FEDERAL COURT OF AUSTRALIA

Viane v Minister for Home Affairs [2020] FCA 152

File number:	NSD 1525 of 2019
Judge:	**FLICK J**
Date of judgment:	20 February 2020
Catchwords:	**MIGRATION** – cancellation of visa – decision not to revoke cancellation decision **ADMINISTRATIVE LAW** – no evidence – illogicality, irrationality or unreasonableness – denial of procedural fairness – mere noting of submissions – whether there was 'proper, genuine and realistic consideration' of submission – claims made in submissions had been resolved
Legislation:	*Migration Act 1958* (Cth) ss 501, 501CA
Cases cited:	*Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83, (2015) 231 FCR 513 *Buadromo v Minister for Immigration and Border Protection* [2017] FCA 1592 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107, (2017) 252 FCR 352 *Fattah v Minister for Home Affairs* [2019] FCAFC 31 *Hands v Minister for Immigration and Border Protection* [2018] FCA 662 *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225, (2018) 364 ALR 423 *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 *Minister for Home Affairs v Buadromo* [2018] FCAFC 151, (2018) 362 ALR 48 *Minister for Home Affairs v Omar* [2019] FCAFC 188, (2019) 373 ALR 569 *Minister for Immigration & Border Protection v Stretton* [2016] FCAFC 11, (2016) 237 FCR 1 *Minister for Immigration & Citizenship v SZMDS* [2010] HCA 16, (2010) 240 CLR 611 *Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274, (2001) 106 FCR 426

	NAJT v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 134, (2005) 147 FCR 51 *Navoto v Minister for Home Affairs* [2019] FCAFC 135 *Spurling v Development Underwriting (Vic.) Pty Ltd* [1973] VR 1 *Romeo v Asher* (1991) 29 FCR 343 *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 231 *Soliman v University of Technology, Sydney* [2012] FCAFC 146, (2012) 207 FCR 277 *Swift v SAS Trustee Corporation* [2010] NSWCA 182 *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116, (2018) 162 ALD 13
Date of hearing:	20 November 2019
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	40
Counsel for the Applicant:	Mr J Donnelly
Solicitor for the Applicant:	Tajik Lawyers Pty Ltd
Counsel for the Respondent:	Ms R Francois
Solicitor for the Respondent:	Sparke Helmore Lawyers

ORDERS

NSD 1525 of 2019

BETWEEN:	**ALEX VIANE** Applicant
AND:	**MINISTER FOR HOME AFFAIRS** Respondent

JUDGE:	**FLICK J**
DATE OF ORDER:	**20 FEBRUARY 2020**

THE COURT ORDERS THAT:

1. The proceeding is dismissed.

2. The Applicant is to pay the costs of the First Respondent, either as agreed or assessed.

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

REASONS FOR JUDGMENT

FLICK J:

1 The Applicant in the present proceeding, Mr Alex Viane, was born in American Samoa, but was raised in Samoa (formerly Western Samoa). At the age of 14 years he moved to Australia, where he was adopted by his uncle. He acquired New Zealand citizenship, but has never been there.

2 In July 2016, his visa was cancelled pursuant to s 501(3A) of the *Migration Act 1958* (Cth) ("*Migration Act"*) (the "*Cancellation Decision*"). Mr Viane sought revocation of the *Cancellation Decision* in July 2016. In June 2017, a decision was made not to revoke the *Cancellation Decision* (the "*Non-Revocation Decision*"). But the *Non-Revocation Decision* was set aside by a decision of the Full Court of this Court and the matter was remitted for further consideration in accordance with law: *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116, (2018) 162 ALD 13.

3 In August 2019, the Respondent Minister made a further decision. The Minister decided that there was no reason why the original decision to cancel the visa should be revoked. He concluded that as he was "*not satisfied that there is another reason why the original decision should be revoked, [his] power to revoke is not enlivened and Mr VIANE's ... visa remains cancelled*". Section 501CA(4)(b)(ii) of the *Migration Act* confers power upon the Minister to revoke a decision if "*there is another reason why the original decision should be revoked*".

4 In September 2019, Mr Viane filed in this Court an *Originating Application* seeking review of the Minister's August 2019 decision. The Applicant also filed an *Amended Originating Application* ("the *Application*") in October 2019. In summary form, in that *Application,* the Applicant put forward the following four *Grounds* of jurisdictional error:

- the making of findings "*for which there was no evidence*";
- the decision "*was illogical, irrational and/or otherwise legally unreasonable*";
- a failure "*to give 'proper, genuine and realistic consideration' of a claim advanced…*"; and
- a denial of procedural fairness.

5 None of these *Grounds* have been made out. The *Application* should be dismissed with costs.

6 The *Application* was heard by this Court on 20 November 2019. Mr Viane and the Minister both appeared by Counsel.

Findings for which there was no evidence?

7 The first *Ground* relied upon on behalf of Mr Viane is that there was no evidence (and the paragraph number of the *Minister's Statement of Reasons* relied upon were the findings) that:

- English is widely spoken in American Samoa and Samoa (at para [23]);
- healthcare and some welfare support are available in American Samoa and Samoa for the Applicant and his immediate family, namely his partner and their daughter Aliikai (at para [23]);
- the Applicant and his immediate family will have access to welfare and healthcare in American Samoa and Samoa (at para [64]); and
- the Applicant and his immediate family will have equal access to welfare, healthcare and education services as do American Samoans and Samoans in a similar positon (at para [64]).

8 Paragraph [23] appears in that part of the *Minister's Statement of Reasons* where he is addressing the "*[b]est interests of minor children*" and provides as follows:

> 23. Should Mr VIANE relocate to either location, Aliikai will be significantly impacted. Given she will be largely unfamiliar with American Samoan and Samoan society and culture, I find that the whole family, may, at least initially, experience problems relating to employment, income, housing and lack of family or social support and this would negatively impact on Aliikai. English, however, is widely spoken in American Samoa and Samoa and healthcare, education and some welfare support are available in either location. I accept that the services available in American Samoa and Samoa may not be of the same standard as those available in Australia, and/or may be more expensive to access, and there may be differences in services between American Samoa and Samoa. I consider that a very young child, however, would not be as greatly affected by language and cultural differences as an older child, although I recognise that a degree of adjustment by Aliikai would be required. I note that Aliikai is not yet of school age and find that relocation to American Samoa or Samoa will not immediately impact on her education or advancement in life, although it may do so in terms of the opportunities available to her as she grows older.

Paragraph [64] appears in that part of the *Minister's Statement of Reasons* where he is addressing the "*[e]xtent of impediments if removed*" and provides as follows:

> 64. I accept that Mr VIANE has spent very little time in American Samoa and has not spent a substantial amount of time in Samoa. I accept that he has no social ties in both countries and that he and his partner may have difficulty finding employment or housing, at least initially, however I do not accept that he or his family will likely have no access to welfare or healthcare. These services exist in American Samoa and Samoa and I consider that Mr VIANE and his family will have equal access to welfare, healthcare and educational services as do American Samoans and Samoans in a similar position, although I recognise

> that these may not be of the standard that is available in Australia and may be more expensive to access. I accept that the quality and costs of these services will differ in these countries.

Paragraph [65] provides as follows:

> 65. I consider that some impediments to resettlement such as initial unemployment or uncertainty as regards to housing, will be eased over time. Nevertheless, I accept that removal to Samoa or American Samoa will involve significant adjustments and hardship for Mr VIANE and his family.

9 An absence of evidence to support a finding of fact may demonstrate jurisdictional error if that fact is a "*critical step*" in the decision-maker's path of reasoning: *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [23], (2012) 207 FCR 277 at 284-285 per Marshall, North and Flick JJ ("*Soliman*"). See also: *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 231 at [19] per Mansfield, Selway and Bennett JJ. In the present statutory context of a decision having been made by the Respondent Minister pursuant to s 501CA(4) of the *Migration Act*, in *Hands v Minister for Immigration and Border Protection* [2018] FCA 662 the primary Judge concluded:

> [37] Moreover, in the context of the decision-making task under s 501CA(4), such an error may be jurisdictional if the finding of fact is "a critical step" along the path to the ultimate conclusion whether or not to revoke the original decision to cancel a person's visa. …

An appeal from this decision has been allowed: *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225, (2018) 364 ALR 423. But there was no disagreement with the above principle set forth by the primary Judge in that case. As pointed out by the primary Judge, it is a principle that had previously been accepted. The basis for allowing the appeal centred upon the absence of any material to support findings made by the Minister which were of "*central importance in the reasoning*", and the failure on the part of the Minister to "*explore the legal and anthropological questions*" arising from Mr Hands' acceptance as part of the Aboriginal community.

10 In the present proceeding, insofar as the challenge is founded upon an absence of evidence that "*English … is widely spoken in American Samoa and Samoa*", it is concluded that the Minister "*was not required to refer to any specific evidence in order to*" make that finding: cf. *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 at [37] per McKerracher J. There is, with respect, no necessity for the Minister to actually have "*specific evidence*" before him at the time he made his decision that both Samoan and English are spoken in the Samoan Islands. No specific representation was made to the

Minister on behalf of Mr Viane as to whether English was or was not "*widely spoken*" in American Samoa or Samoa. It was thus not an issue which the Minister was called upon to resolve potentially competing submissions. It was a matter, presumably, in respect to which Mr Viane did not see any need to adduce evidence.

11 Insofar as the challenge is founded upon an absence of evidence as to the availability of "*welfare, healthcare and educational services*", the finding made by the Minister was a finding that "*[t]hese services exist in American Samoa and Samoa*" (at para [64] of the *Minister's Statement of Reasons*). Greater reservation may be expressed as to whether there need be some evidence as to the healthcare and welfare benefits in fact available in Samoa, if a finding necessarily had to be made in respect to such benefits.

12 There is no clear line that may be drawn between those matters in respect to which a decision-maker may rely upon his own knowledge or specialist knowledge, and those matters in respect to which evidence must be available to support such a finding: cf. *Navoto v Minister for Home Affairs* [2019] FCAFC 135. Middleton, Moshinsky and Anderson JJ there observed:

> [77] There have been recent decisions of this Court in which administrative decision-makers in contexts similar to this case were entitled to rely on their knowledge of features of other countries: *Uelese v Minister for Immigration & Border Protection* [2016] FCA 348; 248 FCR 296 at [69] per Robertson J and *McLachlan v Assistant Minister for Immigration & Border Protection* [2018] FCA 109 at [39] per McKerracher J. Conversely, there was a recent decision of this Court where an administrative decision-maker was not permitted to rely on such knowledge: *Schmidt v Minister for Immigration & Border Protection* [2018] FCA 1162; 162 ALD 495 at [25]–[34] per Burley J. See also *Anaki v Minister for Immigration & Border Protection* [2018] FCA 77 at [24]–[25] per Burley J.
>
> [78] Although we express no view on these decisions, our view, which may be subject to more detailed consideration in an appropriate case, is that it is unlikely that a precise test may be formulated to prescribe the circumstances in which an administrative decision-maker may rely on general knowledge or accumulated specialist knowledge: see *Dekker v Medical Board of Australia* [2014] WASCA 216 at [63] per Martin CJ, Newnes and Murphy JJA. That issue, where it arises, is likely to be determined by reference to all the circumstances of the case, including, amongst other factors, the nature of the decision-maker, the extent and character of the decision-maker's specialisation, and the form of the particular knowledge relied upon by the decision-maker.

The problem as to the extent to which reliance can be placed by administrative decision-makers upon their accumulated expertise is not a problem confined to decisions arising under the *Migration Act* where persons may be forcibly removed from Australia. It is an issue which is not new, and is an issue which has been addressed in other statutory contexts as well: e.g., *Spurling v Development Underwriting (Vic.) Pty Ltd* [1973] VR 1 at 10 per

Stephen J; *Romeo v Asher* (1991) 29 FCR 343 at 349 per Morling and Neaves JJ; *Soliman* [2012] FCAFC 146 at [33], (2012) 207 FCR at 287 per Marshall, North and Flick JJ.

13 In the present statutory context, it is most probably the case that administrators accumulate a great deal of knowledge as to circumstances prevailing in many different geographical areas throughout the world. But to rely upon such knowledge, at least without disclosing that knowledge and inviting a claimant to, for example, make submissions or adduce additional evidence or other materials with respect to that knowledge, may well be tantamount to a denial of procedural fairness. Regardless, wherever the line is to be drawn, the question as to potential hardship to Mr Viane and his family in the present case was a question resolved in his favour. There was a recognition on the part of the Minister (at para [65]) that Mr Viane's removal "*will involve significant adjustments and hardship for Mr VIANE and his family*". No jurisdictional error is exposed.

14 The first *Ground* is thus rejected.

An illogical, irrational or unreasonable decision?

15 The *Application*, in summary form, contends that:

- "*implicit"* in the *Minister's Statement of Reasons* at para [23] "*is the notion that English is not widely spoken in American Samoa and Samoa*", thus the need for a "*degree of adjustment*" and "*... 'potential language' adjustment*" (at para [71] of the *Minister's Statement of Reasons*) – the contention being that "*if English is widely spoken*", "*it is not clear*" why the Applicant's partner and daughter "*would face hardships related to potential language adjustments*"; and
- a finding that the daughter "*is not yet of school age and ... that relocation to American Samoa or Samoa will not immediately impact her education or advancement in life*" (at para [23] of the *Minister's Statement of Reasons*) – the contention being that in the absence of evidence as to "*what the 'school age' was in American Samoa or Samoa ... there is no rational or logical reason to suggest that education of a minor child only materialises when the child reaches 'school age'…*".

16 The finding that the daughter "*is not yet of school age*" is that made at para [23] of the *Minister's Statement of Reasons*. As at the date upon which the Minister made his decision, the daughter was less than 5 years old. Paragraph [71] of the *Minister's Statement of Reasons*, upon which reliance is also placed by Counsel on behalf of Mr Viane, provides as follows:

> 71. In the event that Mr VIANE's partner and minor child decide to relocate to American Samoa, Samoa or New Zealand to preserve their family unit, the hardships and adjustments experiences by Aliikai and Ms Kallu will involve significant cultural, and potentially language adjustments for them. Ms Kallu in particular will experience hardship leaving behind friends, family, employment and other ties to Australia. I accept that they will have no family support in New Zealand and little or no family support in American Samoa or Samoa. I consider that the hardship they will experience, the adjustments they will need to make and the absence of family support in these countries will be impediments to resettlement, although I do not regard them as insurmountable impediments. I consider that these hardships will be more acute in the initial period of resettlement and will ease over time as adjustments to a different culture and society are made. I consider also, that the extent of adjustment and hardship for them will be significantly higher in respect of Samoa and American Samoa than New Zealand.

It is that paragraph which makes relevant findings as to "*hardships and adjustments…*" if Mr Viane and his family relocate from Australia.

17 A decision which is illogical, irrational or unreasonable may expose jurisdictional error.

18 In *Fattah v Minister for Home Affairs* [2019] FCAFC 31 ("*Fattah*"), Perram, Farrell and Thawley JJ summarised the position as follows:

> [45] The Appellant invoked both irrationality and unreasonableness as grounds of review. To discern illogicality (or irrationality) one must demonstrate that there is only one conclusion open on the evidence or that there is no logical connection between the evidence and the inferences drawn: *Minister for Immigration & Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at 649 at [135] per Crennan and Bell JJ; … As to unreasonableness, this may appear in the decision-making process or merely from the outcome and one may ask whether the decision lacks an evident or intelligible justification: … *Minister for Immigration & Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at [8] and [21] per Allsop CJ.

In the passage there relied upon from *Minister for Immigration & Citizenship v SZMDS* [2010] HCA 16, (2010) 240 CLR 611, Crennan and Bell JJ had observed:

> [135] ... Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these applied here …

And in the first of the passages from *Minister for Immigration & Border Protection v Stretton* [2016] FCAFC 11, (2016) 237 FCR 1, to which Perram, Farrell and Thawley JJ in *Fattah* referred, the Chief Justice had observed:

> [8] The content of the concept of legal unreasonableness is derived in significant part from the necessarily limited task of judicial review. The concept does not provide a vehicle for the Court to remake the decision according to its view as to reasonableness (by implication thereby finding a contrary view unreasonable). Parliament has conferred the power on the decision-maker. The Court's function is a supervisory one as to legality: …

19 On the facts of the present case, illogicality, irrationality or unreasonableness has not been made out.

20 There is no illogicality, irrationality or unreasonableness in finding that although "*English… is widely spoken*", there may nevertheless be "*a degree of adjustment…*". The contention expressed in terms of "*hardship*", it may be noted, is not a contention founded upon the findings in fact made at para [23]. The finding that was made (at para [23]) is that *"a very young child … would not be as greatly affected by language and cultural differences as an older child, although I recognise that a degree of adjustment … would be required…*". It was readily open to the Minister to conclude that "*a degree of adjustment*" may be required in a location where both Samoan and English are spoken.

21 Nor is there any illogicality, irrationality or unreasonableness in finding that any relocation to American Samoa or Samoa would "*not immediately impact [the daughter's] education or advancement in life…*". The illogicality, irrationality or unreasonableness in respect to this finding was said to arise because this finding was inconsistent with other findings made by the Minister, being:

- the finding made earlier in para [23] "*that the whole family, may, at least initially, experience problems relating to employment, income, housing and lack of family or social support…*";
- the findings at paras [64] and [65] that Mr Viane "*and his partner may have difficulty finding employment or housing, at least initially…*" and the finding that "*removal to Samoa or American Samoa will involve significant adjustments and hardship for Mr VIANE and his family*"; and
- the finding at para [71] that in the event Mr Viane's partner and daughter decide to relocate, "*the hardship and adjustments experienced … will involve significant cultural, and potentially language, adjustments for them…*".

The Minister's position is that the finding in respect to the impact upon "*education or advancement in life*" was but a subset of the more broadly expressed findings set forth not only in para [23] but also in paras [64], [65] and [71].

22 Albeit not free of difficulty, it is concluded that the Minister's submission should prevail. Although there may have been no evidence as to the school age in Samoa, it was nevertheless open to the Minister to conclude in respect to a child of about four years of age that relocation

would "*not immediately impact*" her education or advancement. A finding that there would be no immediate impact upon the daughter's education is not inconsistent with findings as to the (for example) "*significant*" impacts or "*hardships*" that may be suffered by Mr Viane and his family unit expressed more generally.

23 The availability of illogicality, irrationality or unreasonableness as a ground of judicial review – it is respectfully considered – is not to be employed so as to permit an unjustifiable insistence upon evidence or other materials to support each step in a reasoning process pursued by an administrative decision-maker, irrespective of the importance of that step to the ultimate decision made. Much obviously depends upon the facts and circumstances of an individual case. There may well be greater judicial scrutiny of a finding (for example) as to the impact upon the education of a student approaching matriculation than the impact upon a child (such as in the present case) who is only about four years of age.

24 To the extent that any reliance was sought to be placed on behalf of Mr Viane upon a paper in respect to child training and discipline, any such reliance would be misplaced. Before the Minister there was a paper published by Schoeffel (and others) titled *Pacific Islands Polynesian Attitudes To Child Training and Discipline in New Zealand: Some Policy Implications For Social Welfare and Education*. That was a paper apparently relied upon by Mr Viane in submissions to the Minister in respect to his own childhood in Samoa, and the difficulties he there faced. A course not to be encouraged is for reliance to be placed upon an article or study for one purpose when a claim was before the Minister, and thereafter employed in submissions to this Court for an entirely different purpose. The Minister cannot be called to account for failing to glean from the evidence placed before him a potential relevance of that material to a submission not advanced before him for consideration. No submission was advanced before the Minister in reliance upon the Schoeffel article in respect to the difficulties that may be confronted by the daughter in her early education. In the absence of such a submission, there is no irrationality or illogicality arising by reason of the article and the finding at para [23].

25 The second *Ground* is thus rejected.

Proper, genuine and realistic consideration to a claim advanced & procedural fairness

26 The third and fourth *Grounds* can be considered together.

27 The third *Ground* contends (in summary form) that there was a failure to give "*proper, genuine and realistic consideration*" to the claim that the Australian community "*would expect [the applicant] to be released back into the community without further delay*". Counsel on behalf of Mr Viane put to the Minister that Mr Viane has served his prison sentence, has spent three years in immigration detention and has "*a supportive partner and loving daughter*…". The Minister's *Further Decision,* by merely "*noting*" Mr Viane's claims, it is contended, manifests a failure to "*engage in an 'active intellectual process'...*" when considering the claims made.

28 The fourth *Ground* contends that the failure to "*respond to a 'substantial, clearly articulated argument relying upon established facts' was at least to fail to accord the Applicant natural justice*". The "*clearly articulated argument*" was that set forth in *Ground* 3.

29 These *Grounds* focus attention upon the following paragraphs of the Minister's reasons, namely:

> **Expectations of the Australian community**
>
> 32. I have noted Mr Rigas' submission that the community expects that the decision maker be informed, fair and reasonable, and not solely consider the punitive aspects of the s501 power. I further noted Dr Donnelly's submission on behalf of Mr VIANE that the Australian community would be mindful that Mr VIANE has completed his prison sentence, has now spent almost three years in immigration detention, and has a supportive partner and loving daughter who wish him to be re-united with them. It is submitted that his removal from Australia will impact negatively on various Australian citizens who are members of the community and that the Australian community would expect Mr VIANE to be released back into the community without further delay.
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> 33. In relation to Mr Rigas' remark, the Migration Act provides for the mandatory detention of unlawful non-citizens, such as Mr VIANE. Detention powers contained in the Act are administrative in nature, not punitive. They are intended to facilitate the management of individuals while their immigration status is being resolved, while also protecting the community from potential harm.
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> 34. In relation to the expectations of the Australian community, I find that the community would expect non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust, or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the original decision to cancel the visa of such a person. Mr VIANE has breached this trust as he has been convicted of domestic violent offences in Australia and other very serious violent crimes.
>
> 35. Having regard to the circumstances of the crime he committed, I have concluded that the majority of the Australian community would expect that Mr VIANE not be permitted to remain in Australia.

30 Considerable caution needs to be exercised in circumstances where a party claims that there has been a failure to give "*proper, genuine and realistic consideration*" to a claim or an argument advanced. That phrase, as has commonly been noted, has its origins in observations

made by Gummow J in in *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291. See also: *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134 at [212], (2005) 147 FCR 51 at 92-93 per Madgwick J (Conti J agreeing at [227] to [230]). The reason for caution, as with all grounds of judicial review as opposed to merits review, is that, "*taken out of context*", the above phrase coined by Gummow J is "*apt to encourage a slide into impermissible merits review*": *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45] per Basten JA. The formula of a "*proper, genuine and realistic consideration*", Heerey, Goldberg and Weinberg JJ have observed, has the very real danger of creating "*a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any Tribunal decision can be scrutinised*": *Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274 at [65], (2001) 106 FCR 426 at 442. See also: *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83 at [24], (2015) 231 FCR 513 at 520 per Flick, Griffiths and Perry JJ.

31 And considerable care needs to be exercised when advancing a submission that the mere "*noting*" of a claim or argument being advanced may not of itself be sufficient to demonstrate an active intellectual engagement with that claim or argument: *Minister for Home Affairs v Buadromo* [2018] FCAFC 151, (2018) 362 ALR 48. That decision reversed the decision at first instance: *Buadromo v Minister for Immigration and Border Protection* [2017] FCA 1592. At first instance, it had relevantly been concluded:

> [42] The decision of the Assistant Minister, it is concluded, has been made without findings of fact being made in respect to a number of issues which formed part of the decision-making process. "*Proper, genuine and realistic consideration*" of the issues presented for resolution required the Assistant Minister to go beyond merely "*noting*" what Mr Buadromo had been putting forward for consideration; what was required of the Assistant Minister was the taking of the further step of making an assessment as to whether what was being put forward had factual merit. That assessment process may remain a matter entrusted to the Assistant Minister to resolve; but the Assistant Minister could not halt that assessment process at the outset by merely "*noting*" what had been put before him and not proceeding to engage in some assessment as to the merit of that which was being put forward. The requirement imposed by s 501G(1)(e), which is a "*task required under the Act*", only reinforces the necessity for the Assistant Minister to complete his assessment by making findings of fact. In the face of s 501G, "*the Court may draw certain inferences from what is not expressly set out in the Reasons as much as it may draw an inference from that which is expressly set out*": *Stevens v Minister for Immigration & Border Protection* [2016] FCA 1280 at [44]; (2016) 153 ALD 346 at 358 to 359 per Charlesworth J. The absence of an express finding of fact may thus assist in reaching a conclusion that no finding was implicitly made.

In rejecting this conclusion, the Full Court (Besanko, Barker and Bromwich JJ) concluded:

> [46] Insofar as the primary judge is suggesting in [42] of his reasons (set out above at

> [29]) that a decision-maker is required to make a finding of fact with respect to every claim made or issue raised by an applicant, we do not agree. A finding of fact may not be required if the claim or issue is irrelevant or if it is subsumed within a claim or issue of greater generality or, to use an example advanced by the appellant in the course of submissions in this case, even assuming fact or proposition A, I (the decision-maker) do not accept that fact or proposition B follows. These are only examples and it is not possible to be comprehensive.

32 As their Honours there noted, "*it is not possible to be comprehensive*". Concurrence may also be expressed with their Honours conclusion as to the absence of any necessity to "*make a finding of fact with respect to every claim made*…". But the decision of the Full Court, with respect, does not stand in the way of a conclusion in an appropriate case that it is not sufficient for the respondent Minister to simply "*note*" a claim or argument. As their Honours implicitly recognised, there may be some facts or some arguments which are so centrally relevant to the claims being advanced for consideration that the Minister may be called upon to go beyond merely "*noting*" the claim or argument, and may be called upon to make a finding of fact or to resolve the argument or submission being made. And a failure to actively engage in a claim or argument may be exposed even if that claim or argument forms part of (or may be "*subsumed*" by) a further claim or argument. In an appropriate case, even a step in a claim or argument may call for specific resolution.

33 To so conclude, with respect, is entirely consistent with the reasoning of the Full Court in *Buadromo* and *Minister for Home Affairs v Omar* [2019] FCAFC 188, (2019) 373 ALR 569 ("*Omar*"). The Full Court in *Omar* was constituted by Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ. A joint decision was published. Their Honours there referred, at para [34], to the necessity for "*meaningful consideration*" to be given to certain matters, at para [37], to the necessity to "*engage in an active intellectual process with significant and clearly expressed relevant representations*", to the decision in *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107, (2017) 252 FCR 352, and continued:

> [36] The key points to emerge from *Carrascalao* which are also relevant to the decision-making function under s 501CA(4) are as follows:
>
> …
>
> (f) The inference drawn in *Carrascalao* was one which was arrived at notwithstanding that the Minister's statements of reasons in the two cases there stated that he had "given full consideration to all of the information before me" and that the reasons contained numerous statements by the Minister that he had "considered", "noted", "accepted", "recognised" or "had regard to" various matters in coming to his decision to cancel the visas. In the particular circumstances, these statements were not viewed as conclusive.
>
> …

> [39] Giving meaningful consideration to a clearly articulated and substantial or significant representation on risk of harm independently of a claim concerning Australia's *non-refoulement* obligations, requires more than the Assistant Minister simply acknowledging or noting that the representations have been made. Depending on the nature and content of the representations, the Assistant Minister may be required to make specific findings of fact, including on whether the feared harm is likely to eventuate, by reference to relevant parts of the representations in order that this important statutory decision-making process is carried out according to law …
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> …
>
> [43] In our view, these findings were erroneous, in the following circumstances.
>
> (a) The Minister merely "noted" or said that he had taken into consideration or account some of the matters raised by the respondent on the subject of risk of harm in Somalia (see, for example, [32], [33], [34] and [36] of the statement of reasons). Paragraph 33 of the Assistant Minister's statement of reasons is particularly revealing (it is set out in full at [22] above). Although the Assistant Minister records there that he has taken into consideration the submission made on behalf of the respondent "which states that the treatment of persons with mental illness in Somalia are subjected to systemic and severe discrimination, arguably amounting to cruel, inhumane and degrading treatment", the Assistant Minister makes no finding one way or the other as to whether he accepted that submission. Similarly, no explicit finding of fact is made by the Minister with regard to the separate statement described in [33] "that many Somalian nationals with mental illness are contained with chains and this is a locally accepted treatment in mental health facilities as it is seen as alternative medication". These were significant and serious matters which had been raised on behalf of the respondent and which were supported by other material. The matters were of such central significance that the Assistant Minister had to engage with them properly and make findings of fact one way or the other. Otherwise, he could not assess the veracity and gravity of the risks of harm put forward on the respondent's behalf.

34 With respect to the facts and circumstances of the present case, however, it is concluded that the Minister in his reasons did actively engage with the submission advanced on behalf of Mr Viane as noted at para [32] of those reasons. The submission as to the "*expectations*" of the Australian community being advanced on behalf of Mr Viane (at para [32]), it is concluded, is adequately answered by the conclusion reached as to what "*the majority of the Australian community would expect*…" (at para [35]). Counsel on behalf of Mr Viane sought to contend in oral submissions that although para [34] may have addressed the expectations of the Australian community in respect to the general consequences flowing from criminal convictions, it did not address the submissions addressed to the "*individual circumstances*" of Mr Viane. Those submissions are rejected. Paragraph [34] expressly states that it was Mr Viane who had "*breached*" the trust reposed in him by the Australian community by reason of his having "*been convicted of domestic violen[ce] offences in Australia and other very serious violent crimes*".

35 Paragraph [34], it is respectfully concluded, not only addresses the general expectations of the Australian community in respect to those who commit criminal offences, that paragraph also addresses the "*individual circumstances*" pertaining to Mr Viane. Paragraph [34] goes beyond a simple "*noting*" of the submissions being advanced on behalf of Mr Viane and extends to a finding as to how that submission is to be resolved. There has been no failure to give consideration to the claims made and no denial of procedural fairness. The claims were considered and were rejected.

36 The third and fourth *Grounds* are thus rejected.

CONCLUSIONS

37 The "*devastating consequences*" visited upon Mr Viane, his partner and daughter by the Minister's decision (cf. *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [3], (2018) 364 ALR 423 at 424 per Allsop CJ) may readily be accepted.

38 It is nevertheless concluded that none of the four *Grounds* relied upon have been made out.

39 The *Application* should thus be dismissed.

40 There is no reason why costs should not follow the event.

THE ORDERS OF THE COURT ARE:

1. The proceeding is dismissed.

2. The Applicant is to pay the costs of the First Respondent, either as agreed or assessed.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 20 February 2020