FEDERAL COURT OF AUSTRALIA

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Mukiza [2022] FCAFC 89

Appeal from:	*Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1503
File number:	NSD 30 of 2022
Judgment of:	**MARKOVIC, THAWLEY AND CHEESEMAN JJ**
Date of judgment:	18 May 2022
Catchwords:	**MIGRATION** – appeal from decision of primary judge to grant application for judicial review of Administrative Appeals Tribunal's decision to affirm a decision of a delegate of the Minister not to revoke a mandatory visa cancellation – whether finding about health and rehabilitation services in Canada required evidence – whether no evidentiary material identified in support of a finding – whether the principles as to fact finding for the purposes of s 501CA articulated in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41 apply to Tribunal – *Viane* includes statements of general principle of relevance to the Tribunal's statutory task – appeal allowed
Legislation:	*Acts Interpretation Act 1901* (Cth) s 25D *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1) *Migration Act 1958* (Cth) ss 499, 500(1), 501(3A), 501G(1), 501CA(4)
Cases cited:	*Bochenski v Minister for Immigration and Border Protection* [2017] FCAFC 68; 250 FCR 209 *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; 266 CLR 250 *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; (2021) 395 ALR 403 *Muin v Refugee Review Tribunal* [2002] HCA 30; 190 ALR 601

	Mukiza and Minister for Home Affairs (Migration) [2019] AATA 4445 *Mukiza and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1488 *Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1503 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 95 ALJR 441 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 144; (2020) 278 FCR 386
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	63
Date of hearing:	16 May 2022
Counsel for the Appellant:	Ms R Francois
Solicitor for the Appellant:	Clayton Utz
Counsel for the First Respondent:	Mr D Hooke SC, Dr J Donnelly and Mr JA Thompson
Solicitor for the First Respondent:	Zarifi Lawyers
Counsel for the Second Respondent	The second respondent filed a submitting notice save as to costs.

ORDERS

NSD 30 of 2022

BETWEEN:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** Appellant
AND:	**THIERRY MUKIZA** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**MARKOVIC, THAWLEY AND CHEESEMAN JJ**
DATE OF ORDER:	**18 MAY 2022**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the primary judge be set aside and in lieu thereof the application for judicial review be dismissed.
3. The first respondent file and serve any submissions as to costs of the trial and appeal, additional to those contained at [40] of his submissions dated 6 May 2022, by 19 May 2022, such submissions to be limited to 2 pages.
4. The appellant file and serve any evidence in relation to costs of the trial and appeal, and submissions as to costs limited to 3 pages, by 20 May 2022.
5. The question of costs of the trial and appeal be determined on the papers.

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

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 Mr Mukiza was born in Rwanda on 7 October 1992, but left after the events in 1994. Mr Mukiza's family spent time in Zambia before he and his mother went to Canada in 2003 when Mr Mukiza was 10. Mr Mukiza and his mother remained in Canada where they were accepted as Canadian citizens. When Mr Mukiza was 17, he and his mother moved to Australia, his mother having commenced a relationship with an Australian man. Mr Mukiza was diagnosed with schizophrenia in 2010 when he was in year 11.

2 Mr Mukiza was granted a Class BS Subclass 801 Spouse visa on 20 March 2013.

3 Mr Mukiza's visa was first cancelled on 22 November 2018 under s 501(3A) of the *Migration Act 1958* (Cth) (**Migration Act**). On 29 November 2018, Mr Mukiza applied under s 501CA(4) of the Migration Act for that revocation to be revoked. On 12 August 2019, a delegate of the Minister refused to revoke the cancellation.

4 This decision was set aside by the Administrative Appeals Tribunal (**First Tribunal**) on 1 November 2019: *Mukiza and Minister for Home Affairs (Migration)* [2019] AATA 4445. In setting aside that decision, the Tribunal had stated at [60]:

> It may be assumed in terms of the level of standard of living, welfare, healthcare and associated matters that Canada has an equivalent standard to Australia.

5 Amongst the material considered by the First Tribunal was an undated report of a clinical psychologist, Mr Matt Visser, which included the following:

> While he has not managed his mental health well during his time in Australia, placing him in an environment where he has no familial support and no awareness of support services will significantly increase his risk of harm. The most likely outcome is that he will quickly fall into drug use, cease his medication, and become acutely psychotic. If that occurs in Canada, the best-case scenario is that he is arrested relatively quickly for a minor or drug related crime and is incarcerated. In that case there would be some chance of being integrated into support services, although I am not familiar enough with Canada's social support systems to guess the likelihood of that being effective. Homelessness, with all of the associated risks, for at least some period would be more likely. Should his mother not move to support him, I would estimate the chances of survival for a drug dependent person with no support in acute psychosis in Rwanda to be very low.
>
> Should he be allowed to stay in Australia there are things that could reduce his risk of recidivism. Returning to his mother's care would be of some benefit in reducing his

> risk, especially in helping him to remain on his current antipsychotic medication. At this stage, the best intervention would be transition to a long-term residential drug program. For example, the Karralika Therapeutic Community Adult Program in the ACT takes residents into a 12-month program where they go through an ongoing therapeutic intervention building supportive community networks. As it may take some time to get admitted to such a program, support through community programs, such as Directions ACT would be of benefit in the interim. I would also strongly support ongoing management through Mental Health ACT for access to psychiatric support with his medication.

6 About two months after the First Tribunal's decision, Mr Mukiza committed further offences for which he was convicted in the Queanbeyan Local Court on 9 March 2020.

7 A delegate of the Minister cancelled Mr Mukiza's visa on 18 March 2020 under s 501(3A) of the Migration Act. At the time, Mr Mukiza was serving an aggregate 12-month term of imprisonment. On 2 April 2020, he applied for a revocation of the cancellation decision under s 501CA(4) of the Migration Act.

8 On 25 February 2021, another delegate of the Minister decided not to exercise the power under s 501CA(4) to revoke the second visa cancellation. This decision was notified to Mr Mukiza by letter dated 2 March 2021. The delegate considered the representations which Mr Mukiza had made on 2 April 2020, together with the documents Mr Mukiza had previously submitted in relation to his first request for revocation (dated 29 November 2018) and Ministerial Direction No 79 under s 499 of the Migration Act.

9 Amongst the delegate's reasons was the following (emphasis in the original):

> The AAT previously considered the removal of Mr MUKIZA to a country where he has no support would be '*quite undesirable, disruptive and potentially dangerous to his health*', especially to this mental health as he has to re-establish a clinical relationship in Canada. I accept this may also be the case, but note that he has, as discussed above, failed to maintain regular contact with health care providers here anyway.
>
> I conclude that should Mr MUKIZA require further medical services of this nature, he would have similar access to health services as would be available to other Canadian citizens and his health needs could be met in that country to the same extent that they are in Australia. I note that Mr MUKIZA may suffer some hardship if his medical reports were not available to him if he were removed to Canada, but it has not been shown that this would necessarily happen.

10 On 9 March 2021, Mr Mukiza applied to the Administrative Appeals Tribunal for review of the non-revocation decision (**Second Tribunal**). He was unrepresented. Ministerial Direction No 90 applied at this time, it having been made on 8 March 2021.

11 The Minister, in his Statement of Facts, Issues and Contentions dated 27 April 2021 (**SFIC**), submitted:

> [Mr Mukiza] would have access to a high standard of mental health services and rehabilitation available to citizens of Canada, which is comparable to the services available in Australia.

12 Mr Mukiza did not challenge this statement or the statements made by the delegate set out at [9] above before the Second Tribunal.

13 The Tribunal affirmed the non-revocation decision and published reasons on 25 May 2021: *Mukiza and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1488 (hereafter "**T**").

THE JUDICIAL REVIEW APPLICATION

14 On 16 June 2021, Mr Mukiza applied to this Court for judicial review of the Second Tribunal's decision. This appeal is the Minister's appeal from the decision of the primary judge allowing that application: *Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1503 (hereafter "**J**").

15 The applicant relied on two grounds of judicial review. These were:

(1) It was not legally reasonable, rational, or logical for the Tribunal to conclude that any of the hardships the applicant may face in Canada (including relating to his mental illness) would be overcome in time if the applicant were deported.

(2) The Tribunal made findings for which there was no evidence, specifically that:

  (a) Canada had a similar standard of rehabilitation services to Australia (**Rehabilitation Finding**).

  (b) Canada is a wealthy democracy that enjoys a high standard of living, similar to Australia in many ways (**Standard of Living Finding**).

16 The primary judge rejected Ground 1 and Ground 2(b): at J[71] and J[81]. However, the primary judge concluded that Ground 2(a), concerning the Rehabilitation Finding, had been made out: J[82]. The Rehabilitation Finding is a reference to T[158]:

> The Tribunal makes the observation that should the Applicant be deported to Canada he would be entitled to access a comparable standard of health care to that in Australia, in addition to a comparable standard of support for rehabilitation services.

17 The Standard of Living Finding is a reference to T[161]:

> Whilst the Applicant has resided in Canada previously, the Tribunal accepts that this was at a time when he was predominantly a minor and in his mother's care. However, should the Applicant be deported to Canada he would suffer no language or cultural barriers given the similarities between Australia and Canada. Canada is a wealthy

> democratic democracy, enjoys a high standard of living, and is similar to Australia in many ways. Any hardships the Applicant may face (emotional, financial, or otherwise) associated with resettlement would be overcome in time once the Applicant has had an opportunity to establish himself.

18 Mr Mukiza's challenge to the Rehabilitation Finding was limited to the contention that there was no evidence for concluding that Canada had a "comparable standard of support for rehabilitation services". Mr Mukiza did not challenge the finding that he would be "entitled to access" rehabilitation services.

19 In concluding that the Standard of Living Finding was not erroneous, the primary judge stated at J[81]:

> The Standard of Living finding is of the broad propositional statement kind discussed by Roberston J in *Uelese* at [69], as not requiring evidence. The Tribunal was entitled to make a finding of the general nature of the Standard of Living finding without evidence. The applicant has not made out the second ground in relation to the Standard of Living finding.

20 In concluding that the Rehabilitation Finding was attended by jurisdictional error, the primary judge stated at J[82]:

> The Rehabilitation Finding is to be distinguished from the broad propositional nature of the Standard of Living finding. The Tribunal's finding as to rehabilitation support services is more detailed and specific to the particular personal circumstances of the applicant. It follows a more general statement about there being a comparable standard of health care to that in Australia. After the general statement, the Tribunal makes a specific statement about a category of healthcare: rehabilitation services. The area of rehabilitation services was a very important one in the context of the Tribunal's observations about the applicant's interconnected mental health and drug issues, in the context of its consideration of impediments.

21 Before the primary judge, the Minister did not accept that the Rehabilitation Finding had been made without any evidence. Her Honour rejected the Minister's submissions in this regard, stating:

> [83] The Minister rejected the proposition that the findings were made without any evidence. The Minister pointed to two pieces of evidence: the first, a concession made by the applicant in the first hearing before the Previous Tribunal, that "there is a decent health system in Canada"; and the second, the fact that the applicant had received drug counselling at the Ottawa hospital when he was a minor. Further, the Minister submitted that the applicant had not suggested that that the Rehabilitation Finding is wrong, and that a comparable standard of rehabilitation services was not available in Canada.
>
> [84] The applicant's purported concession goes to a broad proposition as to the state of the Canadian health system. It was made by the applicant in the context of representation as to his mental health and his inability to cope with a move to Canada. It was not suggested that the applicant had any actual knowledge of the state of rehabilitation support services in Canada to inform a concession.

The unfounded purported concession should not outweigh the evidence of Mr Visser, the clinical psychologist noted in his report … that "I am not familiar enough with Canada's social support systems to guess the likelihood of [the support services] being effective".

[85] The drug counselling occurred some 16 years ago when the applicant was 12 years old. It was not stated if that was private or publicly funded counselling or if it was available for adults. It provides no information about the current availability and accessibility of rehabilitation support services for impecunious adult citizens with long term substance abuse problems.

22 The primary judge then addressed why the Rehabilitation Finding required some evidence:

[86] In *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 (***McLachlan***), the Minister made findings to the effect that mental health treatments were available in New Zealand and that New Zealand was culturally and linguistically similar to Australia with comparable standards of health care, education and social welfare support. McKerracher J held at [37] that the decision maker:

> …was not required to refer to any specific evidence in order to arrive at those conclusions which were based on an understanding that New Zealand is a country with equivalent standards of health, welfare and education to Australia.

[87] Unlike the UK and New Zealand, it is not clear the extent to which Australia and Canada have shared historical, cultural and ethnic ties. Although, as the Minister submitted, Australia and Canada share British colonisation, Canada was also colonised by the French and parts of Canada, such as Quebec, speak French as their primary language.

[88] It was not suggested that the Tribunal had specialised knowledge of the state of support for rehabilitation services in Canada.

[89] Nor is the standard of Canadian support for rehabilitation services a matter of common knowledge, even to those in the field of psychology. Indeed, as noted above and referred to in the Reasons, Mr Visser stated he was not familiar enough with Canada's social support systems to guess the likelihood of the support services being effective for the applicant.

[90] To my mind, Canada falls between the UK and New Zealand on the one hand, and the United States on the other. Whilst Canada shares a history of British colonisation and language with Australia, it is geographically distant. Unlike Australia, Canada was also colonised by the French and French is the official language in some parts of Canada. It shares an extensive border with the United States. There is no evidence as to what extent Canada (in particular, the standard of its support for rehabilitation services) has been influenced by its close proximity to the US, or its French heritage.

[91] The authorities support the proposition that a Tribunal or Minister can make general high level statements as to the comparability of healthcare across countries such as the UK, New Zealand and Ireland. However, findings as to more specific or detailed matters, such as entitlement to social security, *EZA20* and *Minister for Immigration and Border Protection v Schmidt* [2018] FCA 1162 (***Schmidt***), require evidence. The Rehabilitation Support Finding falls within the latter category, given its level of specificity.

23 In reaching her decision, the primary judge relied upon the decision of the majority of the Full Court in *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 144; (2020) 278 FCR 386 – see: J[75] – [76], [95] – [98]. Mr Mukiza had relied upon this decision for the proposition that the Tribunal was required, but failed, to comply with an implied condition that the Tribunal reach its state of satisfaction on the basis of factual findings that were open on the evidentiary material before it. The Minister sought to distinguish this decision, noting in his written submissions that special leave to appeal had been granted. *Viane* was argued in the High Court a little over a week before the hearing before the primary judge.

24 Just over a week after the primary judge delivered her reasons, the High Court allowed the appeal from the Full Court's decision, endorsing the conclusions of the minority: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Viane*** [2021] HCA 41; (2021) 395 ALR 403.

25 Given the centrality of the High Court decision in *Viane* to this appeal, it is useful to set out what was decided and why before turning to the grounds of appeal.

THE HIGH COURT'S DECISION IN VIANE

26 The decision in *Viane* focussed on two findings which the Minister had made in his reasons for refusing to revoke a visa cancellation. The first finding was:

> 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.

27 The second finding was:

> 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.

28 In respect of this second finding, the Minister had stated that Mr Viane's family would have "equal access to welfare, healthcare and educational services as do American Samoans and Samoans in a similar position".

29 Mr Viane contended that the findings about the speaking of English and the availability of services in American Samoa and Samoa were made without any evidentiary support. It was common ground that there was no objective evidentiary material before the Minister capable

of supporting either finding, other than the draft reasons for decision which the Minister's Department had prepared.

30 The High Court (Keane, Gordon, Edelman, Steward and Gleeson JJ) observed at [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" [*Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657 [145], [147] per Gummow J].

31 The High Court summarised aspects of the statutory scheme so far as it concerns ss 501(3A) and 501CA(4) in the following way (footnotes omitted):

> [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. In contrast, the power of revocation is broad. 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".
>
> [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 decision where the materials "do not include, or the circumstances do not suggest, a non-refoulement claim". The power must otherwise be exercised reasonably and in good faith.
>
> [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. 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.

32 In relation to the making of findings of fact by the Minister when considering whether to exercise the power in s 501CA(4) to revoke a visa cancellation, the High Court stated (footnotes omitted):

> [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. 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 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. 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" for the conclusion reached by the Minister. Importantly, a failure to comply with s 501G does not invalidate the decision made under s 501CA. 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] 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 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 Minister's Department ("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.

[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. But that has not been suggested here.

[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 [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] 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.

33 The majority in the Federal Court had concluded that the evidence did not support a finding that the Minister used his own personal knowledge when making his findings concerning the speaking of English or the availability of health and welfare support in American Samoa or Samoa. That conclusion was based on four reasons, described by the High Court in *Viane* at [23] in the following way:

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

34 The High Court concluded that "the obvious inference is that the two impugned findings were the product of the Minister's personal or specialised knowledge": at [26]. The High Court stated at [27]:

> [T]he 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.

35 The High Court stated at [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.

THE APPEAL

36 The Minister relied on three ground of appeal:

1. The primary judge erred by holding that the Second Respondent (**AAT**) had erred in the exercise of its jurisdiction by making the "Rehabilitation Finding" without evidence.

2. The primary judge should have accepted that, unless the First Respondent had proved to the contrary, the AAT relied upon:

   (i) its own personal or specialised knowledge; or

   (ii) the specialised knowledge of the Appellant's Department as evidenced in the decision of the Appellant's delegate dated 2 March 2021; or

   (iii) matters that were commonly known.

3. In the alternative, if (contrary to ground 2) there was an error by the AAT with respect to fact finding in relation to the "Rehabilitation Finding" it was an error within jurisdiction given that fact was not put in issue by the First Respondent

in the hearing before the AAT.

Grounds 1 and 2

37 The following should be noted about the context in which the Second Tribunal made the Rehabilitation Finding at T[158] (set out at [16] above):

(1) Mr Mukiza has never put a case that, if returned to Canada, he would not be able to access a comparable standard of health care to that in Australia. No such contention had been made in his representations under s 501CA(4) or to the First or Second Tribunal. Mr Mukiza's evidence before the First Tribunal was that "there is a decent health system in Canada".

(2) The Minister and the Minister's delegates have consistently acted on the basis that the standard of health care in Canada was comparable to that in Australia. As noted at [4] above, in finding in Mr Mukiza's favour, the First Tribunal had stated that it could "be assumed in terms of the level of standard of living, welfare, healthcare and associated matters that Canada has an equivalent standard to Australia". As noted at [9] above, the second delegate referred to the First Tribunal's decision and concluded that Mr Mukiza "would have similar access to health services as would be available to other Canadian citizens and his health needs could be met in that country to the same extent that they are in Australia".

(3) Mr Mukiza has never put a case that rehabilitation support services in Canada were not comparable to those in Australia. He did not adduce any evidence to that effect. Mr Visser's report does not suggest otherwise.

(4) Mr Visser's report was before the First Tribunal and the Second Tribunal. Mr Visser stated that he was "not familiar enough with Canada's social support systems to guess the likelihood of [integration into support services] being effective". This comment was closely followed by the observation that, if Mr Mukiza were permitted to stay in Australia, "the best intervention would be transition to a long-term residential drug program". Mr Visser went on to give an example of a program available in the Australian Capital Territory with which he was familiar. This report does not address whether the health systems in Canada and Australia, including rehabilitation services, are comparable.

38 As was Mr Viane's position in *Viane*, Mr Mukiza does not put a case on appeal, and did not submit to the primary judge, that the Rehabilitation Finding is in fact incorrect.

39 The Tribunal concluded at T[160] that "there will be initial challenges for [Mr Mukiza] in establishing clinical relationships should he be deported to Canada with respect to managing his Schizophrenia". The Tribunal concluded at T[161], however, that there would be no language or cultural barriers, that Canada was a "wealthy democratic democracy" which "enjoys a high standard of living" and "is similar to Australia in many ways". These were the Standard of Living Findings. The conclusion at T[158] that Canada has "a comparable standard of health care to that in Australia, in addition to a comparable standard of support for rehabilitation services" is a generalised conclusion. It was not a finding appropriately described as "specific to the particular circumstances of the applicant" – compare: J[82]. The Rehabilitation Finding was a general statement about the standard of health care and support for rehabilitation services. The finding is expressed at a higher level of generality than the findings considered by the High Court in *Viane*.

40 The Rehabilitation Finding was not one which was only available to be made on the basis of direct evidence. As the High Court stated in *Viane* at [18], it can be assumed that the finding proceeded from the [Tribunal's] personal or specialised knowledge. It is true that the Minister's "personal or specialised knowledge" might be different as between the Minister and the Tribunal. However, like the Minister from time to time, or the Minister's delegates from time to time, the Tribunal also has personal or specialised knowledge. This is not one of the extreme or rare cases where a particular or personal finding has been made "about an applicant, which could not have been the subject of any pre-existing personal or specialised knowledge (or common knowledge)": *Viane* at [21].

41 Further, to the extent the Tribunal might be seen to have acted on the accumulated knowledge of the Department as expressed in the material before the Tribunal, in particular the delegate's decision, this was permissible. There is nothing in the language of s 501CA(4) 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: *Viane* at [31]. The same must be true of the Tribunal when it comes to considering the exercise of the power in s 501CA(4) on review.

42 Mr Mukiza made a number of submissions concerning *Viane*.

43 First, Mr Mukiza relied on the primary judge's observation at J[88] that "[i]t was not suggested that the Tribunal had specialised knowledge of the state of support for rehabilitation services in Canada".

44 The proper inference, it not being suggested that the Tribunal simply made the matter up (see *Viane* at [26]), is that the Tribunal acted on its personal or specialised knowledge that Canada has a standard of health care, including rehabilitation support services, broadly comparable to those available in Australia. It may also have acted on the conclusion broadly to that effect contained in the delegate's decision. Whilst the Tribunal did not expressly refer to the delegate's reasons for decision, the delegate's statement of reasons was before the Tribunal and is likely to have been closely considered. It would have been appropriate to act on the material contained the delegate's decision in circumstances where the Minister's position, as expressed in his SFIC, was that "[Mr Mukiza] would have access to a high standard of mental health services and rehabilitation available to citizens of Canada, which is comparable to the services available in Australia" and Mr Mukiza did not contend that the Minister's proposition was incorrect or adduce evidence against the proposition.

45 It was submitted that Mr Visser's report contradicted the Rehabilitation Finding. Mr Visser is a clinical psychologist practising in the ACT. The relevant part of his report refers to a specific program in the ACT which he considered would be the best program for Mr Mukiza to attend. The report assumes rehabilitation services are available in Canada. Mr Visser was not sufficiently familiar with Canada's social support systems (or rehabilitation services) to express a view about the potential effectiveness of them to Mr Mukiza's particular circumstances. The report does not contradict the Tribunal's finding of broad equivalence in rehabilitation services available in Canada and Australia.

46 Mr Mukiza's second and third propositions were to the effect that the principles in *Viane* did not apply to the Tribunal. Mr Mukiza contended that the statutory power and legislative context are different as between the Minister and the Tribunal. Mr Mukiza submitted that the High Court's reasoning in *Viane* was "strictly concerned" with the Minister acting personally under s 501CA(4). Mr Mukiza observed that the Tribunal is bound by Ministerial Directions whereas the Minister, acting personally, is not. The relevant decision in *Viane* was made by the Parliamentary Secretary to the Minister, who is also not bound by Ministerial Directions: *Bochenski v Minister for Immigration and Border Protection* [2017] FCAFC 68; 250 FCR 209 at [79]. Mr Mukiza submitted that the decision in *Viane* should not be "extended" so as to apply in the Tribunal. It was said that such an "extension" was for the High Court, not this Court.

47 The Migration Act provides a right to seek merits review in the Tribunal of "decisions of a delegate of the Minister under subsection 501CA(4) not to revoke a decision to cancel a visa": s 500(1)(ba). The Tribunal stands in the shoes of the original decision-maker. The Tribunal's statutory task is sourced in the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) and the Migration Act. The Migration Act modifies (and otherwise affects) various provisions of the AAT Act – see, for example: s 499 and s 500(6A) to s 500(6L). The central task of the Tribunal on review, nevertheless, revolves around s 501CA(4).

48 It is true that the High Court was not dealing with a challenge to the Tribunal's fact finding on review of a decision of the delegate of a Minister. However, the High Court was dealing with what s 501CA(4) required of the decision-maker in that case and was addressing that which was permissible in terms of fact finding in relation to a decision under s 501CA(4). The central question for the Tribunal on review is the application of s 501CA(4).

49 Like the Minister acting personally, and the Minister's delegate, the Tribunal may act on its personal or specialised knowledge and on matters which are commonly known. Further, it is permissible for the Tribunal to act on the material before it which might include statements sourced from "accumulated knowledge" (in the sense described in *Viane* at [19]) which the Tribunal might choose to accept. There is nothing in s 501CA(4) or the Migration Act generally or in in the AAT Act which prevents the Tribunal from making findings for the purposes of a review of a decision under s 501CA(4) on the basis of, for example, country information or the decision of the delegate.

50 Mr Mukiza submitted that the High Court's reference at [27] to "the store of knowledge" the Minister has "built up over many years, from dealing with individuals from so many countries and territories" could not be translated to the Tribunal sitting in the General Division.

51 Mr Mukiza submitted that the General Division of the Tribunal could not be equated to other specialist tribunals such as the former Refugee Review Tribunal. In ***Muin*** *v Refugee Review Tribunal* [2002] HCA 30; 190 ALR 601, the applicant sought judicial review in the High Court of a decision of the Refugee Review Tribunal which had conducted merits review of a decision of a delegate of the Minister. Gleeson CJ observed at [7]:

> A review of such a decision is not an adversarial proceeding. There is no contradictor. No issue is joined. The applicant seeks to persuade the Tribunal that the unfavourable decision under review should be set aside. Typically, the primary decision will have taken into account country background information. Both the delegate, and the Tribunal member to whom the application for review is assigned, will be likely to have

> considered many cases involving conditions in, say, Indonesia, and will have access to official and other sources of information bearing upon political and social circumstances in an applicant's country of origin. As is often the case with administrative decision-makers, they are likely to accumulate knowledge from the repetitive nature of the matters with which they deal. They have available to them what is, in effect, a library of reference material to which they may resort for the purpose of making decisions. The Act (s 420) requires the Tribunal to do substantial justice, deciding each case on its merits and avoiding technicalities.

See also: *Muin* at [12] (Gleeson CJ); [116] (McHugh J); [263] (Hayne J); [300] (Callinan J).

52 In *Minister for Immigration and Multicultural Affairs v* ***Jia Legeng*** [2001] HCA 17; 205 CLR 507 at [180], Hayne J observed:

> … The decision-maker, in a body like the Refugee Review Tribunal, will bring to the task of deciding an individual's application a great deal of information and ideas which have been accumulated or formed in the course of deciding other applications. A body like the Refugee Review Tribunal, unlike a court, is expected to build up "expertise" in matters such as country information. Often information of that kind is critical in deciding the fate of an individual's application, but it is not suggested that to take it into account amounts to a want of procedural fairness by reason of prejudgment.

53 The observations of Gleeson CJ in *Muin* and Hayne J in *Jia Legeng* are relevant to the General Division of the Tribunal, where character-related visa decisions are determined. Like the delegate, the Tribunal member to whom an application for review is assigned, is likely to have considered many cases involving conditions in various countries to which a person is potentially being returned. Those members are likely to accumulate knowledge from the matters with which they deal.

54 No doubt the Tribunal, like the Minister, is engaged in work beyond work connected to the Migration Act generally or character-related visa decisions specifically. The fact that the Tribunal performs such other work does not mean that the Tribunal does not have personal or specialised knowledge or that matters will not be commonly known to it.

55 Mr Mukiza also placed reliance on the fact that the Tribunal was required by s 43(1) of the AAT Act to give reasons for its decision. Mr Mukiza ultimately accepted, however, that the content of the obligation to give reasons under s 43 of the AAT Act was not relevantly different from the obligation of the Minister under s 501G(1) read with s 25D of the *Acts Interpretation Act 1901* (Cth).

56 Fourthly, Mr Mukiza submitted that the fact that the Tribunal stands in the shoes of the original decision-maker says nothing about the application of the principles in *Viane* to the decision-making power of the Tribunal.

57 On review, the Tribunal's task is to determine the correct or preferable decision under s 501CA(4) – see, in a different statutory context: ***Frugtniet*** *v Australian Securities and Investments Commission* [2019] HCA 16; 266 CLR 250 at [14] (Kiefel CJ, Keane and Nettle JJ). In *Frugtniet* at [51], Bell, Gageler, Gordon and Edelman JJ said (footnotes omitted):

> … [E]xcept where altered by some other statute, which has not occurred here, the jurisdiction conferred on the AAT by ss 25 and 43 of the AAT Act, where application is made to it under an enactment, is to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review. The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision. A consideration which the primary decision-maker must take into account in the exercise of statutory power to make the decision under review must be taken into account by the AAT. Conversely, a consideration which the primary decision-maker must not take into account must not be taken into account by the AAT.

58 *Viane* describes the statutory task under s 501CA(4) and identifies, amongst other things: (a) that it is not always necessary for the Minister to make findings of fact in considering representations under s 501CA(4); and (b) what is permissible if the Minister makes findings of fact in exercising the power. The Tribunal's task under s 501CA(4) is relevantly the same.

59 It is to be accepted that a review in the Tribunal involves a different procedure, and that various provisions of the AAT Act apply to the Tribunal, which do not apply to the Minister. Nevertheless, the Tribunal's task centres on the application of s 501CA(4). The principles in *Viane* are plainly relevant to the Tribunal's task on review.

60 Fifthly, Mr Mukiza submitted that it could not be concluded that the Tribunal acted on its own knowledge or the knowledge of the Department or on matters which are commonly known. In this regard, Mr Mukiza observed that the Tribunal did not state it was so acting. The short answer to this is that the Tribunal did not have to state that it was acting on that basis: *Viane* at [18]. The question is what the Tribunal did. As noted at [44] above, the better inference is that the Tribunal acted on its own knowledge or, perhaps, on the basis of material contained in the delegate's decision.

61 Finally, Mr Mukiza challenged the Minister's submission that Mr Mukiza was not entitled to succeed unless he could demonstrate either that he was denied procedural fairness or that the

impugned finding was wrong. The onus on Mr Mukiza, assuming he first succeeded in establishing that the finding was one which required evidence but was one in respect of which there was not a skerrick of evidence (*Viane* at [17]), is to show that, if the error had not occurred, there is a possibility that the outcome may have been different: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421; at [2], [45]; ***MZAPC** v Minister for Immigration and Border Protection* [2021] HCA 17; 95 ALJR 441 at [39]. If that onus is not discharged, the error will not have been shown to be jurisdictional: *MZAPC* at [1] to [3], [29] to [32] (Kiefel CJ, Gageler, Keane and Gleeson JJ). The discharge of this onus does not necessarily require proof that the impugned finding was wrong. It might, for example, be shown that the outcome might have been different simply because the impugned finding would not have been made. It is not necessary to determine whether the outcome may have been different if the Rehabilitation Finding was not made, because Mr Mukiza has not established that the Rehabilitation Finding was attended by error.

Ground 3

62 It is not necessary to address Ground 3 of the appeal given that Grounds 1 and 2 are made out.

CONCLUSION

63 The appeal should be allowed. The primary judge's decision should be set aside and, in its place, the Court should dismiss the application for judicial review.

I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Markovic, Thawley and Cheeseman.

Associate:

Dated: 18 May 2022