FEDERAL COURT OF AUSTRALIA

Viane v Minister for Immigration and Border Protection [2018] FCAFC 116

Appeal from:	*Viane v Minister for Immigration and Border Protection* [2018] FCA 3
File number:	NSD 100 of 2018
Judges:	**REEVES, RANGIAH AND COLVIN JJ**
Date of judgment:	2 August 2018
Catchwords:	**MIGRATION** - appeal from decision of primary judge upholding decision not to revoke the cancellation of a visa on character grounds - where appellant made representations about revocation of the cancellation decision to the Minister - where representations concerned hardship to partner and child if appellant had to relocate - whether Minister failed to consider the difficulties the appellant's partner would suffer if the family were relocated - whether appellant denied procedural fairness by failure to consider a substantial argument, claim or submission made to the Minister - appeal allowed - matter remitted to the Minister for determination according to law
Legislation:	*Constitution* s 75(v) *Migration Act 1958* (Cth) ss 476A, 501CA, 501(3A)
Cases cited:	*Ali v Minister for Immigration and Border Protection* [2018] FCA 650 *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; (2017) 248 FCR 456 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* [1971] HCA 12; (1971) 127 CLR 106 *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 *Leach v The Queen* [2007] HCA 3; (2007) 230 CLR 1 *Marzano v Minister for Immigration and Border Protection* [2017] FCAFC 66; (2017) 250 FCR 548 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24

Minister for Immigration and Border Protection v BHA17 [2018] FCAFC 68

Minister for Immigration and Border Protection v SZSRS (2014) 309 ALR 67

Minister for Immigration and Border Protection v WZARH [2015] HCA 40; (2015) 256 CLR 326

Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

Muggeridge v Minister for Immigration and Border Protection [2017] FCAFC 200

MZYTS v Minister for Immigration and Citizenship (2013) 230 FCR 431

NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2004) 144 FCR 1

Parker v Minister for Immigration and Border Protection [2017] FCAFC 115

Picard v Minister for Immigration and Border Protection [2015] FCA 1430

Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319

Plaintiff S157/2002 v The Commonwealth of Australia (2003) 211 CLR 476

Re Minister for Immigration and Multicultural Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1

Stead v State Government Insurance Commission [1986] HCA 54; (1986) 161 CLR 141

Wei v Minister for Immigration and Border Protection [2015] HCA 51; (2015) 257 CLR 22

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National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
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Counsel for the Appellant:	Mr GW McGrath SC with Mr KP Tang and Mr J Donnelly
Solicitor for the Appellant:	D'Agostino Solicitors

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Solicitor for the Respondent:	HWL Ebsworth Lawyers

ORDERS

NSD 100 of 2018

BETWEEN:	**ALEX VIANE** Appellant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** Respondent

JUDGES: **REEVES, RANGIAH AND COLVIN JJ**

DATE OF ORDER: **2 AUGUST 2018**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by Bromwich J on 12 January 2018 be set aside and in lieu thereof it be ordered that:
   (a) the decision made by the Parliamentary Secretary to the Minister for Immigration and Border Protection on 1 June 2017 refusing to revoke the visa cancellation decision in respect of the applicant (appellant) be revoked; and
   (b) the matter be remitted for re-determination according to law.
3. There be liberty to apply within 14 days for orders as to the costs of the proceedings before the primary judge.
4. The respondent pay the appellant's costs of the appeal, as agreed or assessed.

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

REASONS FOR JUDGMENT

REEVES J:

1 I have had the opportunity to read drafts of the judgments of Rangiah J and Colvin J. I agree with their Honours that this appeal should be allowed. Since the factual background, the apposite provisions of the *Migration Act 1958* (Cth) together with the principles relating thereto, and the submissions of the parties have been more than adequately outlined in those judgments, I am able to state my reasons for this concurrence very briefly. I will do so by reference to the judgment of Rangiah J.

2 First, I respectfully agree with his Honour's identification at [17] of his judgment of the representations the Minister failed to consider concerning the difficulties the appellant's partner would suffer if the family were to relocate to Samoa. Secondly, I also respectfully agree with his Honour's reasoning at [32] as to the significance of those representations in the peculiar factual circumstances of this matter. I therefore agree that, in those peculiar circumstances, the Minister's failure to consider those representations can be properly characterised as jurisdictional error.

3 Otherwise, I agree generally with their Honours' reasoning. Accordingly, I would order that:

(1) The appeal be allowed.

(2) The orders made on 12 January 2018 be set aside.

(3) The decision of the Minister dated 1 June 2017 refusing to revoke the cancellation of the appellant's visa be set aside and the matter be remitted to the Minister to be re-determined according to law.

(4) The respondent is to pay the appellant's costs of the appeal.

I certify that the preceding three (3) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves.

Associate:

Dated: 2 August 2018

REASONS FOR JUDGMENT

RANGIAH J:

4 I have had the advantage of reading the reasons of Colvin J in draft. I agree with His Honour that the appeal should be allowed. His Honour's thorough exposition of the facts, issues and submissions allows me to express my own reasons succinctly.

5 On 10 November 2015, the appellant was sentenced to 12 months' imprisonment for assault occasioning bodily harm. The offence involved domestic violence, the victim being the appellant's partner.

6 The effect of s 501(3A) of the *Migration Act 1958* (Cth) (**the Act**) is that the Minister must cancel a visa if satisfied that the visa holder does not pass the character test because, relevantly, the visa holder has been sentenced to a term of imprisonment of 12 months or more. The Minister cancelled the appellant's visa under this provision on 6 July 2016. The appellant was notified of the cancellation decision in accordance with s 501CA(3) of the Act and invited to make representations about revocation of the cancellation decision.

7 Section 501CA(4) of the Act provides:

> (4) The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the Minister is satisfied:
>
> (i) that the person passes the character test (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked

8 On 1 June 2017, the Parliamentary Secretary to the Minister for Immigration and Border Protection made a decision refusing to revoke the cancellation decision. It is convenient to refer to the Minister and the Parliamentary Secretary as "the Minister".

9 The appellant and his solicitor made representations to the Minister in accordance with the invitation to do so. One of the issues raised was which country the appellant would be removed to, or end up living in, if the cancellation decision were not revoked. The appellant was born in American Samoa, but was brought up in what was then Western Samoa. At the age of 14, he moved to Australia, where he was adopted by his uncle. The appellant acquired

New Zealand citizenship through his uncle, but he has never been there. The representations seemed to assume that he would be removed to New Zealand, but that he may then relocate to "Samoa", as he had no family or other connections with New Zealand. In this regard, the representations did not distinguish between American Samoa and Samoa (formerly Western Samoa). I will also refer to American Samoa and Samoa collectively as "Samoa".

10 The appellant has a young daughter with his partner. The representations were supported by letters from the appellant's partner stating that she wants the relationship to continue and that the removal of the appellant from Australia would cause great emotional distress, as well as other problems, to her and her child. The appellant put forward the hardship that would be caused to his partner and child as a reason to revoke the cancellation decision.

11 In a statutory declaration, the appellant said:

> 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 partner and daughter's overall advancement and progression through life.

12 The solicitor's representation contained the following passage:

> 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…
>
> 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.

13 The representations raised various possibilities about what the family might do if the cancellation decision were not revoked and the appellant were removed from Australia. The appellant might remain in New Zealand or relocate to Samoa. The appellant's partner and

daughter might remain in Australia, or they might move to New Zealand or to Samoa with the appellant. Of course, if the decision were revoked, none of these possibilities would eventuate. In this state of flux and uncertainty, it is unsurprising that the family had not made any firm decisions about the future.

14 The first ground of the notice of appeal is that the primary judge erred in failing to find that the Minister denied the appellant procedural fairness by failing to consider a substantial argument, claim or submission made to the Minister. That argument, claim or submission was that if the appellant "were to be removed from Australia to Samoa, he and his family would be the subject of significant impediments in establishing themselves and maintaining basic living standards". In the appeal, the appellant's oral submissions in support of the first ground have focussed upon the claim of hardship to the appellant's partner if she had to relocate to Samoa.

15 Four issues arise in relation to the first ground of appeal, as argued. They are:

(1) Whether the primary judge failed to decide upon an argument that the Minister had failed to consider a submission that hardship would be caused to the appellant's partner if she had to relocate to Samoa.

(2) Whether any submission was made to the Minister that there would be hardship caused to the appellant's partner if she had to relocate to Samoa.

(3) Whether the Minister considered any such submission.

(4) Whether any failure to consider any such submission amounted to jurisdictional error.

16 As to the first issue, I agree with Colvin J's analysis. The primary judge misunderstood the appellant's case as being limited to an argument that there was a failure by the Minister to consider a submission that the appellant himself would suffer hardship if he were removed to Samoa. The case was put more broadly than that, and encompassed the question of whether the Minister had failed to consider a submission that there would be hardship caused to the appellant's partner if she relocated to Samoa. In my respectful opinion, his Honour erred by failing to consider the submission. In fairness to his Honour, that submission appears to have been a somewhat peripheral one at first instance and only became the appellant's main focus in the course of oral argument in the appeal.

17 As to the second issue, in *Minister for Immigration and Border Protection v BHA17* [2018] FCAFC 68, the Full Court, in obiter, said at [139]:

> In our opinion, the Minister was not under any obligation to consider this other reason for revocation that had not been raised by the respondent.

Accordingly, it is necessary to consider whether the appellant's representations raised the hardship to the appellant's partner if she had to relocate to Samoa as a reason why the cancellation decision should be revoked. The appellant relies on the passages in the representations set out above at [11]-[12]. The Minister submits that the issue was not raised because there was a complete lack of detail in the representations concerning the hardships the partner would face. However, the statutory declaration expressly raised the issue of the "unfamiliar setting" for both the partner and the child in Samoa and the "extremely difficult" lives they would have there. As the appellant's partner is Australian, logically, the claim (and the Minister's finding) that the appellant's child would be affected by the language and cultural barriers in Samoa applied equally to his partner. The courts frequently warn of the need to consider a particular part of a decision-maker's reasons in the context of the whole of the reasons. The same admonition must apply to representations that are made to the Minister. It is apparent from a reading of the representations as a whole that the unfamiliar setting and difficult life that it was claimed the appellant's partner would face in Samoa encompassed language and cultural barriers. The question is whether the hardship to the appellant's partner if she moved to Samoa was "sufficiently raised" as a reason for revocation of the cancellation decision: see *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [60]. In my opinion, it was.

18 As to the third issue, the appellant submits that as there is no reference in the Minister's reasons to the claim that hardship would be caused to the appellant's partner if she moved to Samoa, the Minister failed to consider the claim. The Minister accepted the appellant's submission that hardship would be caused to his partner if she remained behind in Australia while he was removed from Australia. It may also be possible to construe the reasons as rejecting the submission that his partner would be caused hardship if she moved to New Zealand because of the similarity between Australian and New Zealand culture and society. The Minister submits that he considered the claim that hardship would be caused to the appellant's family unit as a whole in Samoa, and that this was enough. In his reasons, the Minister referred to the submission that if the "family were forced to relocate to Samoa to stay together, [the child] will be affected by the language and cultural barriers placed upon

her". However, this was a reference to hardship to the child, not the partner. The Minister's reasons made no reference to the submission concerning hardship to the appellant's partner if she moved to Samoa. The inferences that are available are that either the Minister considered the issue and determined that it was not material to his decision, or that he failed to consider the issue because he overlooked it.

19 Section 501G of the Act requires that if a decision is made under s 501CA to not revoke a cancellation decision, the Minister must give the person a written notice that, inter alia, sets out the reasons for the decision. If the written statement does not refer to a matter, the Court may infer that the matter was not considered by the Minister to be material: c.f. *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [10], [35], [69]. The Minister submits that as he considered the hardship that the appellant's partner would face in New Zealand and as it was not suggested that those hardships would be different in Samoa, it was unnecessary or immaterial to specifically consider the hardship she would face in Samoa. However, that submission ignores the issue of language and cultural barriers in Samoa. As the Minister considered hardship to the appellant's partner if she remained in Australia and hardship to the child if she moved to Samoa to be relevant, it is unlikely that the Minister considered the submission that the appellant's partner would face hardship if she moved to Samoa to be immaterial. Instead, it is probable that the Minister overlooked and failed to consider the submission.

20 The fourth issue is whether the Minister's failure to consider the submission that the appellant's partner would face hardship if she relocated to Samoa amounted to jurisdictional error. The application for review of the Minister's decision was made under s 476A(1)(c) of the Act, which confers original jurisdiction on the Federal Court of Australia in relation to a privative clause decision, or purported privative clause decision, made personally by the Minister under s 501CA of the Act. Pursuant to s 476A(2), that jurisdiction is the same as the jurisdiction of the High Court of Australia under s 75(v) of the Constitution. In order to obtain relief under s 75(v) in relation to such a decision, an applicant is required to demonstrate jurisdictional error: *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 at [82]-[83]. Accordingly, the appellant is required to demonstrate jurisdictional error on the part of the Minister.

21 The Minister submits that the appeal cannot succeed because any failure by the Minister to consider a particular matter set out in a representation made under s 501CA(3) of the Act does not amount to a failure to take into account a mandatory relevant consideration.

22 In *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203, Robertson J said, in obiter, at [56]:

> While I accept that under s 501CA(4) representations as a whole constitute a mandatory relevant consideration, I do not accept that any particular statement in the representations should be so characterised.

23 In *Minister for Immigration and Border Protection v BHA17* [2018] FCAFC 68, the Full Court, also in obiter, took a similar approach, saying at [139]:

> However, this is not to say that each representation made gives rise to a mandatory relevant consideration.

24 I accept that a failure by the Minister to consider a particular argument or information contained within a representation and put forward as a "reason" to revoke a cancellation decision under s 501CA(4) of the Act cannot, at least ordinarily, be characterised as a failure to take into account a mandatory relevant consideration. Nevertheless, there are circumstances where a failure to consider a matter that is not a mandatory relevant consideration may amount to jurisdictional error.

25 In *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, in the context of an application for a protection visa, Gummow and Callinan JJ (with whom Hayne J agreed) held at [24] that to fail to respond to a "substantial, clearly articulated argument relying upon established facts" was at least to fail to accord the applicant natural justice: see also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [90]. In *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)*, the Full Court said at [63]:

> It is plain enough, in the light of *Dranichnikov*, that a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error.

26 In *BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456, the appellant, whose visa had been cancelled under s 501CA(4) of the Act, claimed that his life would be in danger because of his religion if he were returned to his country of citizenship.

Justices Bromberg and Mortimer held at [72] that there was jurisdictional error where the appellant had put forward his fear of harm as a reason why the Assistant Minister should revoke the cancellation decision and the Assistant Minister did not consider that matter because of her misunderstanding of the law. Their Honours at [72] characterised the error a failure to lawfully carry out the task required under s 501CA(4) of the Act.

27 In *BCR16*, Bromberg and Mortimer JJ at [62] cited with approval para [42] of *Picard v Minister for Immigration and Border Protection* [2015] FCA 1430, in which Tracey J held:

> If, in making representations, the applicant provides information to the Minister, relating to his or her personal circumstances, and that information is critical and relevant to the applicant's case the Minister is bound to consider it.

While the word "critical" ordinarily refers to something that is of decisive importance, Tracey J did not suggest that the Minister is *only* bound to consider information provided to the Minister where the information is "critical and relevant" to the applicant's case.

28 In the context of an application for a protection visa, it has been held that whether a tribunal commits a jurisdictional error by failing to consider particular documents or other material depends upon the circumstances of the case and the nature of the material; including the cogency of the material and its place in the assessment of the applicant's claims: see *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [111]-[112]; *MZYTS v Minister for Immigration and Citizenship* (2013) 230 FCR 431 at [68]-[70]; *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at [52]-[56]. In *Minister for Immigration and Citizenship v SZRKT*, Robertson J explained at [111]:

> The fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error.

29 The Minister has not submitted that there is any relevant distinction between the functions of a tribunal considering an application for a protection visa and the Minister's function under s 501CA(4) of the Act.

30 If the Minister overlooks a substantial, clearly articulated argument advanced as demonstrating a reason why a cancellation decision should be revoked under s 501CA(4) of the Act, which if accepted would or could be dispositive of the decision, the Minister's error may be characterised as a jurisdictional error. Further, if what is overlooked is better characterised as "information" (or "material", or "evidence"), rather than an "argument", there may be jurisdictional error where the "information" is sufficiently important, such that

the error is serious enough to be described as jurisdictional. It is not essential that either the argument or information is "critical" in the sense that its acceptance by the Minister would necessarily have resulted in a different outcome.

31 In this case, the appellant advanced a substantial and clearly articulated argument that a refusal to revoke the cancellation decision would cause his partner to suffer hardship. The Minister considered the argument in part. However, the Minister overlooked and failed to consider the part of the argument that she would be caused hardship if she moved to Samoa with the appellant. The Minister's error can alternatively be characterised as failing to consider information provided in support of a reason for revoking the cancellation decision.

32 The argument or information indicating that the appellant's partner would suffer hardship if she moved to Samoa was an important part of the appellant's case. The Minister's decision ultimately turned upon his view that there was a risk of the appellant reoffending, which could result in physical or psychological harm to members of the Australian community, and harm to the community itself. The appellant's partner was the victim of the offence which resulted in the cancellation of the appellant's visa. The Minister must, therefore, have had her at the forefront of his mind when considering the risk of harm. The appellant's partner is an innocent party in all of this. The complexities of relationships involving domestic violence are not well understood, and the appellant's partner has apparently decided that her interests, and those of her child, are best served by continuing her relationship with the appellant. If the decision is not revoked, the appellant's partner will suffer because either her family will be broken up, or she will be forced to move overseas with her child, possibly to Samoa. She has been the victim of domestic violence at the hands of the appellant and is now, in a sense, a victim of the cancellation decision. In these circumstances, the Minister's consideration and acceptance of the claim of hardship to the appellant's partner if she had to move to Samoa could have been decisive. In my opinion, by failing to consider the argument or information, the Minister fell into jurisdictional error.

33 I agree with Colvin J that it is unnecessary to consider the appellant's second ground of appeal, which was not a ground raised before the primary judge.

34 In my opinion, the appeal should be allowed, the judgment of the primary judge should be set aside, the Minister's decision should be quashed and the Minister should be ordered to make the decision under s 501CA(4) of the Act according to law. The Minister should pay the appellant's costs of the appeal and the proceeding at first instance.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah.

Associate:

Dated: 2 August 2018

REASONS FOR JUDGMENT

COLVIN J:

35 The appellant, Mr Viane, was born in American Samoa. He spent his early childhood in Western Samoa. He came to Australia as a young teenager. He is now 40 years old. He has lived in Australia for over 25 years. Despite being a New Zealand citizen, he has never lived there. His New Zealand citizenship is derived from his uncle who adopted him when he was 14.

36 In 2016, Mr Viane's Australian visa was cancelled. He made representations to the Minister to revoke the cancellation but they were unsuccessful. His application to this Court for judicial review of the Minister's decision not to revoke the cancellation was also unsuccessful. He now brings an appeal.

37 Mr Viane raises two claims in the appeal. First, he says that the Minister denied him procedural fairness by failing to consider a substantial 'argument, claim or submission' that he made in his representations to the Minister. The matter he says the Minister did not consider was that if he was removed to Samoa then he, his partner and daughter would be subject to significant impediments in establishing themselves and maintaining basic living standards. Second, he says that in deciding whether to revoke the cancellation of Mr Viane's visa, the Minister was required under the *Migration Act 1958* (Cth) to have regard to where he would be sent upon removal if the cancellation of his visa was not revoked, which he says would be his 'home country' Samoa, but the Minister did not do so. The appeal grounds are to the effect that the primary judge erred in failing to uphold these two claims.

38 For the following reasons, ground 1 should be upheld and it is not necessary or appropriate to consider ground 2. The appeal should be allowed, relief in the nature of certiorari should be granted and the matter should be remitted to the Minister for reconsideration according to law.

Mr Viane's imprisonment

39 In November 2015, under the influence of alcohol and drugs, Mr Viane used his partner's vehicle to drive through the closed garage door of her home before backing up and driving through it a second time. He then attempted to gain entry to the home through an internal door. He successfully broke into the house and attempted to take their then infant daughter

from the arms of his partner. When she refused he punched her once to her head causing a cut to her left eyebrow. The sentencing judge described the offence as 'the upper end of assault occasion actual bodily harm'. Mr Viane was sentenced to 12 months imprisonment.

Statutory duty to cancel visa

40 Under s 501(3A) of the *Migration Act*, the Minister must cancel a visa if the Minister is satisfied that (a) the holder has been sentenced to a term of imprisonment totalling 12 months or more; and (b) the holder is serving a sentence of imprisonment on a full-time basis for an offence against an Australian law. Mr Viane's visa was cancelled by a delegate of the Minister in performance of that statutory duty.

41 Where a visa is cancelled in such circumstances, the Minister must give written notice of the decision setting out certain specified relevant information and invite the person to make representations to the Minister: s 501CA(3). If representations are made, the original decision may be revoked by the Minister under s 501CA(4)(b) if 'the Minister is satisfied: (i) that the person passes the character test (as defined by s 501); or (ii) that there is another reason why the original decision should be revoked'. Mr Viane does not satisfy the character test. So, for present purposes it is s 501CA(4)(b)(ii) that is relevant.

Representations by Mr Viane

Mr Viane's statement

42 Representations to the Minister were made by Mr Viane. He provided a detailed written statement. It dealt with his history of offending and his remorse. He explained his family circumstances and his connection with family and involvement in the community, including his work history.

43 In his statement Mr Viane said he met his current partner in 2009. He described this as a turning point in his life. They have a daughter who was born in May 2015. Mr Viane also has an adult daughter in Australia who has young children. He provides support to his adult daughter and his grandchildren.

44 The representations to the Minister on behalf of Mr Viane included some 20 statements or letters of support from other people including his current partner, his former partner, other family members and friends. A detailed letter was also provided by Mr Rigas, a solicitor acting on his behalf, together with other supporting documents. The representations dealt

with a number of matters. However, as to the issues raised by the grounds of appeal, the following matters are of particular significance.

45 Mr Viane's own statement included the following (at paras 51, 64, 65, 66, 69 and 70):

> 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.
>
> …
>
> I know that my partner needs my support in taking care of our daughter; she has done a commendable job so far, but without me to support her financially and emotionally, my partner must find work which, in turn, will only make things more difficult for her and our daughter.
>
> 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 partner and daughter's overall advancement and progression through life.
>
> I strongly militate that the best outcome for my Australian partner and minor-child is for me to remain in Australia and continue to strive to be a better and reliable role model to my growing family. I acknowledge that I was previously warned by the Department about my behaviour. I say without reservation that if I am afforded one last opportunity I will value it greatly and I will ensure that I do not breach the trust that would be placed in me.
>
> …
>
> Although I hold New Zealand citizenship, I have never been there before. I obtained it through my uncle Saaoli but came directly to Australia from Samoa.
>
> 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.

46 These statements contemplate that if the cancellation of his visa is not revoked then Mr Viane will return or relocate to Samoa or New Zealand. (For the most part, no distinction was drawn between American Samoa or Western Samoa in Mr Viane's statement and other documents forming part of the representations to the Minister).

47 At some points in his statement Mr Viane used language indicating that he had in mind being forced to depart or forced to relocate. However, neither in his statement nor the letter from

Mr Rigas (considered below) was any express distinction made between a case in which Mr Viane may be deported or a case in which he elected to leave Australia and was able to choose his destination. The representations that were made by him (or on his behalf) simply recognised that the consequence of non-revocation of the cancellation of his visa would be that he could no longer live in Australia and, as a result, he would end up in Samoa or New Zealand.

48 Mr Viane's statement also addressed the difficulties that would be posed for his partner and their young daughter by him leaving Australia. The submissions presented those difficulties to support representations to the effect that the best outcome for his partner and young daughter would be for him to remain in Australia. Further, the statement recorded his position that he could not expect them to move overseas because 'the lives they would have in either New Zealand or Samoa, depending on where I move to, would be extremely difficult'. Although, this was expressed, in effect, as a further reason why the cancellation of his visa should be revoked so Mr Viane could remain in Australia, there was within it a representation made as to the life that his partner and his young daughter would experience if they joined him in Samoa or New Zealand.

49 The fact that Mr Viane was advancing the prospect that his partner and young daughter may join him in Samoa or New Zealand if his visa cancellation was not revoked is evident from the final part of his statement quoted above (from para 70 of his statement) about difficulties for Mr Viane's young family 'should they be forced to relocate with me'. It contained a representation by Mr Viane that non-revocation may mean that his partner and young daughter may leave with him if he was deported. It is a representation to the Minister that this is one of the consequences that may arise if the cancellation of Mr Viane's visa was not revoked albeit as an alternative that was not to be 'expected' by Mr Viane because of the adverse consequences for them of living in a place other than Australia.

50 Importantly, the representation made was that if they did leave Australia as a family unit then in either place (Samoa or New Zealand) although the three of them would be a family, they would have no ties, no job prospects or home. In particular, as to his partner and young daughter, they would be separated from immediate and extended family and friends and there would be a considerable negative impact on their overall advancement and progression through life.

Mr Rigas' letter on behalf of Mr Viane

51 The letter from Mr Rigas explained in some detail, amongst other things, the adversities that would transpire for his family members if Mr Viane was required to leave Australia. The explanation given is generally expressed in terms of the effect of his absence. Examples include the following:

> Our client's Australian partner will struggle raising their fifteen (15) month old daughter without Mr. Viane. Emotionally, it is difficult as she has suffered with sleepless nights with little respite and no one else to turn to.
>
> …
>
> Mr Viane's young daughter … will not have the support and love of her father on a daily basis, or a positive father-figure in her life, a necessity for ongoing development of a child.
>
> …
>
> In the event the cancellation stands, [Mr Viane's older daughter] will lose the close proximity to her father; further, as a struggling young 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.

52 In dealing with the best interests of his young daughter, an Australian citizen, the letter states:

> 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 forced to depart Australia.

53 It goes on to state:

> 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.
>
> In the alternative if the child and her Australian mother remain in Australia, then the child will be subject to the following:
>
> 1. Her current lifestyle will need to be scaled back as their mother - who is unable to maintain employment and the duties of raising a child single handed - will not be able to meet the family's basic living costs.
>
> 2. Being separated from Mr. Viane will have an adverse effect on his child. As noted above, the child shares a very close relationship with her father, something that is fundamental to her development.
>
>   Despite being incarcerated, Mr. Viane has made all attempts to spend significant amounts of time with his daughters, especially his fifteen (15) month old. This is evidenced in Mr. Viane's pleas to be permitted leave to attend his daughter's christening in mid-2016.
>
> 3. The stress of living in a household where the parents are living apart will be difficult for the child to accept and cope with and may have detrimental effects in later life.
>
> In essence we submit that it is in the best interest of a minor Australian citizen child and also the adult child that Mr. Viane be permitted to remain in .Australia with his family.

54 These submissions, contemplate that one possible consequence of the non-revocation of the cancellation of Mr Viane's visa would be the entire family unit moving to either Samoa or New Zealand. It is a consequence that is stated in the opening words from the passage quoted above. The particular difficulties that would arise for Mr Viane's partner and young daughter if they were to live in Samoa are then addressed expressly, and in some detail in the case of their daughter.

55 However, representations were not being made in the letter that the likely consequence of the non-revocation of the cancellation of Mr Viane's visa was that there would be particular adversity for Mr Viane himself if he was to live in Samoa (that would not arise if he was to relocate to New Zealand). Nor was it being advanced that it was necessarily the case that his partner and young daughter would leave Australia with him. On the contrary, the main submissions being advanced were that non-revocation would separate the family and that would have very adverse consequences for Mr Viane's partner and his daughter and this was a reason why the cancellation of his visa should be revoked. However, the alternative possibility that they may join him in either Samoa or New Zealand was also presented as one

that might arise due to 'both financial and cultural reasons'. This alternative was introduced in the opening words in the relevant part of the letter as an 'adversity' that 'the child and the Australian mother' will suffer, namely having to relocate the entire family to either Samoa or New Zealand.

Mr Viane's personal circumstances

56 When he was notified of the decision to cancel his visa, Mr Viane was invited to complete a personal circumstances form if making a request for revocation of the cancellation of his visa. It was a standard form which he completed in his own hand. This occurred well before the preparation of his statement and the letter and, it appears, before he received any advice.

57 In the personal circumstances form, under the heading 'RETURN TO YOUR COUNTRY OF CITIZENSHIP', Mr Viane made the following statements, in response to the questions stated:

> **Do you have any concerns or fears about what would happen to you on return to your country of citizenship?**
>
> 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 problems you would face if you have to return to your country of citizenship?**
>
> I just don't know anyone there. I would have no where to go or anything.
>
> **ANY OTHER INFORMATION**
>
> **Please outline any other information you would like to Minister or delegate to consider when making their decision**
>
> I am a 38 old male who came to Australia from American 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 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 daughter's or partner's lives.
>
> Submitted for your humble consideration.

58 These statements only concern New Zealand. They were made in a context where the standard form had directed attention to return to a country of citizenship. Further, as I have noted, they preceded the preparation of Mr Viane's detailed statement and the letter from Mr Rigas. In considering the nature and extent of representations made it is those documents to which primary reference should be made. There is no sense in which the representations made subsequently were confined by or to the matters raised in the personal circumstances form.

Other statements

59 Mr Viane's partner also provided statements. In her statement dated 8 August 2016 she described in detail the consequences for her of Mr Viane being deported and the effect upon both her and their young daughter if he was not allowed to live in Australia. The statement was expressed solely in terms that contemplated that they would remain in Australia and the consequences that would flow from their separation from Mr Viane. A further statement from Mr Viane's partner dated 28 February 2017 gave additional details of how the separation from Mr Viane during his time in detention had affected both her and their daughter.

60 There were passages in other statements and letters of support that concerned the place where Mr Viane may be required to go if the cancellation of his visa was not revoked. They all referred to the consequences if Mr Viane was required to go to New Zealand. They did not refer to Samoa.

61 However, these contributions from third parties could not narrow or limit the matters that Mr Viane himself advanced by way of representations through his statement and the letter from Mr Rigas. It is understandable that such statements by third parties would focus upon the consequences of separation if Mr Viane was required to leave Australia given that the statements were expressed in terms of reasons why he should be allowed to remain in Australia.

Representations as to impediments of relocation to Samoa or New Zealand

62 In those circumstances, it is evident that the representations made by Mr Viane to the Minister included a concern that his young family or family unit (being his partner and young daughter) would come with him to Samoa or New Zealand in which case there would be adverse consequences for both of them. In the case of their daughter, it was said that a

relocation to Samoa would have particular difficulties for her education and difficulties in assimilating into a different society and culture (as explained in the letter from Mr Rigas). As to both Mr Viane's partner and their daughter there was specific reference to separation from immediate and extended family and friends and the life they know in Australia. These consequences were said to apply to both Mr Viane's partner and his daughter whether the relocation was to Samoa or New Zealand. In addition, relocation for his young family 'across the Tasman Sea' was described by Mr Viane as being a reality where 'it would be hard and difficult, wrought with upset and uncertainty'.

63 There were no representations as to particular adverse consequences for Mr Viane (beyond separation from his family and community in Australia which would apply wherever he might go) if he relocated to Samoa, but there were particular consequences described if he was relocated to New Zealand because he had never been there and had no connections with New Zealand at all. These were raised principally in his personal circumstances form.

The nature of the statutory power under s 501CA(4)(b)(ii)

64 There is no statutory power to revoke under s 501CA(4)(b)(ii) unless the Minister is satisfied that there is a reason, other than a conclusion that the person concerned passes the character test, which means that the original decision 'should be' revoked. It is not enough that there is a matter that might be considered or may be said to be objectively relevant. It must be a reason that carries sufficient weight or significance to satisfy the Minister entrusted with the responsibility to consider whether to revoke the visa cancellation that the decision should be revoked. Only a reason of that character enlivens the statutory power to revoke. It is the absence of such a reason that will result in a decision not to revoke a visa cancellation.

65 It is not possible to consider whether there is a reason why the original cancellation decision should be revoked without weighing up the nature and circumstances of the offending for which the person has been imprisoned (giving rise to the statutory duty to cancel the visa) on the one hand and the matters raised by way of representations on the other hand. The character of the reason that may satisfy a Minister that the cancellation decision should be revoked will depend upon all the circumstances, including the nature of the offending. There must be a weighing of the factors for and against revocation to see whether, in context, there is a reason that is enough to satisfy the Minister that the original decision should be revoked: *Marzano v Minister for Immigration and Border Protection* [2017] FCAFC 66; (2017) 250

FCR 548 at [30]-[32] (Collier J, Logan & Murphy JJ agreeing) agreeing with Moshinsky J at first instance [2016] FCA 1180 at [52]-[53].

66 Further, as the making of representations about the revocation of the original decision is a condition that must be met before the statutory power to revoke is enlivened, there is a statutory obligation on the part of the Minister to consider whether the required state of satisfaction is met *by reference to the material presented in the representations*.

67 In this case, s 501CA imposes an obligation to invite representations and then form a view as to whether the Minister is satisfied as to whether there is 'another reason' to revoke the cancellation of a visa. So, if representations are made, there is a statutory obligation upon the Minister to consider whether to exercise the power conferred by s 501CA(4). In order to properly discharge that obligation, the Minister must not overlook the representations. A state of satisfaction that is formed without considering the representations is not a state of satisfaction of a kind that the *Migration Act* requires.

68 Further, it is not enough to have regard to only some of the significant matters raised in the representations. In such a case the obligation to form the state of satisfaction by reference to the representations would also not be met. So, the obligation to consider extends to significant matters being those that may with other matters carry sufficient weight or significance to satisfy the Minister to revoke the cancellation. Further, those matters must be made manifest as significant matters by the manner in which they are expressed in response to the invitation that the Minister is required by s 501CA(3) to extend.

69 All of which does not mean that each matter in the representations is a mandatory relevant consideration such that a failure to bring the consideration to account in performing the statutory task (that is, in forming the required state of satisfaction) would be a jurisdictional error. Such an approach would elevate a requirement to consider significant matters raised in representations to an obligation to form the required state of satisfaction by giving weight to each of the considerations raised in the representations.

70 There is no basis for a necessary implication from the subject-matter, scope and purpose of the provisions in the *Migration Act* that any matter raised in representations is required to be taken into account (that is, it is a 'mandatory relevant consideration') such that a failure to take the matter into account (as distinct from a failure to consider the matter at all) is a failure to undertake the statutory task and therefore a jurisdictional error: *Minister for Aboriginal*

Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24 at 39-40. That is why each matter raised by representations is not a mandatory consideration: *Minister for Immigration and Border Protection v BHA17* [2018] FCAFC 68 at [139].

71 Further, the cases concerning the mandatory considerations to be brought to account in the exercise of the statutory power under s 501(2) (also concerned with the cancellation of visas where the Minister is not satisfied that the person passes the character test) would lend support for the conclusion that all matters raised by way of representations are not mandatory relevant considerations. Those cases were collected by Charlesworth J in *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC 200 at [26]. Even assuming that they might be called on to support a view that certain matters are mandatory relevant considerations (despite the different terminology in s 501CA) they do not support a conclusion, by reference to subject-matter, scope and purpose of the *Migration Act* that the place of relocation is such a consideration.

72 The view has been expressed that the recommendations as a whole, but not each matter raised within them, constitute a mandatory relevant consideration: *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 at [56]. So, if the Minister proceeded without taking into account any aspect of the matters raised when forming the required state of satisfaction as to whether there was a reason to revoke the cancellation of the visa, there would be jurisdictional error. The correctness of *Goundar* was left open in *Parker v Minister for Immigration and Border Protection* [2017] FCAFC 115 at [16]. As noted by Flick J in *Ali v Minister for Immigration and Border Protection* [2018] FCA 650 at [42], care needs to be taken in applying the observations in *Goundar* to a particular case. As his Honour recognised, there may be circumstances in which a conclusion would be open that the Minister had failed to properly take into account the representations if 'one or other - but not all - of the discrete matters raised' were considered by the Minister. For reasons I have given, a state of satisfaction formed without considering each of the matters that are raised in the representations in a manner which identified them as significant would be a breach of the statutory requirement to consider the representations.

73 Finally, if the Minister is satisfied that there is a reason why the cancellation decision should be revoked then, given the way in which s 501CA(4)(b) is expressed, the Minister must revoke. As the failure to meet the character test will be the only reason why a person's visa will be revoked under s 501(3A), it would be strange if the Minister was satisfied for the

purposes of s 501CA(4)(b)(i) that the person passed the character test, yet there remained a discretion whether to revoke. Such a construction would mean that the power to revoke could be withheld even though the Minister was satisfied that the basis on which the visa had been cancelled was not actually satisfied. Equally, it would be strange if the Minister found that there was another reason for the purposes of s 501CA(4)(b)(ii) why the original decision should be revoked, but nevertheless retained a discretion to refrain from revoking the cancellation of the visa.

74 Therefore, the opening words to s 501CA(4) are in all likelihood an example of those cases where 'may' means 'must': *Marzano* at [31]; *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* [1971] HCA 12; (1971) 127 CLR 106 at 134-135, 138-139 and *Leach v The Queen* [2007] HCA 3; (2007) 230 CLR 1 at [38]. If there remains a discretion once the Minister is satisfied as to one of the matters in s 501CA(4)(b) it would be a very narrow one that, in most circumstances, could not be reasonably exercised by refusing to revoke the original decision to cancel the visa.

75 It follows from the above that a failure to consider significant matters in the representations would be a failure to conform to the statute. Further, it would be a failure to conform to a part of the statute that must be met in order for there to be a valid exercise of power. The statutory requirement for the Minister to invite representations must lead to the conclusion that if representations are made as to significant matters then the Minister must consider whether to revoke the original cancellation and do so by considering the representations as to those matters. Jurisdictional error, in the sense relevant in the present case, consists of such a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by the *Migration Act*: *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; (2015) 257 CLR 22 at [23]-[26].

76 A failure to conform to a statutory condition that must be met in order for there to be a valid exercise of power invalidates the exercise of power: *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 at [83]-[91]. This is not a matter of natural justice. It is a requirement of the statute. If a complaint that the Minister did not consider a significant matter raised by representations is made out then there is jurisdictional error in the making of the decision of the Minister to refuse to exercise the discretion under s 501CA(4) and the decision is invalid. There is jurisdictional error because a valid refusal to revoke cannot be made by the Minister unless all matters that may be significant for a Minister forming the required state of

satisfaction under s 501CA(4)(b) that are raised by way of representations have been considered by the Minister.

77 For the same reasons, the failure to consider each substantial complaint that is raised by way of representation may also be a failure to afford procedural fairness. A failure to respond to a substantial, clearly articulated argument relying on established facts has been held to be a failure to accord natural justice: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26 at [24], [95].

78 This is the way in which the matter is put for Mr Viane in this appeal.

79 In *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; (2017) 248 FCR 456 at [62] it was recognised that a case where the complaint was a failure to consider a matter that had been advanced as part of the representations as to why there is 'another reason' for the purposes of s 501CA(4) can be characterised as either a denial of procedural fairness or as a failure to carry out the required statutory task.

Decision of the Assistant Minister

80 Mr Viane's representations in support of revocation of the cancellation of his visa were considered by the Assistant Minister for Immigration and Border Protection.

81 In a written statement of reasons, the Assistant Minister made the following findings concerning matters raised by way of representations:

(1) The best interests of affected children were treated as a primary consideration and it was in their best interests for the cancellation of Mr Viane's visa to be revoked (para 13);

(2) Mr Viane's presence is having a positive impact upon his young daughter and his removal from Australia will have a negative impact on her (paras 25, 33);

(3) If Mr Viane's family were forced to relocate to Samoa to stay together this would have a negative impact upon his young daughter's development and future prospects (para 29);

(4) Mr Viane's early childhood was shaped by violence, alcohol and drugs and he wants to ensure his children and grandchildren do not suffer the same kind of life (para 36);

(5) Mr Viane's grandchildren will suffer emotional and practical hardship if the cancellation of his visa is not revoked (para 41);

(6) As Mr Viane has lived in Australia for most of his life, the Australian community may afford a higher tolerance of his criminal conduct (para 43);

(7) Mr Viane has been making a positive contribution for 20 years to the community (paras 44, 84);

(8) If Mr Viane is removed he will not be able to provide his partner with emotional, physical and financial support or help her raise their daughter and that the lack of support is already taking a toll on his partner and she will suffer significant emotional, practical and financial hardship in the case of non-revocation (paras 51, 61);

(9) Mr Viane's family in Australia will suffer emotional, practical and financial hardship if the cancellation of his visa is not revoked (paras 65, 77);

(10) Mr Viane's older daughter will experience emotional, practical and financial hardship in the event of non-revocation (para 71);

(11) The former partner of Mr Viane, who provided a letter of support, may suffer some emotional and practical hardship if the cancellation of his visa is not revoked (para 73);

(12) Mr Viane has significant familial and social ties to Australia (para 83);

(13) Another reason why the decision to cancel his visa should be revoked is that Mr Viane will face impediments in establishing himself and maintaining basic living standards if removed from Australia to New Zealand (para 85);

(14) Mr Viane has never resided in, or been to, New Zealand (para 87);

(15) Mr Viane has no support network in New Zealand and will be separated from his children, partner and family (para 94);

(16) Mr Viane will have access to similar social services and healthcare support as other citizens of New Zealand and, after some initial difficulty, will have the same opportunity to establish a lifestyle comparable to that of other citizens of New Zealand (para 95);

(17) Mr Viane's offending was serious (para 110); and

(18) Overall, in considering the likelihood of Mr Viane's reoffending and taking into account the various factors that lower this risk, including the statements regarding his rehabilitation efforts, the offers of support from his family and friends, his remorse and insight into his offending, his periods of absence from offending in the past, and

his motivations to not reoffend including his children and grandchildren, there is a likelihood, albeit a low likelihood, the Mr Viane will reoffend (paras 130, 134).

82 Further, in the course of the statement of reasons, the Assistant Minister said (at paras 28-29):

> 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 [his daughter], 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.
>
> I note Mr Rigas further states that if Mr VIANE's family were forced to relocate to Samoa to stay together, [his daughter] 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 [his daughter's] development and future prospects and I have taken this into account.

83 The Assistant Minister then expressed his conclusions in the following way (at paras 139-145):

> In considering, in light of Mr VIANE's representations, whether I was satisfied that there is another reason why the original decision should be revoked, I gave primary consideration to the best interests of Mr VIANE's child and grandchildren. I found that their best interests would be served by the revocation of the original decision.
>
> In addition, I have considered the length of time Mr VIANE has made a positive contribution to the Australian community (20 years) and the consequences of my decision for his other family members and friends.
>
> On the other hand, in considering whether I was satisfied that there is another reason why the original decision should be revoked, I gave significant weight to the serious nature of the crimes committed by Mr VIANE, some of which are of a violent nature.
>
> Further, I find that the Australian community could be exposed to harm should Mr VIANE reoffend in a similar fashion. I could not rule out the possibility of further offending by Mr VIANE.
>
> I am cognisant that where harm could be inflicted on the Australian community even other strong countervailing considerations may be insufficient for me to revoke the decision to cancel the visa, even applying a higher tolerance of criminal conduct by Mr VIANE, than I otherwise would, because he has lived in Australia for the majority of his life.
>
> 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.

> Having given full consideration to all of these matters, I am not satisfied, for the purposes s. 501CA(4)(b)(ii), that there is another reason why the original decision to cancel Mr VIANE's visa should be revoked. Accordingly, as I am also not satisfied that there is another reason why the original decision should be revoked, my power to revoke is not enlivened and Mr VIANE's Class TY Subclass 444 Special Category (temporary) visa remains cancelled.

Alleged failure to afford procedural fairness

84 The claim of procedural fairness is not made out unless it be demonstrated that there was a significant matter that was advanced in the representations that was not considered by the Assistant Minister.

85 For reasons I have given, one significant matter advanced in the representations by Mr Viane was the prospect that his partner and young daughter would come with him to Samoa or New Zealand in which case there would be significant impediments for both of them in making a new life. Save for particular consequences raised for his young daughter if she went to Samoa (as to her education and cultural difference), the concerns were expressed as applying both in the case of relocation to Samoa and New Zealand and as applying to both Mr Viane's partner and his young daughter. In short, there was the prospect that they would join him in Samoa or New Zealand if the cancellation of his visa was not revoked and there would be adversities for both of them as a result.

86 The reasons given by the Assistant Minister show that the particular consequences as to the education and cultural difference for Mr Viane's young daughter if Mr Viane relocated to Samoa because his visa cancellation was not revoked and the family unit joined him (as raised in Mr Viane's statement and Mr Rigas' letter) were considered by the Assistant Minister.

87 Otherwise, the consequences that the Minister considered in relation to Mr Viane's partner and their young daughter were confined to those that would arise from the separation of Mr Viane from them. The Assistant Minister did not consider the possibility that they may relocate to Samoa or New Zealand as part of the family unit and the impediments that would arise for them in living in either place. In that regard, it is significant that the Assistant Minster saw fit to consider the effect upon Mr Viane's young daughter's education if she was to relocate with her father Samoa. If the Assistant Minister had formed the view that such a possibility was remote or unlikely then that was a matter that would not have been relevant and would not be expected to be considered. Instead, the Assistant Minister treated that effect as one of the reasons to be taken into account that supported revocation. He said that

the educational opportunities available to children in Australia would be lost to Mr Viane's daughter if his family were forced to relocate to Samoa to stay together (at para 29). However, he did not consider the other consequences for Mr Viane's young daughter in that event and did not consider the consequences for his partner at all (even though this was advanced as a reason that supported revocation).

88 In the course of considering the adverse consequences for Mr Viane himself of relocation to New Zealand, the Assistant Minister recited the concern stated by Mr Viane that 'if his young family were to have to move' there would be a 'lack of support network available to them in New Zealand' (at para 93). This too reflects a recognition that this was a likely prospect. However, the findings that follow (at paras 95-96) are expressed in terms of the consequences of relocation to New Zealand for Mr Viane, not his partner or their young daughter.

89 So, despite the prospect of Mr Viane's partner and his young daughter relocating to Samoa or New Zealand being raised as a significant matter as part of the representations and the Assistant Minister identifying that prospect the broader consequences (described as adversities in Mr Rigas' letter) for Mr Viane's partner and young daughter were not considered in the reasons.

90 Nevertheless, no case was put that the Minister had failed to consider the consequences for Mr Viane's partner and his young daughter if they relocated to New Zealand because his visa remained cancelled. Rather, the case on appeal focussed upon the failure to consider the consequences for the family unit if they relocated to Samoa.

91 It was submitted for the Minister that the finding that Mr Viane will suffer significant emotional, practical and financial hardship if he was removed to New Zealand must mean that any finding in respect of Samoa could not have been in terms that would have been more favourable to Mr Viane. In short, a finding that the same would apply if Mr Viane relocated to Samoa would not have made any difference to the conclusion. Therefore, any failure to consider separately the possibility of relocation to Samoa was of no consequence.

92 However, even if that submission be accepted, it is not a consideration of the consequences for Mr Viane's partner and their young daughter if the possibility of them relocating as part of the family unit arose as a result of the non-revocation of the cancellation of Mr Viane's visa. There was no consideration of their position at all. They would be Australian citizens relocating away from family and friends and support into a different culture. Further, for

each of them, the consequences of relocating to Samoa could not be said to be the same as those for Mr Viane of relocating to New Zealand (being the only matter addressed by the Assistant Minister apart from the effect upon the daughter's education in Samoa).

93 The findings as expressed by the Assistant Minister in relation to relocation by Mr Viane to New Zealand were to the effect that there was an opportunity in New Zealand to establish 'a lifestyle comparable to that of other citizens of New Zealand' where there was similarity to Australian culture and society. The finding that Mr Viane will suffer significant emotional, practical and financial hardship if he is removed to New Zealand must be read in that context. That is, though there would be hardship, the opportunities were the same as in Australia. Even on the assumption that these findings in respect of New Zealand applied also to Mr Viane's partner and daughter in respect of New Zealand it could not be considered that a finding in the same terms would be made in respect of Samoa. It may be expected that the hardship for them in Samoa would be greater and that would be a further significant matter to be considered by the Minister when forming the required state of satisfaction as to whether there was an additional reason why the visa cancellation should be revoked.

94 In follows that there was a failure by the Assistant Minister to consider the representations made concerning the effects upon Mr Viane's partner and young daughter of the real prospect that the family unit would relocate to Samoa. As these were impediments that may befall Australian citizens who were innocent parties, they were significant. It could not be said they were matters that would have no greater impact upon the formation of the required state of satisfaction than the finding that Mr Viane would suffer hardship if he moved to New Zealand.

The procedural fairness ground as stated before the primary judge

95 The primary judge approached the application for judicial review on the basis that it required the Court to determine two critical issues which his Honour expressed as follows:

> (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.

96 Before the primary judge, the amended grounds of the application included a claim that the Assistant Minister denied Mr Viane natural justice or procedural fairness. The particulars of the ground included the following (original emphasis):

> a. The Applicant advanced a substantial argument to the Respondent, to the effect, that if he were deported from Australia to New Zealand or Samoa, he (and his family) would be the subject of significant impediments in establishing themselves and maintaining basic living standards.
>
> b. The Respondent's reasons failed to engage with this substantial argument.
>
> c. When considering the extent of impediments the Applicant would face if removed from Australia, the Respondent *strictly limited* his consideration of this matter to the impediments the Applicant would face if removed from Australia to New Zealand (and not Samoa) (paras [85]-96]).
>
> d. Failing to respond to a substantial argument amounts to a breach of the hearing rule of procedural fairness and the decision is thereby void.

97 The written outline of submissions to the primary judge on behalf of Mr Viane stated that Mr Viane had advanced a substantial argument 'to the effect that if he was deported to his country of national origin (i.e. Samoa), his immediate family (i.e. partner and child) and he would suffer significant impediments in that country' (para 15). The written submissions proceeded on the basis that the Assistant Minister had considered Mr Viane's argument about impediments that he would face if removed to New Zealand but did not consider other arguments about impediments he (and his immediate family) would face if removed to Samoa (paras 17(b) and (c)).

98 The written submissions for the Minister made to the primary judge characterised Mr Viane's argument as 'the Minister only addressed the consequences of removal to New Zealand and did not consider the consequences for the applicant if he was removed to American Samoa' (para 2(a)(i)). It developed an argument that this was not correct 'in light of the evidence and submissions actually made' (para 3).

99 In written submissions for Mr Viane in reply, issue was taken with the characterisation of Mr Viane's case on behalf of the Minister. It was said that Mr Viane's substantial argument was that 'the <u>applicant's family (i.e. de factor partner)</u> would also be the subject of significant impediments in establishing and maintaining themselves in America[n] Samoa' (original emphasis) (para 6). The submission then advanced was that Mr Viane clearly raised an argument that his family would be the subject of extreme hardship in either New Zealand or

American Samoa (para 15). It was then said that the Assistant Minister did not consider the hardship and impediments.

100 The primary judge summarised his findings concerning the procedural fairness ground in the following way at [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.

101 It is apparent from his Honour's reasons at [23]-[28] that the term 'removal' was used to describe the process by which Mr Viane might be forced or required to leave if his visa cancellation was not revoked. His Honour distinguished between a case where Mr Viane might be removed directly to Samoa and a case where Mr Viane might be removed to New Zealand and then might voluntarily undertake a journey from New Zealand to Samoa.

102 Ultimately the primary judge found that the Assistant Minister's reasons did not give consideration to impediments that Mr Viane would face if he was sent directly to Samoa: at [23]. The primary judge then found that the material before the Assistant Minister went no further than raising the consequences for Mr Viane if, after being removed to New Zealand, he were later to make a decision to go to Samoa: at [28]. However, the primary judge found that as no claim was made that Mr Viane would be forcibly removed to Samoa there was no jurisdictional error: at [29].

103 Having regard to the submissions made, the ground raised before the primary judge was broader than these findings. First, it concerned whether the Assistant Minister had considered representations as to the consequences for Mr Viane's partner and young daughter (as well as Mr Viane) if his visa cancellation was not revoked. Second, the claim did not depend upon a claim that Mr Viane might be removed from Australia and sent directly to Samoa. Rather, it depended upon a claim that the consequence of his visa remaining

cancelled would be that he would have to live in Samoa or New Zealand and that there would be adverse consequences for the whole family unit if that occurred because there was the prospect that they would join him in Samoa or New Zealand. There was no reference in the representations as to how that may occur. It may occur voluntarily or it may occur because Mr Viane is sent to Samoa or New Zealand forcibly. However, what was material was the submission that the *consequence* of the cancellation of his visa (if not revoked) was that he would have to leave Australia and live in Samoa or New Zealand.

104 A representation made by a person in the position of Mr Viane did not have to be confined to the consequences if he was relocated to his country of nationality. If the practical reality of his Australian visa being cancelled was that he would end up living in Samoa (because that was where he was born and had some connection) rather than New Zealand (because that was where he had no connection at all) then he was able to make representations based upon the likely consequences of that prospect. Whether the prospect of Mr Viane, his partner and their daughter ending up in Samoa would be a result of choices on their part did not mean that the consideration was irrelevant and might be disregarded by the Assistant Minister in forming the required state of satisfaction.

105 Therefore, I am of the view that the primary judge was in error in confining his consideration of the case in the manner that he did.

Ground 1 upheld

106 It follows that there were representations made that if the cancellation of Mr Viane's visa was not revoked then he may relocate to Samoa with his partner and their young daughter. The consequences for them in that event was a separate and significant matter for the Assistant Minister to consider in forming the required state of satisfaction as to whether there was another reason why the visa cancellation should be revoked. This is especially so given that they are Australian citizens who are innocent parties. Further, it was a matter that was not considered by the Assistant Minister.

107 The fact that the relocation to Samoa may be made voluntarily did not mean that it was not a consequence of the cancellation of Mr Viane's visa and therefore not a relevant matter to be taken into account. Section 501CA(4) requires the Minister to consider whether he or she is satisfied that there was another reason why the original decision to cancel the visa should be revoked. The provision is not confined to a reason based upon a view as to whether a person

may be forcibly removed. It includes any matters that may be consequences of the visa cancellation that may be avoided if the cancellation was revoked.

108 There was an obligation that arose from the terms of the *Migration Act* that required the Minister to invite representations and to consider them when made. It was either part of the statutory task to be performed or a part of the obligation to afford procedural fairness in making the decision whether to revoke the cancellation of the visa under s 501CA(4) of the *Migration Act*. Therefore, the failure to consider the consequences if Mr Viane's partner and young daughter were to relocate to Samoa with him if his visa cancellation was not revoked was jurisdictional and there has been no valid non-revocation decision by the Assistant Minister.

109 The failure to afford procedural fairness resulted in practical injustice. In a case such as the present, it is not incumbent on a person who seeks to establish denial of procedural fairness to demonstrate what would have occurred if procedural fairness had been observed. Rather, it is enough that there was a significant matter that was not considered. The Court should be careful not to step into the statutory responsibility entrusted to the Minister by forming a judgment as to the extent to which the particular matter may have affected the outcome. The relevant practical injustice is that Mr Viane has been deprived of a consideration by the Minister of a significant matter the subject of representations when the Minister determined whether the required state of satisfaction had been reached. In those circumstances there is procedural unfairness: *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326 at [36], [57]-[58]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 and *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141.

110 Therefore, the basis for relief in the nature of certiorari has been made out.

Ground 2

111 Mr Viane sought leave to raise a further ground challenging the approach of the primary judge concerning the place where the applicant would be sent upon removal from Australia was upheld. It claimed that the Assistant Minister had acted upon a misunderstanding of the *Migration Act* in making his decision without considering the effect upon Mr Viane, his partner and their daughter if they were to relocate to Samoa. It sought to raise matters that were not advanced below.

112 The Minister did not oppose the grant of leave.

113 Three submissions were advanced to support the ground.

114 First, it was said that the Minister had a mandatory obligation to consider that Mr Viane would be removed to his 'home country' which was Samoa and this matter had not been considered.

115 Second, it was said that the Minister, in considering the process of making the revocation decision was required to consider (that is, take into account as a mandatory consideration) the best interests of any minor children of the person whose visa was being cancelled and as part of doing so had to form a view as to where the person would relocate which in this case included Samoa and this matter had not been considered.

116 Third, it was said that the primary judge had wrongly concluded that a non-citizen would ordinarily be sent to their country of citizenship upon removal when it was the case that a non-citizen would ordinarily be sent to their 'home country' which in this case was Samoa.

117 It is only necessary to consider these points if the primary judge was correct in the view that any representations made to support the revocation of a visa cancellation that depended upon the place of relocation were to be considered on the basis of where the person was to be forcibly relocated (which, in the view of the primary judge in the present case, was New Zealand and not Samoa). For reasons I have given, in my respectful view the conclusions by the primary judge as to those matters were not correct. Therefore, in the view that I take of the proper approach to the representations it is not necessary to consider the matters raised by ground 2. As the contentions advanced depend upon the correctness of a view of the primary judge which I would not uphold it is not appropriate to consider them on this occasion.

118 For those reasons I would decline leave to raise ground 2.

Conclusion

119 I would allow the appeal on ground 1. Relief in the nature of certiorari should be granted quashing the Minister's decision and remitting the matter to be determined according to law. As Mr Viane has been successful and ground 1 occupied most of the oral argument, I would order that the respondent pay Mr Viane's costs of the appeal. I would reserve liberty to apply in respect of the costs of the proceedings before the primary judge.

I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Colvin.

Associate:

Dated: 2 August 2018