Federal Court of Australia

Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 144

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| Appeal from: | *Viane v Minister for Home Affairs* [2020] FCA 152 |
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| File number: |  |
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| Judgment of: | **BESANKO, KERR AND CHARLESWORTH JJ** |
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| Date of judgment: | 24 August 2020 |
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| Catchwords: | **MIGRATION** – appeal from judgment dismissing an application for judicial review of a migration decision made under the *Migration Act 1958* (Cth) – Minister refusing to revoke a decision to cancel the appellant’s visa on character grounds – whether Minister committed jurisdictional error in the exercise of the power conferred by s 501CA(4) of the Act – where Minister made findings of fact concerning the impediments the appellant would face if removed from Australia and relocated to American Samoa or Samoa – whether the Minister made findings concerning social and cultural circumstances in American Samoa or Samoa without objective evidentiary foundation – whether the findings were based on the Minister’s personal or specialised knowledge – whether the asserted errors were material and so properly characterised as jurisdictional – whether decision affected by legal unreasonableness – whether Minister failed to genuinely consider the appellant’s submissions concerning the expectations of the Australian community – whether the Minister failed to afford procedural fairness |
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| Legislation: | *Evidence Act 1995* (Cth) s 144  *Migration Act 1958* (Cth) ss 474, 501, 501(3A), 501CA |
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| Cases cited: | *Anaki v Minister for Immigration and Border Protection* [2018] FCA 77  *DVE18 v Minister for Home Affairs* [2020] FCAFC 83  *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628  *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123  *Marzano v Minister for Immigration and Border Protection* (2017) 250 FCR 548  *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109  *Minster for Home Affairs v Omar* [2019] FCAFC 188; 373 ALR 569  *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643  *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1  *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421  *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541  *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611  *Muggeridge v Minister for Immigration and Border Protection* (2017) 255 FCR 81  *Navoto v Minister for Home Affairs* [2019] FCAFC 135  *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476  *Romeo v Asher* (1991) 29 FCR 343  *Schmidt v Minister for Immigration and Border Protection* (2018) 162 ALD 495  *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 402  *Soliman v University of Technology, Sydney* (2012) 207 FCR 277  *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203  *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296  *Viane v Minister for Home Affairs* [2020] FCA 152  *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531  *Vo v Minister for Home Affairs* (2019) 269 FCR 566  *Webb v Minister for Home Affairs* [2020] FCA 831 |
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| Counsel for the Appellant: | Mr K Tang |
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| Solicitor for the Appellant: | Scott Calnan Lawyers |
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| Counsel for the Respondent: | Ms R Francois |
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| Solicitor for the Respondent: | Sparke Helmore |

ORDERS

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|  | | NSD 301 of 2020 |
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| BETWEEN: | ALEX VIANE  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  Respondent | |

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| order made by: | BESANKO, KERR AND CHARLESWORTH JJ |
| DATE OF ORDER: | 24 August 2020 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the primary judge on 20 February 2020 be set aside and in lieu thereof, there be orders as follows:
   1. A writ of certiorari to quash the respondent’s decision on 28 August 2019 refusing to exercise power under s 501CA(4) of the *Migration Act 1958* (Cth) (the Act) to revoke an earlier decision made pursuant to s 501(3A) of the Act to cancel the applicant’s visa be issued.
   2. A writ of mandamus requiring the respondent to re-determine, according to law, the applicant’s application to revoke the cancellation of his visa be issued; and
   3. The respondent pay the applicant’s costs of the proceeding as agreed or taxed.
3. The respondent pay the appellant’s costs of the appeal as agreed or taxed.

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

REASONS FOR JUDGMENT

BESANKO J

1. I have had the advantage of reading the reasons for judgment of Kerr and Charlesworth JJ. I adopt their Honour’s statement of the relevant facts and issues and will repeat those matters only where it is necessary to explain my reasoning.
2. I agree with their Honours’ conclusions with respect to Grounds 2, 3 and 4 in the Notice of Appeal, subject to the observation in relation to Ground 2 that this case does not call for a consideration of the relationship between jurisdictional error on the basis of illogicality or irrationality in the sense described in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16;(2010) 240 CLR 611 at [121]–[123] per Crennan and Bell JJ, and jurisdictional error on the basis of “Wednesbury unreasonableness” as applied to broad discretionary powers in cases such as *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 and *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541, or the fact finding process (see *Vo v Minister for Home Affairs* [2019] FCAFC 108; (2019) 269 FCR 566).
3. I respectfully disagree with their Honours’ conclusions with respect to the no evidence ground, namely, Ground 1. In my opinion, this ground should be rejected.
4. I start with some matters of general principle. The Minister’s decision not to revoke the original decision was made under s 501CA(4) of the *Migration Act 1958* (Cth) (the Act). A precondition to a revocation decision under this subsection is that the former visa-holder has made representations to the Minister in accordance with an invitation given by the Minister to the former visa-holder under s 501CA(3). The central role in the statutory regime of the representations made by the former visa-holder to the Minister has been emphasised in a number of decisions in this Court, including *Minister for Home Affairs v Omar* [2019] FCAFC 188; (2019) 373 ALR 569 at [34] and *Minister for Immigration and Border Protection v Maioha* [2018] FCAFC 216; (2018) 267 FCR 643. In the latter case in which the issue was, speaking generally, whether the Minister had given proper consideration to the representations made to him, Rares and Robertson JJ said (at [48] and [50]):

48 It should again be emphasised that the issue for the Minister was whether he was satisfied that there was another reason why the original decision to cancel the visa should be revoked. It was for the respondent to put before the Minister by way of representation what it was she wished the Minister to take into account. The Minister had no legal duty, referable to jurisdictional error, to ask for further representations from the respondent or to make inquiries into the representations she had made. In the present case, in our opinion, the Minister was not required to give more extensive consideration to the representations put, such as investigating and making further findings, in particular findings as to how the respondent “would be able to manage those practical changes” as the primary judge appears to have held at [34]. The Minister found that there would be hardship for the respondent but that it would not be insurmountable.

…

50 It follows, in our opinion, that the Minister did not make a jurisdictional error by failing to make a ﬁnding, beyond those he made, that the respondent would suffer hardship that would “not be insurmountable in light of New Zealand’s similar culture, language and health system standards”, which addressed in greater detail the respondent’s representation that she would have nowhere to live and no money if returned to New Zealand. It was for the respondent to satisfy the Minister that her prospective hardship was another reason why the original decision should be revoked. The Minister was not legally required to analyse the representation in order to negate it, the Minister not having been satisﬁed by what the respondent asserted. It was also not necessary for the Minister’s conclusion that the hardship that the respondent may suffer “will not be insurmountable” to be supported by probative material outside what the respondent had put by way of representation.

1. Where a finding of fact is made by a decision-maker and it is said by an applicant that the finding was made in the absence of evidence thereby leading to jurisdictional error, it will, or may, be necessary to consider the following matters:
2. Whether the case is one in which the decision-maker is entitled to rely on his or her own knowledge or specialist knowledge. That there are such cases is well-established (see by way of example, *Romeo v Asher* (1991) 29 FCR 343 at 349 and *Soliman v University of Technology, Sydney* [2012] FCAFC 146; (2012) 207 FCR 277 (*Soliman*) at [33]). At the risk of stating the obvious, whether the case is such a case may depend upon, among other matters, whether the fact is a broad and general fact, on the one hand, or a specific fact, on the other. This point was made by Robertson J in *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; (2016) 248 FCR 296 (*Uelese*) (at [68] and [69]):

68 When addressing the extent of impediments if the applicant were removed, the Tribunal noted that there was no specific evidence of any social, medical and/or economic support available to Mr Uelese in either New Zealand or Samoa, but said: “I take into account that at least in New Zealand Mr Uelese would have access to government benefits similar to those available to him in Australia”.

69 In my opinion, that statement is 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. The applicant did not put forward to the Tribunal that the non-availability of welfare benefits constituted an impediment which he may face if removed from Australia. I also note that the applicant before me has not put forward any material which suggests that the Tribunal was mistaken in its statement. In any event, I am not satisfied that, in the circumstances, the Tribunal’s statement could constitute jurisdictional error.

As the primary judge noted in this case, the line between those cases where the decision‑maker is entitled to rely on his or her own knowledge or specialist knowledge, and those cases where the decision-maker is not permitted to do so, may be difficult to discern and may require consideration of a number of matters. The Full Court of this Court in *Navoto v Minister for Home Affairs* [2019] FCAFC 135 (*Navoto*) noted that there is not always a “bright line” (at [77]–[78]):

77 There have been recent decisions of this Court in which administrative decision-makers in contexts similar to this case were entitled to rely on their knowledge of features of other countries: *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; 248 FCR 296 at [69] per Robertson J and *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 at [39] per McKerracher J. Conversely, there was a recent decision of this Court where an administrative decision-maker was not permitted to rely on such knowledge: *Schmidt v Minister for Immigration and Border Protection* [2018] FCA 1162; 162 ALD 495 at [25]-[34] per Burley J. See also *Anaki v Minister for Immigration and Border Protection* [2018] FCA 77 at [24]-[25] per Burley J.

78 Although we express no view on these decisions, our view, which may be subject to more detailed consideration in an appropriate case, is that it is unlikely that a precise test may be formulated to prescribe the circumstances in which an administrative decision-maker may rely on general knowledge or accumulated specialist knowledge: see *Dekker v Medical Board of Australia* [2014] WASCA 216 at [63] per Martin CJ, Newnes and Murphy JJA. That issue, where it arises, is likely to be determined by reference to all the circumstances of the case, including, amongst other factors, the nature of the decision-maker, the extent and character of the decision-maker’s specialisation, and the form of the particular knowledge relied upon by the decision-maker.

1. It is not enough to establish jurisdictional error that there is no evidence in support of a fact. The fact itself must have a certain character. It must be a fact that is (at least) a critical step in the decision-maker’s path of reasoning (*Soliman* at [23]; *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; (2003) 77 ALD 402 at [19]; *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 267 FCR 628). I say “at least” because I do not wish to be taken to be overlooking the debate about which of the two requirements concerning the nature of the fact is the correct one (see *Navoto* at [63]–[64]). For present purposes, I can rely on the test of a critical step in the decision-maker’s path of reasoning or path to the ultimate conclusion, as did the primary judge in this case.
2. The breach of a limitation within the statutory procedures which condition the performance of a statutory function will not constitute jurisdictional error unless the breach is material (*Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) 264 CLR 123 at [29]–[31]) and the same rule applies in the case of a breach of procedural fairness (*Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421 (*SZMTA*) at [45]–[51] per Bell, Gageler and Keane JJ). A breach is material if it operates to deprive the applicant of a possibility of a successful outcome or, put another way, if compliance could realistically have resulted in a different decision (*SZMTA* at [3] and [45] per Bell, Gageler and Keane JJ).

It seems to me that there is no reason the same rule does not apply where the alleged jurisdictional error is to make a finding of fact in the absence of evidence. In this area, the requirement that the relevant fact be a critical step in the decision-maker’s path of reasoning occupies some of the area otherwise occupied by materiality. However, the precise formulation of the materiality test in the case of an alleged jurisdictional error by reason of an absence of evidence is not immediately apparent. It is difficult, at least in some cases, to postulate no more than the removal of the fact; the correct fact must be put in its place. The onus to prove materiality is on the person asserting jurisdictional error (*SZMTA* at [46] per Bell, Gageler and Keane JJ). As Robertson J noted in *Uelese* (see [5] above), so in this case, the appellant did not put forward any material which suggested that the Minister was mistaken in his statements with respect to the speaking of English and the availability of healthcare and welfare in American Samoa and Samoa.

1. In this case, the appellant made three relevant representations to the Minister pursuant to s 501CA(3) and (4) of the Act. They are a statutory declaration made by the appellant on 1 March 2017, a statement made by the appellant on 3 December 2018, and a representation made by the appellant’s barrister on 15 March 2019.
2. The appellant’s no evidence arguments related to whether English is widely spoken in American Samoa and Samoa and the availability of healthcare and welfare in those places.
3. With respect to whether English is widely spoken in American Samoa and Samoa, there is no relevant representation made by the appellant in any of the three representations. The appellant did not suggest otherwise on the appeal.
4. With respect to the availability of healthcare and welfare in American Samoa and Samoa, in his statutory declaration the appellant made a representation that in New Zealand or Samoa, he and his family would be “in an unfamiliar setting, with no ties, job prospects or home”. In his statement, the appellant made a representation that in Western Samoa, he and his family, “will likely be homeless, with no job, social ties, welfare or healthcare services”. In his barrister’s representations, the appellant represented that he and his family will have limited prospects “at” life, “with limited prospects of employment, denial of a first-class education for [the appellant’s] daughter, problematic healthcare and no social welfare by the governments in either American Samoa or Western Samoa”.
5. The Minister’s reasons refer to each of the appellant’s representations (at [20], [21] and [22]) and the Minister then states (at [23]).

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

1. Later in his reasons, and in dealing with the extent of the impediments if the appellant is removed, the Minister states (at [64]):

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

1. The Minister concludes (at [65]) that the removal of the appellant to American Samoa or Samoa will involve significant adjustments and hardship for the appellant and his family.
2. With respect to the Minister’s finding that English is widely spoken in American Samoa or Samoa, the primary judge noted that the appellant made no specific representation as to whether English was or was not “widely spoken” in American Samoa or Samoa and it was not an issue in respect of which the Minister was called upon to resolve potentially competing submissions. As the primary judge said, it was a matter, presumably, in respect to which the appellant did not see any need to adduce evidence. The primary judge said, referring to *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 at [37] per McKerracher J, and I agree that, in those circumstances, the Minister did not need to have specific evidence before him at the time he made his decision that both Samoan and English are spoken in the Samoan Islands. Furthermore, there are two other points, perhaps implicit in the primary judge’s reasons, perhaps additional. In my opinion, the Minister was entitled to rely on his own knowledge about such a general matter and, in any event, the appellant has not shown it to be wrong.
3. With respect to the Minister’s findings about the availability of healthcare and welfare in American Samoa and Samoa, those findings stood in a different position as far as the primary judge’s reasoning is concerned. I have already referred to the representations the appellant made about this topic. The primary judge, after pointing out first, that there is a line between cases where the decision-maker may use his or her own knowledge, which may include specialised knowledge, and cases where evidence is required and, second, that even where the decision-maker has substantial knowledge he or she may be required by the rules of procedural fairness to disclose the knowledge and invite submissions on it before relying on it, rejected the appellant’s argument on the basis that the *issue* was ultimately resolved in the appellant’s favour. The *issue* was the potential hardship to the appellant’s family should the cancellation decision not be revoked and, as I have said, the Minister found that removal to Samoa or American Samoa will “involve significant adjustments and hardship for the [appellant] and his family”. I think the primary judge’s reasoning is correct. Context is important here. This is not a case where the Minister proceeded on the basis that the healthcare and welfare system was broadly the same as the system in Australia (see, for example, *Schmidt v Minister for Immigration and Border Protection* [2018] FCA 1162; (2018) 162 ALD 495). The Minister proceeded on the basis that there is healthcare in American Samoa and Samoa and, as he submitted on the appeal, and I accept, that general fact was a matter within his own knowledge. He accepted that the healthcare would be of a lesser standard and more expensive to access than healthcare in Australia. Those facts are to be compared with the appellant’s most recent representation that healthcare in American Samoa and Samoa was problematic. With respect to social welfare, the Minister found that there was some social welfare, although it was below the standard in Australia. When the matter is viewed in that context, the relevant findings of the Minister fall well short of a critical step in the decision-maker’s path of reasoning, or path to the ultimate conclusion. The critical finding in this context was that removal to Samoa or American Samoa will involve significant adjustments and hardship for the appellant and his family and that finding was in the appellant’s favour. In the circumstances, there is no need for me to consider materiality as a separate issue.
4. In my opinion, the primary judge did not err and the appeal should be dismissed.

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| I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Besanko. |

Associate:

Dated: 24 August 2020

REASONS FOR JUDGMENT

KERR AND CHARLESWORTH JJ:

1. The appellant, Mr Alex Viane, is a citizen of New Zealand. He migrated to Australia in 1991 when he was 14 years old. In 2007 he was granted a Class TY Subclass 444 Special Category (Temporary) visa issued under the *Migration* ***Act*** *1958* (Cth).
2. On 10 November 2015, Mr Viane was sentenced in the Local Court of New South Wales to 12 months imprisonment upon being convicted on a charge of assault occasioning bodily harm. As a consequence of that sentence, Mr Viane cannot pass the character test prescribed in s 501(6)(a) and s 501(7)(c) of the Act.
3. Section 501(3A) of the Act relevantly provides that the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because of the operation of s 501(6)(a) on the basis of subs (7)(c), and the person is serving a sentence of imprisonment on a full time basis for an offence against a law of a State. On 6 July 2016, a delegate of the then-named Minister for Immigration and Border Protection cancelled Mr Viane’s visa in the exercise of that mandatory power (cancellation decision).
4. Mr Viane made representations to the Parliamentary Secretary to the Minister as to why the cancellation decision should be revoked. The Parliamentary Secretary refused to revoke the decision. On 2 August 2018, the Full Court set aside the Parliamentary Secretary’s decision and ordered that the matter be “remitted for re-determination according to law”: *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 (*Viane Full Court*).
5. Mr Viane again made representations as to why the cancellation decision should be revoked. In those submissions he said that if he were to be removed from Australia there was a real prospect that he would reside in American Samoa, where he had been born, or Western Samoa, where he had lived as a child.
6. On 28 August 2019 the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs refused to revoke the cancellation decision. The primary judge dismissed an application for judicial review of the Minister’s decision: ***Viane*** *v Minister for Home Affairs* [2020] FCA 152. This is an appeal from that judgment.

# ISSUES ARISING ON THE APPEAL

1. In the proceedings before the primary judge, the onus was on Mr Viane to show that the Minister’s decision was affected by jurisdictional error: Act s 474, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. His four grounds of review were to the effect that the Minister committed jurisdictional error by:
2. making factual findings concerning American Samoa for which there was no evidence;
3. making factual findings in relation to American Samoa and Samoa that were “illogical, irrational and/or otherwise legally unreasonable”;
4. failing “to give proper, genuine and realistic consideration” to Mr Viane’s submissions concerning the expectations of the Australian community; and, in so doing
5. failing to comply with the rules of procedural fairness.
6. The four grounds of appeal are to the effect that the primary judge erred in rejecting each of those grounds for judicial review.

# GROUND 1

1. As soon as possible after making a decision to cancel a visa under s 501(3A), the Minister must notify the affected person of the decision and invite the person to make representations to the Minister about revocation of the decision: s 501CA(3).
2. Section 501CA(4) provides:

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

1. Pursuant to s 501CA(3), Mr Viane made representations to the Minister through his legal representatives about the impediments he and his family would face should they be removed from Australia either to American Samoa or to New Zealand. Relevantly, it was submitted that Mr Viane had a de facto partner and a young child (referred to in these reasons as “child A”) both of whom were Australian citizens. It was submitted that if he were to be removed from Australia, Mr Viane, his partner and child A would be uprooted from Australia and forced to live in an unfamiliar country. It was submitted that their prospects in American Samoa would be limited “with little prospects of employment, denial of a first-class education for Mr Viane’s daughter, problematic healthcare and no social welfare by the governments in either American Samoa or Western Samoa”.
2. In his written reasons for the non-revocation decision, the Minister said that he had considered the representations made on Mr Viane’s behalf and the documents he had provided in support: at [7] and [11]. The Minister accepted that prior to his incarceration and subsequent detention, Mr Viane had resided with his partner and child A, that he contributed to child A’s care and that their relationship remained close. The Minister accepted that Mr Viane was a positive presence in child A’s life. The Minister stated (at [18]) that he had regard to submissions made by Mr Viane’s former lawyer. The Minister said that he had taken into account the submission:

… regarding the possibility that [child A] may relocate with Mr VIANE to Samoa and the attendant barriers to her advancement in life that would result, for example, from the differences in language, culture and education.

1. The Minister went on to acknowledge and summarise the submissions Mr Viane had made about the likelihood of his family residing in American Samoa should the cancellation decision not be revoked and the impediments they would face there: at [21]. The Minister considered (at [23] – [31]) the impediments Mr Viane and his family may face should they be removed from Australia and reside in either American Samoa, Samoa or New Zealand. As to the situation in American Samoa and Samoa, the Minister said (at [23]):

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

1. Later in his reasons, the Minister said:

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

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

1. The Minister’s reasons were said at first instance to contain critical findings of fact for which there was no probative evidence, namely:

i. English is widely spoken in American Samoa and Samoa.

ii. Some welfare support is available in American Samoa and Samoa for the Applicant and his immediate family (i.e. partner and child).

iii. Healthcare is available in American Samoa and Samoa for the Applicant and his immediate family (i.e. partner and child).

iv. The Applicant and his immediate family will have access to welfare and healthcare in American Samoa and Samoa (i.e. these services exist in American Samoa and Samoa); and

v. the Applicant and his immediate family will have access to welfare, healthcare and educational services as do American Samoa and Samoans in a similar position.

1. On appeal these five strands of argument merged into two, the first concerning the Minister’s conclusion that English was widely spoken in American Samoa and Samoa (the language finding) and the second concerning the conclusion that health and welfare services existed there which Mr Viane and his family could access (the welfare finding). It is common ground that there was no objective evidentiary material before the Minister capable of supporting either of the findings.

# REASONS OF THE PRIMARY JUDGE

1. Argument before the primary judge, as on the appeal, turned on the question of whether the findings were capable of being founded upon the Minister’s personal or specialised knowledge.
2. The primary judge observed that a finding of fact made in the absence of evidence may demonstrate jurisdictional error “if that fact is a ‘*critical step*’ in the decision-maker’s path of reasoning”: *Viane* at [9]. His Honour said that there was no clear line that may be drawn between “those matters in respect to which a decision-maker may rely upon his own knowledge or specialist knowledge, and those matters in respect to which evidence must be available to support such a finding”: at [12]. His Honour cited (at [12]) *Navoto v Minister for Home Affairs* [2019] FCAFC 135 at [77] (Middleton, Moshinsky and Anderson JJ), the Full Court there referring to two cases in which administrative decision-makers were held, in similar contexts, to be entitled to rely on their knowledge of living conditions in other countries: ***Uelese*** *v Minister for Immigration and Border Protection* (2016) 248 FCR 296 at [69] (Robertson J); ***McLachlan*** *v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 at [39] (McKerracher J). The Full Court referred to another decision in which the decision-maker was not permitted to rely on such knowledge: ***Schmidt*** *v Minister for Immigration and Border Protection* (2018) 162 ALD 495, at [23] – [34] (Burley J); *Anaki v Minister for Immigration and Border Protection* [2018] FCA 77 at [25] (Burley J). The Court continued (at [78]):

Although we express no view on these decisions, our view, which may be subject to more detailed consideration in an appropriate case, is that it is unlikely that a precise test may be formulated to prescribe the circumstances in which an administrative decision-maker may rely on general knowledge or accumulated specialist knowledge: see *Dekker v Medical Board of Australia* [2014] WASCA 216 at [63] per Martin CJ, Newnes and Murphy JJA. That issue, where it arises, is likely to be determined by reference to all the circumstances of the case, including, amongst other factors, the nature of the decision-maker, the extent and character of the decision-maker’s specialisation, and the form of the particular knowledge relied upon by the decision-maker.

1. Having summarised the authorities, the primary judge adopted the language of McKerracher J in *McLachlan* at [37], concluding that the Minister “was not required to refer to any specific evidence in order to” make the language finding: at [10]. His Honour said:

There is, with respect, no necessity for the Minister to actually have ‘*specific evidence*’ before him at the time he made his decision that both Samoan and English are spoken in the Samoan Islands. No specific representation was made to the Minister on behalf of Mr Viane as to whether English was or was not ‘*widely spoken*’ in American Samoa or Samoa. It was thus not an issue which the Minister was called upon to resolve potentially competing submissions. It was a matter, presumably, in respect to which Mr Viane did not see any need to adduce evidence.

1. The primary judge expressed “greater reservation” as to whether there needed to be evidence before the Minister in support of the welfare finding (at [11]) before concluding (at [13]):

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

# CONSIDERATION

1. In *Uelese* an administrative tribunal made a finding 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 so constituted jurisdictional error. Rejecting that submission, Robertson J said (at [69]):

In my opinion, that statement is 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. The applicant did not put forward to the Tribunal that the non-availability of welfare benefits constituted an impediment which he may face if removed from Australia. I also note that the applicant before me has not put forward any material which suggests that the Tribunal was mistaken in its statement. In any event, I am not satisfied that, in the circumstances, the Tribunal’s statement could constitute jurisdictional error.

1. Like *Uelese*, *McLachlan* 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. On judicial review, 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.

1. In *Schmidt*, Burley J upheld a ground of review alleging that the Minister committed jurisdictional error in respect of 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. His Honour said that the unavailability of welfare support was a central issue: at [26] – [27]. It was common ground that there was no objective evidence before the Minister to support the findings: at [28]. His Honour continued:

28 …  Were it to be a question of judicial notice under s 144(1) of the Evidence Act 1995 (Cth) (**Evidence Act**), one might say that this is an unsafe conclusion to reach. Indeed it might be said that the common knowledge in Australia, or alternatively, the knowledge of the ordinary wide-awake person, used by one who is trained to express it in terms of precision (*Brisbane City Council v Attorney-General (Qld)* (1978) 19 ALR 681 at 425 (Privy Council)), indicates that the welfare systems of the United States and Australia are *not* broadly comparable. However, the standard required by s 144(1) of the Evidence Act is not applicable to an administrative decision such as the present.

29 The relevant test for jurisdictional error arising by reason of an absence of evidence is set out in *SFGB* the Full Court (Mansfield, Selway Bennett JJ) at [19]:

… If the Tribunal makes a finding and that finding is a critical step in its ultimate conclusion and there is no evidence to support that finding then this may well constitute a jurisdictional error: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-7; 94 ALR 11 at 37-9 ALD1 at 23-5 …

1. There was no suggestion, his Honour said, that the Minister had relied upon built up “expertise”, nor that he had considered or informed himself of country information concerning the welfare system in the United States of America available to him at the time of the decision: at [33]. His Honour said that the case was not comparable to the situations that arose in *Uelese* and *McLachlan*, where the welfare system under consideration was that of New Zealand: at [34].
2. In ***Webb*** *v Minister for Home Affairs* [2020] FCA 831 Anastassiou J considered whether it was permissible for the Minister in that case to base factual findings about the availability of public health and welfare in the United Kingdom on “common knowledge”. After considering the authorities referred to above, his Honour said it was “conceivable that common knowledge about one country compared to another is more ‘common’ or ‘widely understood’”, for reasons possibly including “geographic or regional proximity, historical ties, cultural, religious and ethnic ties, political systems and so on”: at [97]. His Honour concluded (at [98]):

Given the historic ties between Australia and the United Kingdom, if common knowledge is a sufficient basis for findings concerning the availability of public health and welfare in New Zealand, it would be surprising if common knowledge would not be equally valid for like characteristics in relation to the United Kingdom.

1. Submissions on this appeal focused principally on the question of whether it was permissible for the Minister to base the language finding and the welfare finding on his personal and specialised knowledge. Those submissions pre-supposed that that was what the Minister had done. Whether the Minister based his findings on personal or specialised knowledge is itself a question of fact to be determined in light of all of the circumstances of the particular case.
2. In our view the evidence before the primary judge did not support a finding that the Minister in fact proceeded on the basis of his own knowledge and understanding as to the cultural and social circumstances in American Samoa or Samoa. Four observations may be made.
3. First, the reasons of the Minister do not specify that the findings were based upon personal or specialised knowledge. Whilst not conclusive, in a case such as the present the absence of any reference to any such personal or specialised knowledge tends toward a conclusion that there is none.
4. Second, it cannot be said that the facts stated by the Minister are commonly known. Unlike the cultural, linguistic and political circumstances in America Samoa and Samoa, the circumstances in countries such as New Zealand and the United Kingdom are matters of common knowledge, so explaining the outcomes in *Uelese*, *McLachlan* and *Webb.* As Burley J observed in *Schmidt*, the outcomes in such cases are “unexceptional”. In contrast, the proposition that there are comparable welfare systems as between Australia and the United States of America is neither notorious nor patently correct, as Burley J found in *Schmidt*. Similarly, it is not a notorious fact that English is widely spoken in American Samoa and Samoa. That is not to say that the Minister’s fact finding function is conditioned by evidentiary rules concerning judicial notice such as that contained in s 144 of the *Evidence Act 1995* (Cth). It is simply to say that the more obscure the subject matter, the less likely it will be that a court bound by such rules on judicial review will draw the inference that the Minister has in fact acted upon “evidence” in the form of common or specialised knowledge. Depending on all of the circumstances, the preferable inference may be that the Minister has acted on no such knowledge, and hence no evidence at all.
5. Third, the evidence before this Court does not support an inference that the Minister in fact had specialised knowledge or expertise in respect of the subject matter of his findings concerning American Samoa and Samoa in any event. Possession of knowledge or expertise of that kind is not to be inferred merely from the fact that the decision-maker is the Minister having responsibility for the administration of the Act.
6. Fourth, it is plain that the Minister’s reasons were not drafted by the Minister personally. In accordance with what is now a common practice, the Minister signed, without alteration, a set of suggested reasons prepared in advance of his decision by a Departmental officer. There is no evidence that the author of the draft reasons had any appreciation of the Minister’s prior knowledge (or lack thereof) of the subject matter of the findings as set out in the draft. The proper inference is that the Minster adopted the suggested findings in the draft reasons as his own, in the absence of any evidentiary foundation for them.
7. The Minister’s power to revoke an original decision to cancel a visa will be enlivened if (relevantly) the Minister is satisfied that there is another reason why the original decision should be revoked: Act, s 501CA(4)(b)(ii). Properly construed, the power is subject to the implied condition that the Minister’s state of satisfaction, or non-satisfaction, be formed on the basis of factual findings that are open to be made on the evidentiary materials. In the present case, the Minister failed to comply with that condition in respect of both the language finding and the welfare finding and so failed to comply with a condition affecting the exercise of the power. It remains to consider whether the error is properly to be characterised as jurisdictional.
8. Section 501CA(4) is not to be interpreted as denying legal force and effect to every decision made in breach of the condition to which we have referred. As the plurality said ***Hossain*** *v Minister for Immigration and Border Protection* (2018) 264 CLR 123 “the statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance”: at [29] (Kiefel CJ, Gageler and Keane JJ). Ordinarily, the threshold of materiality would not be met “in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which the decision was made”: *Hossain* at [30] (Kiefel CJ, Gageler and Keane JJ). See also *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [57]. In the context of s 501CA(4), an error in the performance of the Minister’s fact finding function may amount to jurisdictional error if the finding affects a critical step in the Minister’s ultimate conclusion as to whether or not there is “another reason” to revoke the original decision: ***Hands*** *v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at [45] – [48] (Allsop CJ, Markovic and Steward JJ agreeing).
9. In *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 Bell, Gageler and Keane JJ said (at [46]):

Where materiality is in issue in an application for judicial review, and except in a case where the decision made was the only decision legally available to be made, the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof. Like any ordinary question of fact, it is to be determined by inferences drawn from evidence adduced on the application.

1. Counsel for Mr Viane submitted that if the Minister’s errors had not been made, the Minister *would* have made different findings resulting in a conclusion that the impediments faced by Mr Viane and his family were so severe as to be insurmountable. It was then submitted that the insurmountable impediments *would* have outweighed other considerations that favoured the non-revocation of the cancellation decision, including Mr Viane’s history of serious criminal offending.
2. As later acknowledged by counsel, these submissions overstated the test for materiality. To discharge his burden on judicial review, it would be sufficient for Mr Viane to show that the identified errors deprived him of the possibility of a different outcome.
3. Given that Mr Viane could not pass the character test, the Minister’s task was to form a state of satisfaction or non-satisfaction as to whether there existed another reason to revoke the cancellation decision: s 501CA(4)(b). The task was an evaluative one in two respects: the Minister was required to decide questions of fact that arose on the materials and to assess the relative weight to be ascribed to the countervailing considerations. *Marzano v Minister for Immigration and Border Protection* (2017) 250 FCR 548 at [30] – [32] (Collier J, Logan and Murphy JJ agreeing). The ascription of weight to each consideration necessarily depended on the factual circumstances as the Minister had determined them to be. In the given statutory context, an error in a finding of fact (here facts relating to the social circumstances in a country) has the capacity to affect the weight given by the Minister to the particular consideration in question. Expressed in terms of the test for materiality stated in *Hands*, the weight to be ascribed to the hardship that would be suffered by child A should she relocate to Samoa or American Samoa was a critical step in the Minister’s ultimate conclusion as to whether there was another reason to revoke the cancellation decision. That conclusion is reinforced by the historical, factual and legal circumstances in which the Minister’s decision was made: *Hossain* at [30] (Kiefel CJ, Gageler and Keane JJ).
4. As has been mentioned, the Full Court in *Viane Full Court* set aside a previous decision of the Parliamentary Secretary not to revoke the cancellation decision. The submissions that had been made by Mr Viane to the Parliamentary Secretary in 2016 acknowledged that the country to which Mr Viane and his family would relocate was at that time uncertain. The submissions dealt with the alternate scenarios that Mr Viane’s family would not relocate with him at all, that they would relocate to New Zealand or that they would relocate to Samoa. As to the circumstances in Samoa, the representations stated (*Viane Full Court* at [12]):

… should the child and the Australian mother be required to relocate to New Zealand or Samoa with Mr Viane, it is submitted that they will suffer the following adversities:

1. Due to both financial and cultural reasons the entire family unit will need to return to either Samoa or New Zealand if Mr Viane’s visa is cancelled …

2. If relocating to Samoa, the child, although young, will have limited understanding of her father’s native language and as such any schooling and advancement in life will be materially affected by the language and cultural barrier that will be placed upon her.

3. The child will find it difficult to assimilate in a society and culture which she has limited experience and understanding of.

4. The educational opportunities available to children in Australia would be lost if the family were forced to relocate to New Zealand or Samoa.

1. Colvin J (with Reeves and Rangiah JJ agreeing) held that the Parliamentary Secretary had failed to consider Mr Viane’s representations concerning the effect upon his partner and child A of “of the real prospect that the family unit would relocate to Samoa”. His Honour concluded (at [94]):

…  As these were impediments that may befall Australian citizens who were innocent parties, they were significant. It could not be said they were matters that would have no greater impact upon the formation of the requirement state of satisfaction than the finding that Mr Viane would suffer hardship if he moved to New Zealand,

1. The material before the Minister in the present case included the same submissions that had been made by Mr Viane on 13 July 2016 in advance of the Parliamentary Secretary’s decision, together with additional submissions and supporting material provided to him following the delivery of judgment in *Viane Full Court*. The Minister may be presumed to have proceeded on the basis that he was bound to comply with the orders of the Full Court and to have read its reasons for judgment.
2. Under the heading “Best interests of minor children” (at [13]), the Minister stated that he had acted in conformity with Article 3 of the United Convention on the Rights of the Child and treated the interests of child A as a “primary consideration”. The Minister’s concluded that it was not in child A’s best interests for the cancellation decision to be revoked. That conclusion must be interpreted as having been informed not only by the language finding at [23], but also by the welfare finding at [64].
3. Later in his reasons the Minister repeated that he had treated the interests of child A as a “primary consideration”. Whilst not expressly stated, the Minister is to be understood as affording the interests of child A great weight in the ultimate evaluative exercise. The ultimate conclusion was expressed as follows (at [128]):

In reaching my decision about whether I am satisfied that there is another reason why the original decision should be revoked, I concluded that Mr VIANE represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed the best interests of his child and other minor family, members, as a primary consideration, and any other considerations as described above. These include his lengthy residence and ties, employment, volunteer and other activities, familial ties to Australia, impediments to settlement that he, his partner and child may face overseas, and the hardship Mr VIANE, his family and social networks will endure in the event the original decision is not revoked.

1. The primary judge determined that any error in respect of the language finding would not be material because Mr Viane had made no representation to the Minister to the effect that English was not widely spoken in American Samoa or Samoa. Respectfully, there is error in that reasoning.
2. The Minister reasons contain a statement (at [18], extracted at [27] above) to the effect that Mr Viane’s representations included an assertion that child A would experience language difficulties should she relocate to Samoa. That understanding properly reflects the submission referred to in *Viane Full Court*, a submission said by the Minister to have been read and considered by him. The submission was to the effect that child A, although young, would have limited understanding of “her father’s native language”. In our view, the Minister’s error affecting the language finding was made in the course of grappling with that submission.
3. The Minister was correct to consider himself bound to determine whether, and to what extent, English was spoken in Samoa or American Samoa for two reasons. First, as explained above, the difficulties associated with language were one of a number of aspects of life in Samoa expressly raised by Mr Viane in his representations. Second, the Minister’s decision required discrete consideration to be given to the best interests of child A in accordance with Australia’s international obligations. The Minister correctly considered it necessary to give factual content to his conclusion as to why revocation was not in child A’s best interests and to weigh that factual content in the balance. The Minister correctly determined that those considerations were to be given significant weight. The same may be said of the welfare finding, Mr Viane’s submissions on that issue being even more plainly stated.
4. It has not been overlooked that the proposition that there were language differences as between Australia and Samoa or American Samoa was accepted by the Minister. The error affected the Minister’s assessment of the nature and extent of those differences and hence the extent to which they affected the interests of child A and otherwise presented an impediment to Mr Viane and his family. The error goes to a question of degree. So too does the error concerning the existence and quality of welfare services. In our view the errors are of a kind that lead the Minister to afford less weight to the interests of child A than he might otherwise have done and so affected a critical aspect of the Minister’s reasoning.
5. It should be emphasised that Counsel for the Minister on this appeal did not seek to defend the decision on the basis that there was an alternative path of reasoning to the ultimate conclusion that was unaffected by error, whether related to Mr Viane’s status as a New Zealand citizen or otherwise. Nor did the Minister contend on the appeal that a future factual enquiry by the Minister, unaffected by error, could only result in the same factual findings concerning the circumstances in Samoa or American Samoa and hence produce the same outcome.
6. The appeal should be upheld on this basis.
7. We reserve for a future occasion the question of whether the Minister would have been entitled to proceed on the basis that the outer boundary of his duty to consider the interests of child A was defined by the particulars Mr Viane expressly identified in his representations. In our opinion it is arguable that the reasoning of the plurality (French CJ, Kiefel Bell and Keane JJ) in *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [61] – [68] suggests that may not be the case. By way of analogy with the reasoning of Full Court in *Minster for Home Affairs v Omar* [2019] FCAFC 188; 373 ALR 569 it may be that the Minister would have been required to identify and then confront the objective reality of a circumstance in which an Australian child will be taken from Australia to a country where his or her parent will be compelled to return; and then to explain how that reality has, or has not, affected the exercise of power; no matter how inadequately or incompletely his or her parent has put that consequence of the decision in issue. However, given our reasons at [42] – [46] and [53] – [61], we are satisfied that the circumstances material to child A’s interest about which the Minister made the impugned findings were adequately articulated in the representations, so requiring the Minister’s lawful determination of the factual matters there asserted. We therefore need not consider what may or may not have been the position had Mr Viane’s representations (including those he had earlier advanced and had been previously remitted for the Minister’s reconsideration according to law) omitted to mention one or more of those matters.

# GROUND 2 – IRRATIONALITY/UNREASONABLENESS

1. The second ground of appeal alleges that the primary judge erred in failing to find that the Minister’s decision was illogical or irrational or otherwise affected by legal unreasonableness.
2. An administrative decision may be affected by legal unreasonableness if there is no logical connection between the evidence and the inferences or conclusions drawn, if it lacks an intelligible or evident foundation, or if it involves factual findings or inferences that are internally irreconcilable: see, respectively *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [135] (Crennan and Bell JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76] (Hayne, Kiefel and Bell JJ*)*; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [11] (Allsop CJ, Wigney J agreeing); *Muggeridge v Minister for Immigration and Border Protection* (2017) 255 FCR 81 at [56] (Charlesworth J, Flick and Perry JJ agreeing).
3. In the proceedings at first instance, the Minister’s decision was said to be legally unreasonable in two respects.
4. The first alleged error was that the Minister made inconsistent or irreconcilable findings of fact concerning the language difficulties child A might face if relocated to American Samoa or Samoa, namely that (on the one hand) English was widely spoken in those places and (on the other hand) that child A would experience language and cultural difficulties, although not to the same extent as she might if she were older. The Minister repeated (at [71]) that the hardships and adjustments faced by Mr Viane’s partner and child A would potentially include language difficulties.
5. The primary judge did not err in rejecting this argument. The Minister’s conclusion that English was widely spoken in American Samoa or Samoa did not equate to a finding that English was the only language spoken there. The finding did not logically preclude a conclusion that Mr Viane’s partner and child A would experience some language difficulties if they were to relocate to either place.
6. The second alleged error related to the Minister’s finding that child A (then aged four) was “not yet of school age” and that her relocation to American Samoa or Samoa “will not immediately impact on her education or advancement in life, although it may do so in terms of the opportunities available to her as she grows older”. It was submitted that there was no evidence before the Minister as to the age at which children commenced formal schooling in either American Samoa or Samoa such that there could be no intelligible basis for the conclusion that child A’s education would not be immediately impacted. It was further submitted that the conclusion that child A’s advancement in life would not be immediately impacted could not be reconciled with the finding that she would suffer language adjustments, as well as other findings about the difficulties Mr Viane and his partner would experience finding employment and housing, at least initially (at [64] and [65]).
7. The primary judge proceeded from an assumption that the Minister had implicitly assumed that the age for commencing school in American Samoa or Samoa was the same as that in Australia. His Honour said:

22. …  Although there may have been no evidence as to the school age in Samoa, it was nevertheless open to the Minister to conclude in respect to a child of about four years of age that relocation would ‘*not immediately impact*’ her education or advancement. A finding that there would be no immediate impact upon the daughter’s education is not inconsistent with findings as to the (for example) ‘*significant*’ impacts or ‘*hardships*’ that may be suffered by Mr Viane and his family unit expressed more generally.

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

1. The primary judge was correct to conclude that this aspect of the Minister’s decision was not affected by jurisdictional error. However, we would reason to that conclusion by a different route.
2. Properly understood, the Minister’s reasons do not expressly or implicitly include any finding as to the school age of children in American Samoa or Samoa. Rather, the Minister should be understood to have concluded that child A’s schooling would not be immediately disrupted because she had not yet reached the age at which a child would ordinarily commence formal schooling in Australia. The finding at [23] must also be read as confined to its subject matter. The finding expressly relates to the *immediate* impact on child A’s advancement in life, the overall impact of her relocation being considered in detail elsewhere in the Minister’s reasons. Read as a whole, the Minister’s decision not to revoke the cancellation decision rests on an overall acceptance that child A’s opportunities in life would indeed be greatly impacted should she relocate to American Samoa or Samoa, but that her best interests were outweighed by countervailing considerations. Read in context, there is nothing irrational in the conclusion the impacts on child A’s educational opportunities and advancement in life would not be felt immediately.

# GROUNDS 3 AND 4

1. The third ground of judicial review was to the effect that the Minister failed to give proper, genuine and realistic consideration to a submission Mr Viane had made through his legal representative concerning the expectations of the Australian community, namely:

… the Australian community would be mindful that [the Applicant] has completed his prison sentence, has now spent almost three years in immigration detention and has a supportive partner and loving daughter who wish him to be with them. It is submitted that his removal from Australia will impact negatively on various Australian citizens who are members of the community and that the Australian community would expect [the Applicant] to be released into the community without further delay.

1. The submissions concluded:

Finally, for the purposes of the primary consideration of ‘Expectations of the Australian community’, the Australian community would hold an expectation that Mr Viane be released back into the Australian community. The Australian community would be cognisant of the fact that Mr Viane has completed his prison sentence, spent almost three years in immigration detention, has a supportive partner and loving daughter, and would not want to see Mr Viane held in immigration detention any longer.

1. Clearly, the propositions advanced by Mr Viane constituted a significant part of the reasons why he submitted the cancellation decision should be revoked. Given their content and potential importance to the outcome, the Minister was required to do more than merely note that the submissions had been made. In the circumstances of this case, the proper exercise of the power conferred by s 501CA(4) of the Act required that the factual and legal propositions put forward on Mr Viane’s behalf be the subject of active deliberation and decision: see generally *DVE18 v Minister for Home Affairs* [2020] FCAFC 83 at [34] and the authorities cited therein.
2. As the primary judge observed, the Minister noted and correctly summarised the submissions at [32] of his reasons as follows:

I have noted Mr Rigas’ submission that the community expects that the decision maker be informed, fair and reasonable, and not solely consider the punitive aspects of the s501 power. I further noted Dr Donnelly’s submission on behalf of Mr VIANE that the Australian community would be mindful that Mr VIANE has completed his prison sentence, has now spent almost three years in immigration detention, and has a supportive partner and loving daughter who wish him to be re-united with them. It is submitted that his removal from Australia will impact negatively on various Australian citizens who are members of the community and that the Australian community would expect Mr VIANE to be released back into the community without further delay.

1. The Minister went on to say:

33. In relation to Mr Rigas’ remark, the Migration Act provides for the mandatory detention of unlawful non-citizens, such as Mr VIANE. Detention powers contained in the Act are administrative in nature, not punitive. They are intended to facilitate the management of individuals while their immigration status is being resolved, while also protecting the community from potential harm.

34. In relation to the expectations of the Australian community, I find that the community would expect non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust, or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the original decision to cancel the visa of such a person. Mr VIANE has breached this trust as he has been convicted of domestic violent offences in Australia and other very serious violent crimes.

35. Having regard to the circumstances of the crime he committed, I have concluded that the majority of the Australian community would expect that Mr VIANE not be permitted to remain in Australia.

1. Having referred to those passages, the primary judge rejected the ground of review, concluding at:

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

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

1. There is no appealable error in that reasoning. To his Honour’s conclusion we would add that the Minister gave further consideration to Mr Viane’s submission elsewhere in his reasons as follows:

37 Mr VIANE arrived in Australia on 23 December 1991, as a child of 14 years, after he was adopted by his uncle Saaoli. Mr VIANE has resided in Australia for some 27 years. Mr VIANE has lived in Australia for most of his life and from the age of 14, therefore I consider that the Australian community may afford a higher tolerance of criminal conduct. Nonetheless, in light of the fact that Mr VIANE started to offend at age 17, soon after arriving in Australia, after having lived here for the relatively short period of two years, I have given less weight to this factor.

…

127 I am cognisant that where significant harm could be inflicted on the Australian community even other strong countervailing considerations may be insufficient for me to revoke the original decision to cancel the visa, even applying a higher tolerance of criminal conduct by Mr VIANE, than I otherwise would, because he has lived in Australia for most of his life from the age of 14.

1. The fourth ground of review alleged that Mr Viane was denied procedural fairness in respect of the same subject matter. It properly fell with the third ground.

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| I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kerr and Charlesworth. |

Associate:

Dated: 24 August 2020