN Convention of the Rights of the Child provides a framework for us to protect our children. It is our responsibility to provide the environment of learning for our children, and if we can teach our children to respect people without violence, we can transform our minds and spirits…*". It is worthy to note that such sentiments are shared by Mr. Viane in that he wishes for a positive childhood and upbringing for his daughters and grandchildren, he strives to be a positive role-model in their lives.
>
> We note that such implications for the Australian child are in direct contrast to what is expected as per the Conventions on the Rights of the Child. In effect, to remove Mr. Viane would place the Department of Immigration in the precarious position of

defying a United Nations-issued article on human rights and propagating a stance that supports the separation of the family unit, a core and fundamental aspect of Australian society.

Additionally, should the child and the Australian mother be required to relocate to New Zealand or Samoa with Mr. Viane, it is submitted that they will suffer the following adversities:

1. Due to both financial and cultural reasons **the entire family unit will need to return to either Samoa** or New Zealand if Mr. Viane's visa is cancelled. The Department may note that even Mr. Viane, despite his New Zealand citizenship, has never actually been there before.

2. **If relocating to Samoa**, the child, although young, will have limited understanding of her father's native language and as such any schooling and advancement in life will be materially affected by the language and cultural barrier that will be placed upon her.

3. The child will find it difficult to assimilate in a society and culture which she has limited experience and understanding of.

4. The educational opportunities available to children in Australia would be lost if the family were forced to **relocate to** New Zealand or **Samoa**.

The Department will agree that Australia offers some of the best educational programs and opportunities in the world and as such **if the family are required to relocate to Samoa** the Australian child, through no fault of her own, would lose the opportunity to study in Australia. This we submit will have a negative impact on the child's development and prospects in the future.

The Parliamentary Secretary's reasons

21 The passages of the Parliamentary Secretary's submissions relied upon by the Minister are as follows:

7. I have considered the representations made by Mr VIANE and the documents he has submitted in support of his representations.

...

10. As I am not satisfied that Mr VIANE passes the character test, I have considered, in light of Mr VIANE's representations, whether I am satisfied that there is another reason why the original decision should be revoked.

11. In understanding this task, I assessed all of the information set out in the attachments. In particular, I considered Mr VIANE's representations and the documents he has submitted in support of his representations regarding why the original decision should be revoked.

…

30. I have had regard to letters of support provided by friends, family and members of the community. I note that many of these letters provide testimony that Mr VIANE is very close to Aliikai and that his removal will have a significant, negative impact on her upbringing.

22 The passages of the Parliamentary Secretary's submissions relied upon by the applicant are as follows:

> …
>
> 12. In the representations/documents submitted by or on his behalf, Mr Viane has articulated reasons why the original decision should be revoked, which include:
>
> …
>
> > Despite being a New Zealand citizen, Mr VIANE has never been to New Zealand, has no family or support there and all of his ties are to Australia.
>
> …
>
> 28. I have had regard to Mr VIANE's submissions that in the event of non-revocation he will need to relocate to New Zealand or return to Samoa. It is further submitted that this will have an adverse effect on Aliikai, particularly as her Australian lifestyle will be unsustainable on only her mother's income and also because she will suffer psychologically should Mr VIANE be forced to depart Australia.
>
> 29. I note Mr Rigas further states that if Mr Viane's family were forced to relocate to Samoa to stay together, Aliikai will be affected by the language and cultural barrier placed upon her. It is also submitted that the educational opportunities available to children in Australia would be lost if the family were to relocate to New Zealand or Samoa. I accept that this will have a negative impact on Aliikai's development and future prospects and I have taken this into account.
>
> …
>
> Extent of impediments if removed
>
> 85. In coming to my decision about whether or not I am satisfied that there is another reason why the original decision should be revoked, I have had regard to the impediments that Mr VIANE will face if removed from Australia to New Zealand in establishing himself and maintaining basic living standards.
>
> 86. I note Mr VIANE is 39 years of age and has had an alcohol dependency for many years.
>
> 87. I note Mr VIANE's entire family reside in Australia and he states that he has no immediate family or support in New Zealand. I further note Mr VIANE states that he was adopted by his uncle Saaoli Viane, when he was 14 years old. As his uncle held New Zealand citizenship, Mr VIANE was granted New Zealand citizenship at that time. As his uncle resided in Australia at the time of adoption, Mr VIANE has never resided in, or been to, New Zealand.
>
> 88. I have considered Mr VIANE's submissions regarding his concerns about being removed to New Zealand. In particular I note his concerns that he doesn't know anyone in New Zealand and would have no place of residence and states '*I will have no chance of contributing positively to their society.*' Mr VIANE further states '*I would have no one I can turn to overseas. It would be a life-shattering experience to undertake*'.
>
> 89. I note Mr VIANE advises that he has lived with Ms Kallu since 2009 and has a one year old child with her. He submits that being removed from Ms Kallu and Aliikai would be devastating. Mr VIANE further submits '*I have never set foot*

in New Zealand and I am extremely concerned that if I am sent there I will not be able to contribute to my or my daughter's or partner's lives.'

90. I have considered the submission by Mr VIANE's social worker, Ms Kath Mclean, who, in her letter of 7 November 2016, states that he has no support in New Zealand and being returned there '*will result in emotional issues and pain for all concerned for many years to come*.'

91. I further note Mr VIANE submits that Ms Kallu was a turning point in his life and considers her to be his best friend and confidant. He states '*I cannot begin to imagine my life without her*.'

92. I have had regard to Mr VIANE's concerns that his daughter, Jaylee, will struggle without his presence and this is causing him emotional hardship.

93. I have also considered Mr VIANE's submission that relocating to New Zealand '*would be hard and difficult, wrought with upset and uncertainty*" and that he has no ties or bonds with New Zealand. He also states his concern if his young family were to have to move and the lack of support network available to them in New Zealand.

94. I accept that Mr VIANE was adopted from Samoa to Australia and that he has never resided in or visited New Zealand. I accept that Mr VIANE has no support network in New Zealand and will be separated from his children, partner and family.

95. I find that Mr VIANE will have access to similar social services and healthcare support as other citizens of New Zealand. I also find that after some initial difficulty, Mr VIANE will have the opportunity to establish a lifestyle comparable to that of other citizens of New Zealand.

96. I have considered the hardship Mr Viane may suffer in the case of non-revocation, taking into account the separation from his children, his partner and his family and friends, as well as his lack of ties and experience in New Zealand. Notwithstanding the similarity in Australian and New Zealand culture and society, I find Mr VIANE will suffer significant emotional, practical or financial hardship if he is removed to New Zealand.

…

144. In reaching my decision about whether I am satisfied that there is another reason why the original decision should be revoked, I concluded that Mr VIANE represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed the best interests of his child and other minor family members, as a primary consideration, and any other considerations as described above. These include his lengthy residence and bonds, employment, volunteer/charity work and familial ties to Australia, and the hardship Mr VIANE, his family and social networks will endure in the event the original decision is not revoked.

…

Whether being sent directly to Samoa was raised or considered

23 The submissions for the applicant correctly point out that the Parliamentary Secretary's reasons do not disclose that any consideration was given to impediments the applicant would

face if, upon being removed from Australia, he was sent directly to Samoa. Counsel for the Minister did not seriously contend otherwise.

24 If a concern about the consequences of being removed from Australia and sent directly to Samoa was a claim that was made by or on behalf of the applicant, then it would be necessary to assess whether the failure to consider that claim amounted to a jurisdictional error in all the circumstances. However, determining whether such a claim was not considered requires satisfaction that the applicant being sent directly to Samoa was in contemplation by the Parliamentary Secretary, or should have been in contemplation by reason of the material that was before him. The Parliamentary Secretary's reasons give no basis for concluding that he, in fact, had in contemplation the applicant being sent directly to Samoa upon removal from Australia. If that was raised by the material that was before him, it was not addressed.

25 At the time of the Parliamentary Secretary's consideration, the applicant was, by consequence of the visa cancellation decision, an unlawful non-citizen facing removal from Australia if that decision was not revoked. Accordingly, the following removal obligations contained in s 198(2B) of the *Migration Act* would be invoked upon a non-revocation decision being made:

> An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
>
> (a) a delegate of the Minister has cancelled a visa of the non-citizen under subsection 501(3A); and
>
> (b) since the delegate's decision, the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and
>
> (c) in a case where the non-citizen has been invited, in accordance with section 501CA, to make representations to the Minister about revocation of the delegate's decision--either:
>
> (i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or
>
> (ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the delegate's decision.
>
> Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in the regulations for the purposes of subsection 501E(2).

26 Section 5 of the *Migration Act* defines "*remove*" as "*remove from Australia*". The question of where the applicant would be sent to upon removal, while not necessarily being one the Parliamentary Secretary was required to address in the process of considering the revocation decision, is nonetheless potentially important because of the legal and practical consequences

it can have for a person whose visa is cancelled, noting that, ordinarily, future exercises of discretion and statutory power are to be resolved when they arise: see *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; 220 FCR 1 at [17], [177]-[178]; *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83; 231 FCR 513 at [19]; and *Minister for Immigration and Border Protection v Le* [2016] FCAFC 120; 244 FCR 56 at [45]-[46]. Ministerial Direction no. 65 provides the following guidance, in the context of one of the factors relevant to a decision to revoke a visa cancellation decision (emphasis added):

> **14.5 Extent of impediments if removed**
>
> (1) The extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:
>
> (a) The non-citizen's age and health;
>
> (b) Whether there are substantial language or cultural barriers; and
>
> (c) Any social, medical and/or economic support available to them in that country.

27 The Parliamentary Secretary was not bound to take into account the guidance provided by the Direction: *Bochenski* at [79]. The above passage nonetheless articulates an assumption that the non-citizen would ordinarily be sent directly to their country of citizenship upon removal from Australia, and is likely to reflect the day-to-day practices of the Department, especially when a decision is made by a delegate and the Direction is binding. There is no reason to suppose that this practice would change simply because the decision is instead made by the Parliamentary Secretary or the Minister. The conclusion that this assumption would apply to the applicant, and indeed to any applicant for revocation, is supported by the section in the apparently standard personal circumstances form, extracted above at [15(2)], that requests that the applicant provide details of any impediments anticipated upon return to his country of citizenship. This conclusion is also consistent with the observations of the High Court in *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562 at [7]:

> … Removal is not necessarily limited to removal to an unlawful non-citizen's country of nationality. However, it does not include simply ejecting a person physically from Australian territory, and therefore, in a given case, may require international co-operation as mentioned above.

28 The present case is not one in which the simple ejection of the applicant from Australian territory, without return to another country, was in issue or even apparent contemplation. Rather, from the material before the Parliamentary Secretary, it is clear that the applicant being sent directly to his country of citizenship, New Zealand, upon removal was in contemplation. It will therefore not suffice if all that was raised by the material before the Parliamentary Secretary was the consequences for the applicant if, after being removed from Australia and sent to New Zealand, he were to later make a decision to go to Samoa. Unfortunately for the applicant, the material before the Parliamentary Secretary goes no further than that. In particular:

(1) As noted above at [17], neither the request for revocation form nor the subsequent personal circumstances form makes any reference to the applicant being removed from Australia and being sent directly to Samoa. To the contrary, the typewritten part of the personal circumstances form contains express reference to return to the applicant's country of citizenship and asks questions that are evidently designed to ascertain whether there is any reason why that is not an appropriate destination upon removal. The applicant gave no reason of that kind for not being sent to New Zealand, although he emphasised his lack of any practical connection to that country. It is not of any relevance that these forms were completed without the benefit of legal or migration agent advice. Nor was it explained what possible difference that might have made to the answers given.

(2) The applicant's statutory declaration made reference to a return to Samoa, but there is nothing to indicate that that would be anything other than a voluntary step taken after being removed from Australia and sent directly to New Zealand. The same characterisation applies to all subsequent references to the applicant going to, or being in, Samoa. Further, while [16] of the applicant's statutory declaration indicate an unhappy early childhood in Samoa (and in Australia), and while [51] refers to "*return to Samoa*", [70] refers to relocation across the Tasman Sea, which is between Australia and New Zealand, not between Australia and Samoa, and makes further reference to there being nothing in New Zealand for his family or for him. In that context, the contemplated return to Samoa is clearly enough anticipated as possibly being necessary if he is sent directly to New Zealand upon being removed from Australia.

(3) Neither of the letters of support relied upon by the applicant provide any support for the notion that the applicant would be sent directly to Samoa upon removal from Australia.

(4) All four letters of support relied upon by the Minister contemplate the applicant being sent directly to New Zealand in the event of removal from Australia.

(5) The passing references to Samoa in the submissions by letter made by the applicant's solicitor make no reference to being sent directly to Samoa upon removal from Australia. None of the references in that letter to "*return*", "*relocate*" or "*relocating*" to Samoa suggest that that is referring to a direct trip from Australia, as opposed to a journey that may be voluntarily undertaken after being sent directly to New Zealand upon removal from Australia.

(6) No part of the Parliamentary Secretary's reasons suggest being sent directly to Samoa upon removal from Australia was in contemplation, rather than a journey that may be voluntarily undertaken after being sent directly to New Zealand upon removal from Australia.

29 Given that the claim relied upon has not been demonstrated to exist, nothing turns on the fact that such a claim was not considered. There was no failure of the kind alleged, such that the question of jurisdictional error does not arise.

Conclusion

30 The amended originating application must be dismissed with costs.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich.

Associate:

Dated: 12 January 2018