HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
Appellant

and

ALEX VIANE
Respondent

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

1. The respondent certifies that these submissions are in a form suitable for publication on the Internet.

Part II: ISSUES

2. The respondent accepts that the appeal raises the two issues reflected in the submissions of the appellant[1] (the **Minister**) **(AS)**: **AS[2]**. However, for the reasons given at paragraph [7] below, the first ground of appeal does not capture the finding of fact actually made by the Full Federal Court (**FC**) at [41]-[46].

3. The respondent's Notice of Contention **(NOC - CAB 146)** raises the following further issues:

   (a) whether it was permissible for the Minister to rely upon his personal knowledge or accumulated specialist knowledge, in the circumstances of this case, to find:

      (i) that English was widely spoken in American Samoa and Samoa; or

      (ii) that Health and welfare services existed in those jurisdictions, which the respondent and his family could access; and

   (b) if it was permissible for the Minister to rely upon the personal knowledge or accumulated specialist knowledge to make those findings, whether the Minister was required by the rules of procedural fairness to disclose that knowledge to the

[1] Appellant's Submissions **(AS)**, dated 30 April 2021.

respondent and invite the respondent to make submissions or adduce additional evidence or other materials concerning that knowledge.

4. The second ground was not put below and the respondent accepts he requires leave to rely upon that ground, which involves a pure question of law (see paras [55]-[62] below).

Part III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

5. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required in this case.

Part IV: STATEMENT OF RELEVANT FACTS

6. The respondent accepts the Minister's statement of relevant facts reflected at **AS[6]-[14]** subject to the following qualification. At **AS[13]**, it was asserted that the Minister made findings that 'English is spoken' in Samoa and American Samoa. To be more precise, the actual finding made by the Minister was that English is widely spoken in those jurisdictions.[2]

Part V: ARGUMENT

The reasoning of the majority at [41]-[46] was not precluded by the terms of the Act

7. The Minister misstates the effect of the reasoning of the majority at FC [41]-[46]. That reasoning was not primarily directed to a "factual contest" as to whether the Minister did or did not possess "relevant accumulated knowledge" (contra AS [26]). As was expressly noted at FC [41], their Honours were rather concerned with a different question: "[w]hether the Minister based his findings on personal or specialized knowledge" (our emphasis). That, as their Honours correctly observed, is "a question of fact to be determined in light of all the circumstances of the case". And, framed in that way, the inquiry necessarily assumes that the *Migration Act 1958* (Cth) (the **Act**) permits recourse to such knowledge or expertise.[3]

8. The effect of the Minister's submission appears to be that that factual issue is foreclosed once one is dealing with any finding of fact which falls within the "field of knowledge that s 501CA assumes the Minister will have": AS [26]. That is, one is to apply some form of presumption that the decision has in fact been made on the basis of such knowledge.

9. There are obvious difficulties with that suggestion. On any view, s 501CA does not

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[2] Core Appeal Book **(CAB)**, 11[23].
[3] See the first two sentences of FC [41] and cf AS [22]-[24].

require that any factual issues regarding conditions in countries (where relevant) be determined by reference to the Minister's accumulated knowledge or expertise. The authorities upon which the Minister relies go no further than the proposition that, depending upon the particular statutory context, a decision maker may be *permitted* to rely upon such matters.[4] There could hardly be a *more* prescriptive approach to s 501CA given the breadth of that power.[5]

10. And the fact that a decision maker is permitted to rely on such matters could not answer the question of whether the decision maker has in fact done so. There may be good reasons why the decision maker would choose not to proceed by reference to their own expert or accumulated knowledge and determine instead to rely upon other material.[6] Those reasons may well include that the decision maker considers that their knowledge is inadequate or incomplete. It is an inherently improbable construction that the Act is to be construed as permitting one to proceed on the basis that the Act "assumes" the decision maker has relied upon knowledge or expertise they do not in fact possess: cf AS [25], [26].

11. Nor do the authorities upon which the Minister relies suggest any rule of construction or principle which would produce that odd result. In *Spurling*, which appears to be the foundation for the Minister's argument regarding the authority to proceed on the basis of accumulated knowledge or expertise, Justice Stephen observed that the members of the Tribunal "have" specialist expertise and experience which the legislation intends them to "employ".[7] That is plainly a reference to a body of knowledge and experience which is in fact possessed and able to be employed by the Tribunal. In *Thomson*,[8] Fox J likewise referred to the Committee "using" its "collective knowledge" in its evaluation, which can only sensibly be understood to be the application (or use) of the knowledge which it actually possesses.

12. Nor have the Courts applied any such presumption of the kind for which the Minister seemingly contends.

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[4] *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1 1 (***Spurling***) at 11; *Minister for Health v Thomson* (1985) 8 FCR 213 at 217 (***Thomson***).

[5] *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 383 ALR 194 (***Applicant S270***) at [36].

[6] See, for example, *Kalil v Bray* [1977] 1 NSWLR 256 at 265 (Moffit P), referring to the "considerable dangers in an expert tribunal using expert knowledge in respect of which there is a genuine difference of view within the body of the profession concerned" and going on to observe that in such a case "[t]he issue should then be dealt with by evidence".

[7] *Spurling* [1973] VR at 11.

[8] *Thomson* (1985) 8 FCR 213 at 217.

13. Far more clearly than the provisions in issue here, the statute in *Spurling* indicated that the Tribunal was to apply its knowledge and experience to its decision-making task: so much was obvious from the provisions dealing with its composition.[9] Yet it is clear that Stephen J did not proceed on the basis that it ought be presumed that the Tribunal had in fact acted upon such knowledge or expertise. His Honour rather scrutinised the reasons and the transcript of the hearing before the Tribunal and concluded that "the Tribunal did not act upon its own experience but rather upon the evidence placed before it as to what had been the experience in the case of other regional shopping centres".[10]

14. A similar approach is apparent in the reasoning of the Court of Appeal of Western Australia in *Dekker v Medical Board of Australia*.[11] Again, far more clearly than the provisions in issue here, the statute in *Dekker* expressly contemplated that the Western Australian State Administrative Tribunal would make "appropriate use of the knowledge and experience of Tribunal members".[12] The Tribunal as constituted in that case included two medical practitioners,[13] as was required by the Act.[14] An important issue of fact in that case was whether a particular professional standard or duty was generally accepted by members of the medical profession (a duty on medical practitioners to stop and render assistance at a car accident), and the content of any such duty.[15] The Tribunal did not expressly make findings as to that matter and the Court said it was "difficult to imply a finding to that effect", particularly having regard to the conduct of the hearing.[16] The Court did go on to find that, even if it be assumed for the sake of argument that such a finding had been made (as was urged by the respondent), that would have involved error.[17] However, as is plain from the doubts it expressed about that issue, the Court did not apply some form of presumption that the knowledge and experience of the medical members had in fact been applied in that way.

15. Closer to the current context, and as the majority here explained (FC [44]), the

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[9] *Spurling* [1973] VR 1 at 11, referring to s19A of the *Town and Country Planning Act 1961* (Vic).
[10] *Spurling* [1973] VR 1 at 8-10.
[11] [2014] WASCA 216 (***Dekker***).
[12] See s9 of the *State Administrative Tribunal Act 2004* (WA), extracted at [45].
[13] *Dekker* [2014] WASCA 216 at [43].
[14] Section 22A(1)(b) of the *State Administrative Tribunal Act 2004* (WA), extracted at [22].
[15] *Dekker* [2014] WASCA 216 at [72] and [86].
[16] *Dekker* [2014] WASCA 216 at [81].
[17] *Dekker* [2014] WASCA 216 at [84] and [92]-[93].

decisions of first instance judges of the Federal Court in *Uelese*,[18] *McLachlan*,[19] *Webb*[20] and *Schmidt*[21] cohere with that understanding.

16. *Uelese* concerned a finding made by the Administrative Appeals Tribunal to the effect that a former visa holder would have access to government benefits in New Zealand that were of a similar standard to those available to him in Australia. On judicial review of the Tribunal's decision, it was submitted that the finding was unsupported by evidence and thus constituted jurisdictional error. Rejecting that ground, Robertson J said that statement was "no more than a broad proposition as to the availability of government benefits in New Zealand and not one that required evidence as to the amount of a benefit, the terms and conditions of that benefit or the eligibility criteria for that benefit".[22] *McLachlan* similarly concerned the non-revocation of a decision to cancel the visa of a New Zealand citizen. The Minister in that case 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. Justice McKerracher held that the Minister "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".[23] *Webb*[24] involved similar reasoning.

17. However, those decisions, properly understood, did not involve the application of some form of broad presumption about the Minister's state of knowledge about the conditions in other countries. That was made clear in *Schmidt*, which concerned a finding that the United States of America had a government welfare system offering a level of support that was broadly comparable to that available in Australia. It was common ground that there was no objective evidence before the Minister to support the findings. Justice Burley held that situation was not comparable to that which arose

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[18] *Uelese v Minister for Immigration & Border Protection* [2016] FCA 348; 248 FCR 296 at [69] (Robertson J).
[19] *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 at [37] (McKerracher J).
[20] *Webb v Minister for Home Affairs* [2020] FCA 831 (Anastassiou J) (***Webb***).
[21] *Schmidt v Minister for Immigration and Border Protection* [2018] FCA 1162; (2018) 162 ALD 495 at [25]-[34] (Burley J) (***Schmidt***).
[22] *Uelese v Minister for Immigration & Border Protection* [2016] FCA 348; 248 FCR 296 at [69] (Robertson J).
[23] *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 at [37] (McKerracher J).
[24] *Webb* [2020] FCA 831 at [96]-[100].

in *McLachlan* and *Uelese* – observing that a "broad statement as to the availability of welfare benefits could be regarded as unexceptional" (cf his Honour's observations regarding the comparability of Australian and United States welfare systems at [28], to the effect that the Minister's conclusions on those matters were neither notorious nor patently correct). Nor did his Honour accept, in that context, that the Minister had relied upon expertise or accumulated knowledge as contended for by the Minister: at [27]. That was because the material before the Court did not suggest that the Minister was relying on "built up 'expertise' in matters such as country information of the type to which Hayne J was referring [in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [180]] or that he had considered or informed himself of country information concerning the welfare system in the United States available to him at the time of his decision".

18. As the majority observed in the decision below (FC[44]), the result in *Schmidt* can be explained by reference to a (common sense) proposition that the particularity or obscurity of the relevant subject matter may ("[d]epending on all the circumstances") lead to a factual inference that the decision maker has not in fact acted upon any specialised or accumulated knowledge, and has instead acted upon no evidence at all. That may be particularly so where (as in *Schmidt*) the decision maker expresses the relevant "finding" in conclusory terms, glossing over possible matters of controversy or detail.[25]

19. Once those matters are brought to account, and even if the Minister be correct in asserting that the Act permitted him to have regard to accumulated knowledge and expertise, it cannot be said that the terms of the Act foreclosed the factual inquiry identified by the majority at FC [41]-[46]. No error arises from the fact that the majority entertained that inquiry (contra AS [26]).

No error in the reasoning of the majority at [41]-[46]

20. Nor does the reasoning at FC [41]-[46] otherwise display any relevant error: contra AS [30]-[34].

21. The Minister criticises or seeks to downplay the four observations there made by their Honours. For the following reasons, those criticisms are not well made.

22. The **first observation** (FC [43]) concerned the Minister's reasons, noting that they

[25] See *Dekker* [2014] WASCA 216 at [90] and see also [89].

did not specify that the findings were based upon personal or specialised knowledge, which naturally tended "toward a conclusion that there was none". The Minister suggests that that was a "neutral factor", and asserts that the majority accepted "it was not sufficient in itself": AS [31]. That somewhat understates what was said by their Honours. Their Honours certainly observed that matter was "not conclusive", which goes no further than observing that other aspects of the evidence may have pointed the other way. But the point was that there was no such material, as emerges from the reasoning that followed.

23. Nor is there any difficulty in attributing importance to what emerged from the Minister's reasons in this context. As submitted at para [13] above, that was the very approach adopted by Stephen J in *Spurling*.

24. The **second observation** (FC [44]) is likewise unremarkable for the reasons given at [15]-[18] above. Again, their Honours said no more than that one could apply a (common sense) proposition that the particularity or obscurity of the relevant subject matter may lead to an inference that the decision maker has not in fact acted upon any specialised or accumulated knowledge. Indeed the Minister seemingly accepts as much: AS [31]. Applied here, that suggested that the preferable inference was that the Minister had instead acted upon no evidence at all.

25. The Minister points to the fact that the Court used the term "common knowledge" (as a contrast to that which was "obscure") and submits that there was no evidence as what was or was not "common knowledge", or what could be regarded as "obscure": AS [31]. However, in using those terms, the Court was merely explaining the different outcomes in *Uelese*, *McLachlan*, *Webb* and *Schmidt* and responding to a submission put by the Minister's counsel to the effect that the Minister was entitled to rely upon his "general" or "common" knowledge as opposed to that which concerned more "obscure" subject matter: **CAB 81, lines 21-30 and lines 39-43**. The Minister can scarcely complain that the Court dealt with that submission in a manner which reflected the terms in which it was made. In any event, the more fundamental point made by the majority was the common-sense proposition identified above.

26. The **third observation** is to be read in light of the second observation: the point was, there was no reason one would infer from the Minister's responsibility for the administration of the Act knowledge of that relatively obscure and particular subject matter. The Minister's criticism of that reasoning is, in part, simply to assert otherwise. That does not grapple with the Court's reasoning. Nor is it answered by

observing (as the Minister does) that the then Minister had served in the portfolio for some time and may be understood to have "acquired some basic knowledge about the nations of the Pacific" (our emphasis). The point made by the Court was that the information in question was not of that nature. It involved matters of more granular detail concerning the cultural, linguistic and political circumstances in Samoa and America Samoa (see FC [44] and cf AS [20]). In that regard:

a. The Minister's finding that English is widely spoken in American Samoa and Samoa[26] is not a statement of a "general nature" (contra AS [20]); it is a *specific* assertion that a particular language is spoken with a particular frequency or commonality throughout one foreign state and throughout a part of another foreign state, each located in the region of the Pacific Ocean.

b. The Minister's finding that the respondent and his family 'will have equal access to welfare, healthcare and educational services as do American Samoans and Samoans in a similar position'[27] is also not of that nature and conceals a number of assumptions of some specificity. By way of example, the finding assumes that the respondent's family (i.e. partner and child) would have access to welfare in those two countries. However, it is far from clear that Australian citizens would have access to welfare in a foreign jurisdiction of which they are *not* a citizen (and otherwise be treated in the same manner, for welfare purposes, as American Samoans and Samoans).

27. The further suggestion that the knowledge (if any) of those points of detail held by the Minister's entire Department should in some way be attributed to the Minister cannot be accepted. The only authority cited for that submission is *Bochenski*,[28] which does not support that proposition. The resulting conceptual difficulties attending that proposition are acute – how, for example, does one sensibly apply such a proposition where different views are held on the relevant subject matter as between the many persons engaged as employees[29] for the purposes of the relevant Department of State?[30]

28. The **fourth observation** (the reasons were prepared in advance by a Departmental

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[26] CAB at 11[23].
[27] CAB at 16[64].
[28] *Bochenski v Minister for Immigration and Border Protection* (2017) 250 FCR 2019 – see footnote 12 of the AS.
[29] Section 22(1) *Public Service Act 1999* (Cth).
[30] *Dekker* [2014] WASCA 216 at [89] and see also GA Flick "*Error of Law or Error of Fact*" [1983] 15(3-4) UWALR 193 at 216.

officer and adopted without alteration by the Minister) needs be read together with the preceding reasoning. There was, as the majority observed, nothing, in the evidence, to suggest that that officer had any appreciation of the Minister's state of knowledge regarding the particular matters of detail concerning Samoa and American Samoa. And, as the Court had earlier observed, the reasons themselves were silent as to that issue. The proposition that the reasons (on adoption) became the Minister's reasons (absent evidence suggesting otherwise) is of no assistance to the Minister in those circumstances.[31] The adoption of the brief conclusory statements in the reasons served only to highlight the difficulties identified in the Court's first three observations. The proper inference, in light of all of the circumstances, was that the Minister adopted those "findings" without any evidentiary foundation for them.

29. Contrary to what is suggested at AS [29], none of that reasoning involved a reversal of the onus of proof. Even if FC[42] is infelicitously expressed, it is plain from the reasoning that follows that the Court was positively satisfied, on the evidence, that the Minister had not relied upon any personal or specialised knowledge. It did not suggest that the Minister had failed to meet some form of onus of demonstrating that that was so. In any event, the maxim stated by Lord Mansfield in *Blatch*[32] that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" was applicable here. The matters identified at FC [43]-[46] cast at least an evidentiary burden upon the Minister of demonstrating that he had in fact relied upon such knowledge. He did not meet that burden.

Not permitted to have regard to material in any event (Ground 1 of the NOC)

30. The proposition that the Minister is permitted to rely upon accumulated general or specialized knowledge involves what is sometimes referred to as "official notice", which has a number of well recognized difficulties.[33] In observations cited with apparent approval by McHugh J in *Muin*,[34] the US Court of Appeals in *Castillo-Villagra v INS*[35] observed that the "administrative desirability of [official] notice as

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[31] See AS footnote 14, referring to, inter alia, *Minister for Immigration and Multicultural Affairs v W157/00A* (2002) 124 FCR 433 at [39].
[32] *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970.
[33] See eg J Smillie "The Problem of 'Official Notice'" [1975] PL 64; K Mason "The Bounds of Flexibility in Tribunals" AIAL Forum No 39, 18 at 22.
[34] *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [138].
[35] [1992] USCA9 2160; 972 F 2d 1017 (9th Cir, 1992) at 1026-1027 (***Castillo-Villagra***).

a substitute for evidence cannot be allowed to outweigh fairness to individual litigants" and that "[u]nregulated notice, even of legislative facts, gives finders of fact 'a dangerous freedom'". Parliament ought not be presumed to have left that freedom unchecked.

31. One mechanism by which that "dangerous freedom" is kept in check is via the requirements of procedural fairness (as to which see [55]-[61] below), which will generally be an implied constraint upon any statutory power.[36] It was that constraint which was in issue in *Muin* and in *Castillo-Villagra*. The Minister accepts that constraint: AS [25].

32. A further constraint involves a matter that the Minister accepts, but only in part: that is, even if a particular decision maker is authorised to act upon accumulated knowledge or expertise, that authority may not extend to *all* questions of fact which arise before that decision maker.

33. Thus, in the present context, the Minister draws a distinction between "conditions in countries to which persons whose visas are cancelled might be removed" as opposed to "facts particular to individual visa holders": AS [24]. That seemingly has in mind the kinds of distinctions drawn by Professors Pierce and Hickman and by the authors of Aronson et al:[37] in that regard, Professors Pierce and Hickman distinguish between "legislative" and "adjudicative" facts. Adjudicative facts concern the immediate parties and "usually answer the question of who did what, where, when, how, why with what motive or intent", whereas legislative facts "are the general facts that help the tribunal decide questions of law and policy and discretion".[38] The point of that distinction is to argue that it ought to be easier for a decision maker to take official notice of legislative facts as opposed to adjudicative facts.

34. That categorical approach, as Professors Pierce and Hickman acknowledge, is difficult because the boundary is uncertain[39] (a particular fact may concern matters "particular to individual visa holders", notwithstanding the fact it can also be characterized as concerning country conditions[40]).

35. The categorical approach is also at odds with a number of statements made by

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[36] See eg *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [11]-[15].
[37] Aronson and Groves, *Judicial Review of Administration Action* (6th ed) at [8.210].
[38] RJ Pierce and KE Hickman *Administrative Law Treatise* (6th edn) Wolters Kluwer (2020) Vol II, p 1040.
[39] RJ Pierce and KE Hickman *Administrative Law Treatise* (6th edn) Wolters Kluwer (2020) Vol II, pp 1062-1063.
[40] See eg *Circu v Gonzales* 450 F.3d 990 (9th Cir 2006), discussed by Professors Pierce and Hickman at 1068.

Australian intermediate appellate courts. For example, in *Dekker*,[41] the Court of Appeal of Western Australia observed that it was unlikely that a precise test could be formulated to prescribe the circumstances in which the Tribunal might rely on general knowledge or accumulated specialist knowledge under the legislative scheme in issue in that matter. In obiter observations in *Navoto*, Justices Middleton, Moshinsky and Anderson JJ indicated that that observation was apt in the context of s 501CA.[42] Their Honours went on to observe that that issue is likely to depend upon "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". It is also likely to depend upon the "specific matter requiring determination".[43]

36. That "circumstance-specific" approach ought to be applied cautiously in the context of s 501CA. Many of the authorities the Minister relies upon concern the distinctly different cases of specialist tribunals with particular qualification requirements.[44] True it is that it has been accepted that delegates and Tribunals exercising decision making functions under the Act could, separately from their pre-existing expertise, be expected to build and apply a store of knowledge and experience by reason of the "repetitive nature" of their work.[45] But that serves only to highlight the difficulties of seeking to apply the concept of official notice to circumstances where the particular subject matter is relatively more obscure, and not an area into which the decision maker has "repetitively" entered. For the reasons given above at paragraph [26], that was the case here. Properly construed, the Act does not permit purported reliance upon accumulated knowledge or expertise in such a case.

37. For that further reason, the Minister's findings were not based upon probative material (or at least none to which the Act permitted regard).

Jurisdictional error

38. It can be accepted that the principle that fact finding must be based on probative material is "allied"[46] to the requirement that a repository of power act rationally.

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[41] [2014] WASCA 216 at [63].
[42] *Navoto v Minister for Home Affairs* [2019] FCAFC 135 (***Navoto***) at [78].
[43] *Dekker* [2014] WASCA 216 at [50].
[44] See eg *Spurling* [1973] VR 1 at 11; *Thomson* (1985) 8 FCR 213 at 217; and *Romeo v Asher* (1991) 29 FCR 343 at 349 (referred to at AS [23]).
[45] See eg *Muin* (2002) 190 ALR 601 at [12] (Gleeson CJ) and at [263] (Hayne J). See also the references collected by the Minister at AS [22] and the reasons of Flick J at first instance at CAB 34 [13].
[46] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 **(*SZMDS*)** at [124] (Crennan and Bell JJ).

However, it does not follow that those principles or requirements are coextensive, or that a failure to make findings on the basis of probative material can only result in jurisdictional error in the circumstances described by Crennan and Bell JJ in *SZMDS*[47] at [130]-[131], [135] (contra AS [36]-[41]).[48]

39. Indeed, that was made clear by Crennan and Bell JJ earlier in their reasons in *SZMDS* where (after observing that there was a relationship between those requirements) their Honours went on to say that one "correlative" of the "principle that fact finding must be based on probative material" is that "a decision based on no evidence displays jurisdictional error" (our emphasis): at [124]. The notion that a decision "based on" no evidence displays jurisdictional error aligns with the Federal Court authorities to the effect that a finding made with no evidence will amount to jurisdictional error where the affected finding is a "critical step" in the decision-maker's path of reasoning.[49] In such a case, the decision will be "based on" a finding lacking evidence in the sense that that finding is of significance to the ultimate exercise of power.

40. None of that involves a slide into merits review (contra AS [40]) or departure from the propositions that the notion of "jurisdiction" in the term "jurisdictional error" refers to the "scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences" or that, accordingly, statutory limits of the decision-making authority conferred by a statute are determined as an exercise in statutory interpretation informed by evolving common law principles of statutory interpretation (cf AS [38]).

41. Rather, the implication of a constraint resulting in the invalidity of decisions "based on" no evidence (or formulated by reference to the findings, lacking evidence, which are "critical") can be seen to be a further aspect of common law principles informing the construction of statutes, reflecting "qualitative" judgments about the appropriate

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[47] *SZMDS* (2010) 240 CLR 611 at [130]-[131], [135] (Crennan and Bell JJ).
[48] Being the reasoning the Minister urges this Court to prefer over the dissenting reasoning of Gummow ACJ and Keifel J at [37]-[42] and [53] (which, as the Minister acknowledges, is consistent with the "critical step" reasoning which emerges from the authorities in footnote 49 below).
[49] See *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at 284-285 [23] (Marshall, North and Flick JJ). See also: *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 77 ALD 402 at [19] (Mansfield, Selway and Bennett JJ): *Schmidt* (2018) 162 ALD 495 [24]; *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at [45]-[47] (Allsop CJ), [54] (Markovic J) and [55] (Steward J) (***Hands***); *ZGWQ v Minister for Home Affairs* [2019] FCA 1096 [14] (Robertson J) and *DFW18 v Minister for Home Affairs* [2019] FCA 599; 165 ALD 259 [52] (Steward J).

limits of administrative power to which a legislature may be taken to adhere.[50] It is a qualitative statements about the *extent* or *gravity* of an error which will (subject to some contrary statutory intention) generally suffice to constitute jurisdictional error. That involves no violence to the "spare statutory language" (AS [40]). To the contrary, that open textured language readily accommodates principles of construction that can be described as providing a common sense "guide to what a Parliament in a liberal democracy is likely to have intended".[51] The fact that such conclusions are necessarily expressed in qualitative language does not render the resulting analysis a form of merits review.[52]

10 42. It is convenient to identify more specifically how those principles were (correctly) applied by the majority.

43. The majority first discerned an implied condition that the Minister's state of satisfaction in s 501CA(4) must be formed on the basis of factual findings that were based upon probative material: FC [47]. That conclusion was unremarkable – it was supported by other intermediate appellate authority considering s 501CA(4): see eg *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at [45]-[47] (Allsop CJ) [54] (Markovic J) and [55] (Steward J) and *Minister for Immigration and Border Protection v DRP17* (2018) 267 FCR 492 at [45]-[46] (the Court). It involves the application of the "principle" identified by Crennan and Bell
20 JJ in *SZMDS*, which can be understood to be a principle of construction applicable to most statutory powers in the absence of a contrary intention.[53]

44. Their Honours also concluded that the Minister had failed to abide by that condition as regards the language finding and the welfare finding – those findings were "not open" on the evidence: FC [47].

45. The question which then arose was whether that non-compliance was jurisdictional. The observation (at FC [61]) that those errors affected a "critical aspect" of the Minister's reasoning was an expression of their gravity. The conclusion that a decision of that nature was not authorised by the statute (again clearly supported by

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[50] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***Hossain***) at [25], [28] (Kiefel CJ, Gageler and Keane JJ) and [64] (Edelman J) and *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 (***MZAPC***) at [31], [32] per Kiefel CJ, Gageler, Keane and Gleeson JJ. See also *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 at [35] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[51] *MZAPC* [2021] HCA 17 at [32] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
[52] A Robertson, "Is Judicial Review Qualitative?", in Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance*, (2016) 243 at 249-253.
[53] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97].

other intermediate appellate authority considering s 501CA[54]), was a conclusion that gave effect to the reality that "[d]ecision-making is a function of the real world", where errors large or small can be made.[55] Applying orthodox principles of construction, the legislature can be presumed not to have attached legal effect to the former. None of that involved error.

46. And, contrary to AS [43], there is no bright line between that analysis and the question of materiality (which similarly involves, as a question of construction, discernment of the extent of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute).[56] As such, the Full Court did not err to the extent it considered those issues together at FC[48]-[52]. Indeed, it was logical to do so given that each involved the proper construction of the Act and the limits of the power thereby conferred.

The findings in issue were of sufficient importance to the ultimate conclusion to be regarded as "critical"

47. There is also no error in the way in which the Court reasoned its way to the conclusion that the errors affected a "critical" aspect of the Minister's reasoning. The following matters are of importance.

48. **First**, as Nettle, Gordon and Edelman JJ noted in *Applicant S270*,[57] although the s 501CA(4) discretion is wide, it must be exercised by the Minister considering the claims and material put forward by the applicant. They will be central to that decision.

49. **Second**, those claims here included:

    a. a claim that the respondent's daughter would have limited understanding of her father's native language, materially affecting her schooling and advancement in life (FC [53], also CAB 10 [18]);

    b. A claim that the prospects of the family would be limited including because there was "no social welfare by the governments in either American Samoa

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[54] See again *Hands* (2018) 267 FCR 628 at [46] (Allsop CJ), [54] (Markovic J) and [55] (Steward J) and *Minister for Immigration and Border Protection v DRP17* (2018) 267 FCR 492 at [46].
[55] *MZAPC* [2021] HCA 17 at [32] (Kiefel CJ, Gageler, Keane and Gleeson JJ) and *Hossain* (2018) 264 CLR 123 at [28] (Kiefel CJ, Gageler and Keane JJ).
[56] *Hossain* (2018) 264 CLR 123 at [27], [29] (Kiefel CJ, Gageler and Keane JJ); *MZAPC* [2021] HCA 17 at [30] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
[57] (2020) 383 ALR 194 at [36].

or Western Samoa" **(**FC [26])

50. **Third**, the Minister plainly recognised the requirement to seek to grapple with that material (in way identified in *Applicant S270*) and sought to do so at [23] and [64] of his reasons (**CAB 11 and 16**), those being the paragraphs in which he made findings which were found to be unsupported by evidence.

51. **Fourth**, those findings involved either complete or partial rejection of the representations in fact made by the respondent. They involved complete rejection of the claim that the family would have access to no social welfare. They involved partial rejection of the representation that language difficulties would materially affect the schooling and advancement in life of the respondent's daughter. That was of obvious importance in considering whether, having regard to the material advanced by the respondent, there was another reason as to why the original decision should be revoked.

52. It is of course true, that at a level of generality, the Minister accepted that:

    a. the respondent's daughter would be "significantly affected" by any relocation **CAB 11 [23]** and that it was in her best interests that cancellation be revoked **CAB 12 [30]**; and

    b. that removal to Samoa or American Samoa would involve significant adjustments and hardship to the family: **CAB 16 [65].**

53. It is also true that the Minister had regard to those broad findings in the weighing process at **CAB 25 [128]**. But, as the majority observed at FC [57] and [60]-[61], that was the point: the fact that the interests of the respondent's child were given significant weight in the ultimate evaluative exercise, served only to illustrate the importance of the factual findings the Minister made regarding that issue. The *gravity* of errors affecting the Minister's assessment of those matters stood to be significantly magnified by dint of that path of reasoning. That, self-evidently, does not carry with it the proposition that "every finding of fact that was relevant to a decision would be 'critical'": cf AS [43]. It merely reflects the fact that the relative gravity of such errors (and the question of whether the statute gives force and effect to the resulting decision) will depend upon the "decision which was made" and the "circumstances in which that decision was made".[58]

[58] *Hossain* (2018) 264 CLR 123 at [30].

54. The Minister also submits that something turns upon the fact that the respondent had the option of living in New Zealand': AS[42] and see also AS [41]. That submission is in some tension with what the earlier Full Court determined: 'Whether the prospect of [the respondent], his partner and their daughter ending up in Samoa would be a result of choices on their part did not mean that the consideration was irrelevant and might be disregarded by the Assistant Minister in forming the required state of satisfaction'.[59] Unsurprisingly, in light of those findings, the Minister did not do so in his later decision. And so none of that could affect the conclusion that the error was central to the path of reasoning that the Minister actually applied in this case.

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Procedural fairness (Ground 2 of the NOC)

55. Finally, even if it was permissible for the appellant to rely on personal knowledge or accumulated specialist knowledge to make the impugned findings, the Minister was required as a matter of procedural fairness to: (a) disclose that "knowledge" to the respondent, and (b) invite him to make submissions or provide further evidence or materials concerning that knowledge.

56. **First,** there can be no doubt that the appellant was bound to accord the respondent procedural fairness when dealing with his application under s 501CA(4).[60] Materially, that meant that the respondent was "entitled to know the case sought to

20 be made against him and to be given an opportunity of replying to it".[61] So much is explicitly accepted in the appellant's submissions to this Court: "*what controls the potential for abuse of … specialized knowledge is whether that knowledge has been deployed in circumstances which are procedurally fair*": AS [25].

57. **Second,** where a decision-maker is relying on generalised knowledge or experience, they "*must provide notice and an opportunity to comment if they intend to take account of matters that are 'identifiable', 'particular' or 'specific'*".[62] This summary, adopted by the authors of Aronson et al, is consistent with the authorities, commencing with the observations of Doyle CJ in *Chiropractors Association of*

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[59] *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116 [104].
[60] *Stowers v Minister for Immigration and Border Protection* (2018) 265 FCR 177 at [37]-[49] (Flick, Griffiths and Derrington JJ); *Dunn v Minister for Immigration and Border Protection* (2018) 267 FCR 246 at [52] (Charlesworth J, Steward J agreeing); *Picard v Minister for Immigration and Border Protection* [2015] FCA 1430 at [31] (Tracey J).
[61] *Kioa v West* (1985) 159 CLR 550 at 582.
[62] Aronson and Groves, *Judicial Review of Administration Action* (6th ed) at [8.210].

Australia (SA) Ltd v WorkCover Corporation of South Australia:[63] "*courts have not required an administrative decision-maker … to identify, in advance … the knowledge and experience that will be used [but] it may be that an adverse conclusion of a type that could not reasonably be expected by an applicant might have to be brought to an applicant's attention, as a matter of fairness*".

58. Similarly, in *Dekker* it was said that: "*[s]pecific disclosure would generally be required in relation to particular medical facts*" as compared to those in the *"general knowledge and experience of the medical profession*".[64] The reason for the distinction is one consistent with the general approach to putting adverse material to the person as a matter of fairness: the person subject to a decision should be appraised of any "*critical issue*" not apparent from the nature of the decision or the terms of the statutory power and be advised of "*adverse conclusions which would not obviously be open on the known material*".[65]

59. **Third,** if it be concluded that the respondent could rely on his personal knowledge as to the nature and prevalence of anglophones, and the nature and level of access to welfare services in Western Samoa and Samoa, the exercise of the Minister's power required singular disclosure of such intended reliance. That disclosure would have entailed the capacity for challenge to that knowledge and experience by material which called into question, qualified or contextualised those specific matters. The obvious tension between permitting reliance on personal knowledge and affording natural justice is conditioned by the requirement that "*material which will play an important part in the final decision is disclosed to the parties in advance and [the parties] are given a fair opportunity for discussion and rebuttal*".[66]

60. **Fourth,** this is consistent with the rationale and scope of the rules of natural justice more broadly. Natural justice is concerned with affording a person an opportunity to be heard; providing the opportunity for a person to propound his or her case in such a way that is practically fair.[67] Here, the Minister relied upon his "knowledge" that

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[63] [1999] SASC 120 at [87] (emphasis added) (not disturbed on appeal: *Chiropractors Association v WorkCover Corporation* (1999) 75 SASR 374); see also *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 127 ALR 699 at 714.
[64] [2014] WASCA 216 at [67].
[65] *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [9].
[66] K Mason "The Bounds of Flexibility in Tribunals" AIAL Forum No 39, 18 at 22, quoting J Smillie "The Problem of 'Official Notice'" [1975] PL 64 at 67.
[67] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ*); Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; at [30]-[31] (Gleeson CJ and Hayne J); *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [82] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and

English was widely spoken in American Samoa and Samoa, and that health and welfare services existed which the respondent *and* his family could access. As noted above at [51], this "knowledge" supplied the basis for the rejection of the representations made by the respondent that language difficulties would affect his daughter and that the family would have no access to social welfare. The failure to afford the respondent an opportunity to respond constituted a denial of procedural fairness

61. **Finally,** there is no credible materiality point to be made against the respondent. It is not to the point to suggest that "potential hardship" as a general matter was "resolved" in Mr Viane's favour (cf the reasons of the primary judge at **CAB 34 [13]**). The point is that the interests of the respondent's child, to which the "personal knowledge" facts were directed, were given significant weight in the ultimate evaluative exercise. The nature of those interests, however, were predicated by the personal knowledge findings. That is, the impact on the respondent's child was considered to be tempered by reason of the language, health and welfare findings. The ultimate factual matrix which formed the basis of the Minister's decision was indissolubly comprised of that tempered conclusion, and that tempered conclusion was made in a manner that was procedurally unfair. The question is whether there is a realistic possibility the decision in fact could have been different if the breach had not occurred.[68] The answer must be yes: at no point has the respondent had the opportunity to deal with the findings as to the widespread incidence of anglophones or most significantly, the existence and nature of health, welfare and educational services for him and his family.

62. A majority of this Court in *MZAPC* made clear that the burden is not to prove that a different decision *would* have been made; the court must rather be satisfied of the realistic possibility that a different decision *could* have been made.[69] There does not appear to be any real dispute between the parties on this point: the appellant admits "*the possibility can be accepted that, if different findings were made … the Minister might have given more weight to the impact of the decision on the child*" and that

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Gordon JJ). See also *Durani v Minister for Immigration and Border Protection* (2014) 314 ALR 130 at [57] (Besanko, Barker and Robertson JJ); *Jione v Minister for Immigration and Border Protection* [2015] FCA 144 (Buchanan J).

[68] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [45]-[49] (Bell, Gageler and Keane JJ) (***SZMTA***); *MZAPC* v *Minister for Immigration and Border Protection* [2021] HCA 17 at [2]-[4] (Kiefel CJ, Gageler, Keane and Gleeson JJ) (***MZAPC***).

[69] *MZAPC* [2021] HCA 17 at [39] (Kiefel CJ, Gaegler, Keane and Gleeson JJ).

"*[t]hat could perhaps be relevant to materiality*": **AS [43]**. That possibility is a realistic one (see [59] above).[70] The breach was material.

Conclusion

63. The appeal should be dismissed (noting that, under the conditions upon which leave was granted, the applicant is to pay the reasonable costs of the respondent in this Court regardless of the outcome).

Part VII: ESTIMATED TIME FOR ORAL ARGUMENT

10 64. The respondent estimates that he will require 1.5 hours for oral argument.

Dated: 28 May 2021

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[70] *SZMTA* (2019) 264 CLR 421 at [45] (Bell, Gageler and Keane JJ). See also *Nguyen v Minister for Home Affairs* (2019) 270 FCR 555 at [54]-[55] (Jagot, Robertson and Farrell JJ).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
Appellant

and

ALEX VIANE
Respondent

ANNEXURE
LIST OF STATUTES AND STATUTORY INSTRUMENTS

1. *Migration Act 1958* (Cth), s 501CA (Compilation 144, 17 April 2019 to 29 August 2019).