HIGH COURT OF AUSTRALIA

KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL
AFFAIRS APPELLANT

AND

ALEX VIANE RESPONDENT

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane

[2021] HCA 41
Date of Hearing: 9 September 2021

Date of Judgment: 8 December 2021

S34/2021

ORDER

1. Appeal allowed.

2. Set aside orders 4 and 5 of the orders made by the Full Court of the Federal Court of Australia on 24 August 2020 and, in their place, order that:

(a) order 2 of the orders made by the Federal Court of Australia on 20 February 2020 be set aside and, in its place, order that the respondent pay the applicant's costs of the proceeding as agreed or taxed; and

(b) the appeal be otherwise dismissed.

3. The appellant pay the reasonable costs of the respondent in this Court.

On appeal from the Federal Court of Australia

2.

Representation

G R Kennett SC with R S Francois for the appellant (instructed by Sparke Helmore Lawyers)

C L Lenehan SC with J D Donnelly and K P Tang for the respondent (instructed by Scott Calnan Lawyer)

CATCHWORDS

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane

Immigration – Visas – Cancellation of visa – Revocation of cancellation – Where respondent's temporary visa cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where respondent made representations seeking revocation of cancellation decision under s 501CA(4) – Where representations included bare assertions about conditions in American Samoa – Where Minister decided there was not "another reason" to revoke cancellation decision under s 501CA(4)(b)(ii) – Where Minister made findings about conditions in American Samoa and Samoa – Where it was common ground no evidentiary material to support Minister's findings – Whether Minister always obliged to make findings of fact in response to representations received – Whether Minister's findings relating to hardship respondent's family would face if visa cancellation decision not revoked were open – Whether Minister entitled to rely on personal or specialised knowledge, or commonly accepted knowledge, in making findings about conditions in American Samoa and Samoa – Whether as matter of procedural fairness Minister required to disclose personal or specialised knowledge and invite submissions from applicant about that knowledge before making findings.

Words and phrases – "another reason", "bare assertions", "commonly accepted knowledge", "conditions in American Samoa or Samoa", "hardship", "Minister's personal or specialised knowledge", "no evidence", "personal knowledge", "reasons for decision", "removal to American Samoa", "representations about revocation", "specialised knowledge", "visa cancellation".

Migration Act 1958 (Cth), ss 501, 501CA.

1 KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ. The respondent was born in American Samoa, was largely raised in the Independent State of Samoa ("Samoa"), and is a citizen of New Zealand. At the age of 14 he arrived in Australia. In 2007, he was granted a Class TY Subclass 444 Special Category (Temporary) visa, which he held until 2016. Following his conviction for, amongst other crimes, seriously assaulting his partner, his visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) ("the Act"). Subsequently, the appellant ("the Minister") decided that there was not "another reason" to revoke that cancellation decision for the purposes of s 501CA(4)(b)(ii). The respondent sought judicial review of that decision in the Federal Court of Australia[1]. Initially, his application was dismissed, but on appeal[2] the Minister's decision was set aside. A majority of the Full Court of the Federal Court decided that the Minister's decision was vitiated by the presence of jurisdictional error[3]. The Minister has appealed that decision to this Court. For the reasons which follow, the appeal should be allowed.

The alleged errors of law

2 For the purposes of making representations about whether there was "another reason" to revoke the visa cancellation decision[4], the respondent asserted, amongst other contentions, that there was a "real prospect" that he and his partner and young child, unless the visa cancellation decision were to be revoked, would go to American Samoa, where they would face "substantial impediments". As an example of these "substantial impediments", the respondent submitted that his partner and child would be "unfamiliar with the culture and society in American Samoa", and that his child would "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". He also contended that as "a family unit" they would likely be "homeless, with no job, social ties, welfare or healthcare services in American Samoa". He subsequently diluted this claim and submitted that his partner and child's "prospects at life" would be "*limited*, with little prospects of employment, denial of a first-class education for [his]

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1 *Viane v Minister for Home Affairs* [2020] FCA 152.

2 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386.

3 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386 at 403 [61] per Kerr and Charlesworth JJ.

4 *Migration Act 1958* (Cth), s 501CA(3)(b).

daughter, problematic healthcare and no social welfare" (emphasis added). None of these contentions were supported by any evidence.

3 In his statement of reasons for decision under s 501CA of the Act, the Minister addressed these concerns, and decided that if the child were to relocate to American Samoa or Samoa she would be "significantly impacted". In reaching this conclusion, the Minister largely accepted the respondent's assertions, but made two qualifying observations which were the subject of successful challenge below. The first was as follows:

> "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 [the respondent's child]. English, however, is widely spoken in American Samoa and Samoa and healthcare, education and some welfare support are available in either location."

4 Notably, no specific claim was made by the respondent about the extent to which English was spoken in either American Samoa or Samoa.

5 The second was in these terms:

> "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."

6 In relation to that observation, the Minister remarked that the respondent's family would have "equal access to welfare, healthcare and educational services as do American Samoans and Samoans in a similar position".

7 The respondent contended that each observation, about the speaking of English and the availability of services in American Samoa and Samoa, was made without any evidentiary support. In that respect, it was common ground that there was no objective evidentiary material before the Minister capable of supporting either finding[5]. This led to the majority's finding that

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5 Other than the draft reasons for decision which the Minister's Department had prepared.

the Minister wrongly afforded less weight to the child's interests, and "so affected a critical aspect of the Minister's reasoning"[6].

8 It should be noted that the respondent has never suggested that the Minister's observations were in fact incorrect. Even though it was open to the respondent to show this, assuming each observation in fact to be mistaken, he has chosen not to do so. On appeal to this Court, senior counsel for the respondent strikingly submitted that even if the two impugned observations were true, the Minister had nonetheless erred because those findings were made without the support of "some probative material"[7].

9 Tellingly, the respondent did not attack equivalent findings made about conditions in New Zealand. For example, the Minister said in his reasons:

> "In relation to New Zealand, I find that [the respondent] and his family will have access to similar social services and healthcare support to those enjoyed by citizens of New Zealand. I find that these services are of a similar level to those available in Australia and that New Zealand is culturally and linguistically similar to Australia."

10 In light of the foregoing, the respondent has nonetheless indicated that if he is to be deported, he would choose to move to American Samoa, even though, it would seem, he accepts that the standards of social services in New Zealand are much higher than those, as he contends, that are available in American Samoa. He then relies precisely on that lack of services as a reason for the revocation of the visa cancellation decision.

11 Ultimately, each impugned finding, together with other findings that have not been challenged, led the Minister to determine that it was in the best interests of the respondent's child that the cancellation decision be revoked, and that the respondent's removal to American Samoa or Samoa would result in "significant adjustments and hardship" for him and his family. In other words, the Minister accepted the substance of the claims made. However, the Minister weighed these favourable factors against the risk of harm to the Australian community if the respondent were not removed. The Minister considered that this risk was "unacceptable" and that it

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6 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386 at 403 [61] per Kerr and Charlesworth JJ.

7 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657 [145], [147] per Gummow J.

"outweighed" the factors favouring revocation of the cancellation decision. No attack has been made on the manner in which the Minister weighed these various matters in not reaching a state of satisfaction that there was "another reason" for revocation of the cancellation decision.

Fact finding for the purposes of s 501CA

12 The legal capacity conferred on the Minister by s 501CA of the Act to revoke a decision to cancel a visa is premised upon the prior exercise of the power of cancellation conferred by s 501(3A). Importantly, once the conditions of s 501(3A) are fulfilled, the power of cancellation is mandatory; the Minister must cancel the visa[8]. In contrast, the power of revocation is broad[9]. Upon receiving representations about revocation in accordance with s 501CA(4), the Minister must determine whether to be satisfied that the person passes the character test (as defined by s 501(6)) or whether there is "another reason why the original decision should be revoked"[10].

13 The relevant statutory scheme mandated by s 501CA of the Act comprises: the giving of relevant information to a person whose visa has been cancelled; inviting that person to make representations about why that cancellation decision should be revoked; the receipt of representations by the Minister made in accordance with that invitation; and, thereafter, the formation of a state of satisfaction, or not, by the Minister that the cancellation decision should be revoked. That scheme necessarily requires the Minister to consider and understand the representations received. What is "another reason" is a matter for the Minister. Under this scheme, Parliament has not, in any way, mandated or prescribed the reasons which might justify revocation, or not, of a cancellation decision in a given case. It follows that there may be few mandatorily relevant matters that the Minister must consider in applying s 501CA(4)(b)(ii). Thus, the Minister is not obliged to take account of any non-refoulement obligations, as expressed in the Act or otherwise, when determining whether there is another reason to revoke a cancellation

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8 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 347 [44] per Kiefel CJ, Bell, Keane and Edelman JJ.

9 *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897 at 902 [36] per Nettle, Gordon and Edelman JJ; 383 ALR 194 at 201.

10 *Migration Act 1958* (Cth), s 501CA(4)(b).

decision where the materials "do not include, or the circumstances do not suggest, a non-refoulement claim"[11]. The power must otherwise be exercised reasonably and in good faith[12].

14 No part of the statutory power conferred by s 501CA of the Act obliges the Minister to make actual findings of fact as an adjudication of all material claims made by an applicant. Based upon the representations made by an applicant, the cancellation decision and the "relevant information" given to the applicant pursuant to s 501CA(3)(a), the Minister must, when the Minister is not satisfied that an applicant passes the character test, then determine relevantly whether to be satisfied that there is "another reason" why the cancellation decision should be revoked[13]. Deciding whether or not to be satisfied that "another reason" exists might be the product of necessary fact finding, or the product of making predictions about the future, or it might be about assessments or characterisation of an applicant's past offending.

15 If the representations made lack any substance altogether, then this of itself might justify a decision not to be satisfied that "another reason" exists to revoke the cancellation decision, without any need to make any findings of fact about the various claims made. Moreover, some of the topics that might be traversed might not lend themselves to be addressed by way of evidence[14]. They may involve matters of judgment, especially when weighing factors for and against revocation. The breadth of the power conferred by s 501CA of the Act renders it impossible, nor

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11 *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897 at 902 [33] per Nettle, Gordon and Edelman JJ; 383 ALR 194 at 200.

12 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 per Latham CJ (Starke J agreeing). See also *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 532 [73] per Gleeson CJ and Gummow J; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 35 [33] per Gageler and Keane JJ.

13 In the case of a delegate of the Minister or the Administrative Appeals Tribunal, any written directions given by the Minister must also be complied with: s 499 of the *Migration Act 1958* (Cth).

14 *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 1010 [262] per Hayne J; 190 ALR 601 at 661.

is it desirable, to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation.

16 If the Minister is not satisfied that another reason for revocation exists, s 501G(1) of the Act obliges the Minister to give the applicant a written notice setting out, amongst other things, the decision, specifying the provision – and its effect – under which the decision was made, and the reasons for the decision[15]. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*, a majority of this Court said that the minimum obligation under s 501G was to express the "essential ground or grounds"[16] for the conclusion reached by the Minister. Importantly, a failure to comply with s 501G does not invalidate the decision made under s 501CA[17]. For the purpose of giving "reasons", the Minister is also obliged, pursuant to s 25D of the *Acts Interpretation Act 1901* (Cth), to set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based. The respondent here did not suggest that s 25D had not been complied with.

17 If the Minister exercises the power conferred by s 501CA(4) and in giving reasons makes a finding of fact, the Minister must do so based on some evidence or other supporting material, rather than no evidence or no material, unless the finding is made in accordance with the Minister's personal or specialised knowledge or by reference to that which is commonly known. By "no evidence" this has traditionally meant "not a skerrick of evidence"[18].

18 There is otherwise nothing in the statutory language of s 501CA(4) of the Act that prohibits the Minister from using personal or specialised knowledge, or commonly accepted knowledge, for the purpose of considering the representations made by an applicant, and in

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15 Where the decision was made by the Minister's delegate, the notice must also set out the applicant's rights of review: s 501G(1)(f) of the *Migration Act 1958* (Cth).

16 (2003) 216 CLR 212 at 224 [40] per Gleeson CJ, Gummow and Heydon JJ.

17 *Migration Act 1958* (Cth), s 501G(4). See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 225 [45] per Gleeson CJ, Gummow and Heydon JJ.

18 *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 587 [575] per Weinberg J, quoting Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 239.

determining whether the Minister is satisfied that there is "another reason" for revocation. Indeed, there are simply no limitations on the sources of information that may be considered by the Minister in determining whether to reach the state of satisfaction prescribed by s 501CA(4)(b)(ii). Nor is there any express requirement that the Minister disclose whether a material finding was made from personal knowledge. In the circumstances of the present case, where no evidence or other material has been identified in support of the Minister's findings about the speaking of English and the availability of services in American Samoa and Samoa, it can be assumed that the findings proceeded from the Minister's personal or specialised knowledge or were matters commonly known.

19 In exercising the power conferred by s 501CA(4) of the Act, the Minister is free to adopt the accumulated knowledge of the Department of Immigration, Citizenship, Migrant Services and Multicultural Affairs ("the Department"). Indeed, it is now well established that the Minister may adopt as the Minister's own written reasons a draft prepared by a departmental officer, provided that such reasons actually reflect the reasons why the Minister had reached her or his decision[19].

20 There is no necessary dividing line, for the purposes of s 501CA of the Act, between the use of personal or specialised knowledge, or the use of that which is commonly known, as against the need for some evidence or other material to support a finding which the Minister may make. Where the Minister wishes to make a finding in support of a conclusion that she or he is not satisfied that there is "another reason" for revocation, and the Minister has personal or specialised knowledge which supports that finding, the Minister may use that knowledge. The Minister may also supplement or support such a finding with evidence or other material. Where the finding is not within such personal or specialised knowledge, and is not a matter commonly known, it will need to be supported by some evidence or other material. It cannot be asserted without any basis at all. Different considerations might arise if the finding in question was material to the process of reasoning and was incorrect[20]. But that has not been suggested here.

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19 *Minister for Immigration and Multicultural Affairs v W157/00A* (2002) 125 FCR 433 at 446 [39] per Branson J (Goldberg and Allsop JJ agreeing); *C Incorporated v Australian Crime Commission* (2010) 113 ALD 226 at 241-242 [59] per Black CJ, Mansfield and Bennett JJ; *Folau v Minister for Immigration and Border Protection* (2017) 256 FCR 455 at 474 [78], 475 [84], 477 [90] per Murphy and Burley JJ.

20 cf *Duggan v Federal Commissioner of Taxation* (1972) 129 CLR 365 at 368-369, 373 per Stephen J.

Keane J

Gordon J

Edelman J

Steward J

Gleeson J

21 It would, one would hope, be a rare case where a fact is asserted in support of a reasoned outcome under s 501CA of the Act which has no basis for its existence. However, there have been exceptions in extreme and rare cases where the Minister has made particular or personal findings about an applicant, which could not have been the subject of any pre-existing personal or specialised knowledge (or common knowledge), and were not otherwise supported in any way. Examples of this have included findings made in the absence of any evidence or supporting material about the danger an applicant might pose in the future to the Australian community, and about the type of hardship an applicant might personally suffer if deported[21].

22 It finally remains to be observed, and emphasised, that an applicant's prospects of persuading the Minister to revoke a cancellation decision will doubtless be all the greater if the applicant adduces evidence, or other supporting material, to make good the claims that she or he makes. The production of such evidence or material in the applicant's representations would engage the need for the Minister to consider such evidence and, if necessary, to answer it with further or different evidence, or other material, if the claims are to be rejected.

The decision of the Full Court

23 Because it was common ground that there was no evidence before the Minister concerning the speaking of English or the availability of health and welfare support in American Samoa or Samoa, the basis upon which the Minister had reached his conclusions on those matters assumed importance below. The majority decided that the evidence did not support a finding that the Minister used his own personal knowledge. That was so for four expressed reasons[22]. First, the Minister's own reasons did not expressly state that he was relying on his personal knowledge. Secondly, the matters were said not to be commonly known, which supported an inference that the basis for the two findings could not have been drawn from personal knowledge. Thirdly, it could not be inferred that the Minister had the required personal knowledge on the basis that he was the Minister charged with the responsibility of administering the Act. Fourthly, there was no

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21 See, eg, *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628; *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595.

22 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386 at 399-400 [42]-[46] per Kerr and Charlesworth JJ.

evidence that the author of the Department's draft reasons had "any appreciation" of the Minister's prior knowledge.

24 As the majority concluded that it was an implied condition for the exercise of the power conferred by s 501CA(4) of the Act that the Minister's state of satisfaction "be formed on the basis of factual findings that are open to be made on the evidentiary materials"[23], it was said that this condition had not been complied with. This principle was said by senior counsel for the respondent to be supported by the reasons of Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu*[24]. In the result, the majority determined that the impugned findings were "critical"[25] to the Minister's reasoning process, and so it followed that the Minister had made a jurisdictional error.

25 In contrast, Besanko J found that both matters were within the Minister's personal knowledge. His Honour also found that the respondent had made no relevant claim about the extent to which English is spoken in American Samoa and Samoa, and that this impugned finding had not, in any event, been shown to be "wrong"[26]. Moreover, and critically, both matters were said to support the ultimate finding, namely that "removal to Samoa or American Samoa [would] 'involve significant adjustments and hardship for the [respondent] and his family'"[27], a matter which favoured the respondent. It followed that the Minister had not erred.

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23 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386 at 400 [47] per Kerr and Charlesworth JJ.

24 (1999) 197 CLR 611 at 657 [145], [147].

25 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386 at 401 [48], [52], 403 [61] per Kerr and Charlesworth JJ.

26 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386 at 393 [13].

27 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386 at 393-394 [14].

The Minister's personal knowledge

26 With respect, Besanko J was correct. In the circumstances of this case, the obvious inference is that the two impugned findings were the product of the Minister's personal or specialised knowledge. Senior counsel for the respondent expressly disavowed any suggestion that the Minister had merely made things up.

27 Again, with respect, the four reasons relied upon by the majority below for concluding that each observation was not made using the Minister's personal or specialised knowledge should not be accepted. Given the store of knowledge the Minister will have built up over many years, from dealing with individuals from so many countries and territories, the source of such specific observations about conditions in American Samoa and Samoa could only have been from the Minister's experience. In that respect, to reiterate, it had not been shown that either observation was incorrect.

28 It follows that the majority's observation that the Minister's satisfaction or non-satisfaction for the purposes of s 501CA(4) of the Act must be formed on the basis of factual findings that are open to be made on the evidentiary materials is not, with great respect, entirely correct. First, and as already mentioned, the Minister is not prohibited from using the accumulated knowledge of the Department. Secondly, representations may be received which are no more than bare assertions about a course of future events. The Minister may simply not be persuaded that such assertions can constitute "another reason" for revocation. Such a conclusion does not require the Minister to make any factual findings. Finally, because of the applicable statutory regime, the respondent's particular deployment of *Eshetu* was, with respect, misconceived.

29 It also follows that the Minister did not err in law when making the two impugned findings. It is, therefore, not necessary to address the reasoning of the majority, or the respondent's submissions, to the effect that the suggested errors were jurisdictional in nature.

Notice of contention

30 The respondent sought to support the majority's decision below on two additional and alternative bases: first, that it was not legally permissible for the Minister to have relied on his personal or accumulated specialised knowledge instead of evidence; and secondly, that if it was permissible to rely on such knowledge, the observations about the widespread use of English and the state of health and welfare services in American Samoa and Samoa, as a matter of procedural fairness, should have been disclosed to the respondent to permit him to make submissions about those matters.

31 The first contention has no basis. As already mentioned, there is nothing in the language of s 501CA of the Act that limits the sources of information that may be used by the Minister in determining whether to be satisfied that there is "another reason" for revocation of an earlier visa cancellation decision. Nor did the respondent refer to any other provision of the Act which would qualify the power conferred in the way suggested.

32 The respondent accepted that he needed leave to rely on the second contention, as it was new. It is not necessary to consider the issue of leave, as the second contention should, in any event, also be rejected. It was the respondent who made claims about how he and his family would be exposed to adverse conditions if his family were to follow him to American Samoa or Samoa. He was given the opportunity to make submissions about such issues and to support his claims with evidence. In the end, he relied only upon bare assertions. By his reasons, the Minister gave his response to that claim, which, in substance, was no more than to reject it. He was under no obligation to disclose his disagreement and give the respondent yet another opportunity to make claims about the likely conditions in American Samoa or Samoa[28]. This is not a case where the Minister relied upon information or matters that could not have been knowable by the respondent[29]. Nor is there any equivalent here to ss 424AA or 424A of the Act for the purposes of reaching a state of satisfaction under s 501CA(4). Even if such a provision existed, it would not oblige the Minister to give "advance written notice" of the reasons on this issue[30].

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28 *Kioa v West* (1985) 159 CLR 550 at 587 per Mason J (Deane J agreeing); *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 1010-1011 [265] per Hayne J; 190 ALR 601 at 661-662.

29 See, eg, *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 per Northrop, Miles and French JJ; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 164-165 [41]-[44] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

30 *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196 [18] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; 235 ALR 609 at 616. See also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 166 [48] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

Keane *J*

Gordon *J*

Edelman *J*

Steward *J*

Gleeson *J*

33 The appeal should be allowed. The Minister should pay the reasonable costs of the respondent in this Court.

34 Orders 4 and 5 of the orders made by the Full Court of the Federal Court of Australia on 24 August 2020 should be set aside and, in their place, it should be ordered that:

1. order 2 of the orders made by the Federal Court of Australia on 20 February 2020 be set aside and, in its place, order that the respondent pay the applicant's costs of the proceeding as agreed or taxed; and

2. the appeal be otherwise dismissed.