FEDERAL COURT OF AUSTRALIA

Nafady v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 1434

File number: QUD 149 of 2022

Judgment of: **LOGAN J**

Date of judgment: 30 November 2022

Catchwords: **MIGRATION** – application for judicial review of a personal decision by Minister not to revoke visa cancellation decision made under s 501(3) of the *Migration Act 1958* (Cth) – relationship between reasonable suspicion in s 501(3)(c) and reasonable satisfaction in s 501C(4) of the *Migration Act 1958* (Cth) – where applicant initially convicted of sexual offences against five women – where convictions subsequently quashed and retrial returned not guilty verdicts – where Minister undertakes own review of sentencing remarks and reasons for judgment on appeal and subsequent retrial – where Minister not able to rule out the possibility that the applicant had committed serious sexual offences in the past – where Minister finds that there is a risk that applicant will engage in serious sexual offending in the future – where Minister's decision does not expose basis upon which the Minister formed a reasonable satisfaction that the applicant did not pass the character test – application granted

Legislation: *Administrative Appeals Tribunal Act 1975* (Cth) s 33
Migration Act 1958 (Cth) ss 116, 501, 501A, 501C, 501CA

Cases cited: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1
Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353
Boughey v The Queen (1986) 161 CLR 10
Briginshaw v Briginshaw (1938) 60 CLR 336
Cadbury UK Ltd v Registrar of Trade Marks [2008] FCA 1126
Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379
Coker v Minister for Immigration and Border Protection [2017] FCA 929
De Silva v The Queen (2019) 268 CLR 57
EVX20 v Minister for Immigration, Citizenship, Migrant

Services and Multicultural Affairs [2021] FCA 1079

Fardon v Attorney-General (Qld) (2004) 223 CLR 575

George v Rockett (1990) 170 CLR 104

Graham v Minister for Immigration and Border Protection (2017) 263 CLR 1

Hussien v Chong Fook Kam [1970] AC 942

HZCP v Minister for Immigration and Border Protection (2019) 273 FCR 121

MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1161

Minister for Immigration and Border Protection v Makasa (2021) 270 CLR 430

Minister for Immigration and Border Protection v Sabharwal [2018] FCAFC 160

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

Minister for Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane (2021) 96 ALJR 13

Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12

Nathanson v Minister for Home Affairs (2022) 96 ALJR 737

Plaintiff M1/2021 v Minister for Home Affairs (2022) 96 ALJR 497

Sullivan v Civil Aviation Safety Authority (2014) 226 FCR 555

Sun v Minister for Immigration and Border Protection (2016) 243 FCR 220

Yasmin v Attorney-General (Cth) (2015) 236 FCR 169

Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	66
Date of hearing:	27 July 2022
Counsel for the Applicant:	Mr J Moxon

Solicitor for the Applicant:	Sentry Law
Counsel for the Respondent:	Mr B McGlade
Solicitor for the Respondent:	Sparke Helmore Lawyers

ORDERS

QUD 149 of 2022

BETWEEN:	**ADEL NADER ABDALLAH NAFADY** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** Respondent

ORDER MADE BY: **LOGAN J**

DATE OF ORDER: **30 NOVEMBER 2022**

THE COURT ORDERS THAT:

1. A writ of certiorari issue bringing the decision of the respondent dated 24 March 2022 not to revoke, under s 501C(4) of the *Migration Act 1958* (Cth), the cancellation of the applicant's Criminal Justice Stay visa (original decision) into this Court and quashing it.
2. A writ of mandamus issue directing the respondent to re-determine the original decision according to law.
3. The respondent pay the applicant's costs of and incidental to the application, to be fixed by a registrar in a lump-sum if not agreed.

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

REASONS FOR JUDGMENT

LOGAN J:

1 Mr Adel Nafady (Mr Nafady) is a citizen of the Arab Republic of Egypt. He entered Australia lawfully on 28 February 2015 as the holder of a Subclass 573 (Higher Education Sector) visa (student visa), issued pursuant to the *Migration Act 1958* (Cth) (the Act).

2 If one accepts that conduct the subject of later criminal charges occurred (and it is no part of my function to determine whether it occurred), a little over a month after he arrived in Australia, during the period from 30 March 2015 and 21 May 2015, Mr Nafady embarked upon a course of conduct which included the commission of a number of sexual offences in respect of six adult female complainants. These alleged offences concerned women Mr Nafady was alleged to have met via dating or relationship websites, whom he was alleged to have raped (and in one instance allegedly falsely imprisoned) after meeting.

3 This alleged conduct having come to the attention of the respondent Minister's department, a delegate of the Minister, acting under s 116(1)(e) of the Act, cancelled Mr Nafady's student visa on 28 May 2015. That decision was affirmed by the Administrative Appeals Tribunal (Tribunal) on 28 June 2016. That was at a time when the criminal charges mentioned were yet to be dealt with to finality.

4 Mr Nafady was later granted a "criminal justice stay" visa (the visa) under the Act. On 12 April 2021, the then Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Minister), the Honourable Alex Hawke MP, acting personally and pursuant to s 501(3) of the Act, decided to cancel the visa (cancellation decision). Mr Nafady then applied to the Minister for the revocation of the cancellation decision pursuant to s 501C of the Act. On 24 March 2022, again acting personally, Mr Hawke decided not to revoke the cancellation decision (non-revocation decision). I detail below the materials upon which the Minister acted in making the non-revocation decision.

5 Mr Nafady has applied for the judicial review of the non-revocation decision. The present Minister (a successor of Mr Hawke) is the respondent to that application. As they came to be amended, Mr Nafady's grounds of review are as follows:

> (a) Ground 1 – The respondent's decision was affected by jurisdictional error in that in reaching the view that he was not satisfied the applicant passed the character test, he took an irrelevant consideration into account namely the applicant's quashed convictions for rape.

(b) Ground 2 – The respondent's decision was affected by jurisdictional error in that in reaching the view that he was not satisfied the applicant passed the character test he failed to take into account a relevant consideration which could affect his determination, namely the circumstances of and reasons for the applicant's acquittal when re-tried on a count of rape. Alternatively, the failure to consider those matters rendered the formation of the respondent's state of mind that the applicant did not pass the character test illogical or irrational and without an evident justification.

(c) Ground 3 – The respondent's decision was affected by jurisdictional error in that in reaching the view that he was not satisfied the applicant passed the character test he considered charges which had been withdrawn and police investigations which did not proceed, and thereby considered irrelevant material, alternatively the failure to consider those matters rendered the formation of the respondent's state of mind that the applicant did not pass the character test illogical or irrational and without an evident justification.

(d) Ground 4 – The formation by the respondent of the view that the applicant did not pass the character test because he could not exclude the possibility that the applicant had committed rape was vitiated by illogicality and irrationality.

6 Consideration of these grounds first requires that s 501C and pertinent extracts of s 501 of the Act be set out and that related reference be made to authorities touching upon their meaning:

> **501C Refusal or cancellation of visa—revocation of decision under subsection 501(3) or 501A(3)**
>
> (1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3) or 501A(3) to:
>
> (a) refuse to grant a visa to a person; or
>
> (b) cancel a visa that has been granted to a person.
>
> (2) For the purposes of this section, ***relevant information*** is information (other than non disclosable information) that the Minister considers:
>
> (a) would be the reason, or a part of the reason, for making the original decision; and
>
> (b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.
>
> (3) As soon as practicable after making the original decision, the Minister must:
>
> (a) give the person, in the way that the Minister considers appropriate in the circumstances:
>
> (i) a written notice that sets out the original decision; and
>
> (ii) particulars of the relevant information; and
>
> (b) except in a case where the person is not entitled to make representations about revocation of the original decision (see subsection (10))—invite the person to make representations to the Minister, within the period and in the manner ascertained in

accordance with the regulations, about revocation of the original decision.

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

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

(b) the person satisfies the Minister that the person passes the character test (as defined by section 501).

(5) The power under subsection (4) may only be exercised by the Minister personally.

(6) If the Minister revokes the original decision, the original decision is taken not to have been made. This subsection has effect subject to subsection (7).

(7) Any detention of the person that occurred during any part of the period:

(a) beginning when the original decision was made; and

(b) ending at the time of the revocation of the original decision;

is lawful and the person is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention.

(8) If the Minister makes a decision (the ***subsequent decision***) to revoke, or not to revoke, the original decision, the Minister must cause notice of the making of the subsequent decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the subsequent decision was made.

(9) If the person does not make representations in accordance with the invitation, the Minister must cause notice of that fact to be laid before each House of the Parliament within 15 sitting days of that House after the last day on which the representations could have been made.

(10) The regulations may provide that, for the purposes of this section:

(a) a person; or

(b) a person included in a specified class of persons;

is not entitled to make representations about revocation of an original decision unless the person is a detainee.

(11) A decision not to exercise the power conferred by subsection (4) is not reviewable under Part 5 or 7.

501 Refusal or cancellation of visa on character grounds

…

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

…

(4) The power under subsection (3) may only be exercised by the Minister personally.

…

(6) For the purposes of this section, a person does not pass the character test if:

…

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way;

…

Pardons etc.

(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

…

7 An observation made in the joint judgment of the High Court in *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, at [15], confirms what a reading of the text of s 501C(4) of the Act would in any event suggest as a matter of ordinary English, which is that the subsection, "empowers the Minister, following receipt of any such

representations, to revoke the decision to refuse or to cancel if, but only if, 'the person satisfies the Minister that the person passes the character test'". This singularity of focus distinguishes s 501C(4) of the Act from the relatively more frequently encountered s 501CA(4) of the Act. In those cases to which it applies, and the present is not one, s 501CA(4) provides for a wider basis for revocation of the cancellation of a visa:

> (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.

8 Occasion for the less frequent encounter with exercises of the visa revocation power in s 501C(4) is supplied by its linkage to visa cancellation powers under either s 501(3) or, as the case may be s 501A(3), each of which provides that the power may only be exercised by the Minister personally: see, respectively, s 501(4) and s 501A(5) of the Act. The linkage between s 501C(4) and, materially, s 501(3) is confirmed by this observation made by Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ in their joint judgment in *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 (*Graham*), at [56]:

> Section 501(3) is to be read with s 501C(4), which confers power on the Minister to revoke a decision under s 501(3). A condition of that power is that the person satisfies the Minister that the person passes the character test.

9 This observation in *Graham* also highlights another feature of s 501C(4), which is that it is for the former visa holder to engender the requisite state of Ministerial satisfaction, which is the condition precedent to the exercise of the power of revocation by the Minister. This feature of s 501C(4) of the Act distinguishes the exercise of the Minister's power under that subsection from the usual position which prevails in administrative decision-making, which is that the notion of a burden or an onus of proof is foreign, inaptly borrowed from a realm of discourse which has civil litigation as its touchstone: see *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220 (*Sun*), at [61] et seq, esp at [64] per Flick and Rangiah JJ (with whom I agreed generally). A non-citizen may engender that satisfaction either by the representation made, by supplementary materials submitted thereafter or by

reference to the "relevant information" already furnished by the Minister under s 501(3)(b) of the Act, a related, supplementary submission or some combination thereof.

10 Recently, in *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 (*Nathanson*), and with reference to the earlier decided *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13 (*Viane*), the High Court elaborated upon the task which fell to the Minister (or the Tribunal in place of a delegate) under s 501CA(4) of the Act. In circumstances where the alternative specified in s 501CA(4)(b) of the Act is raised, the High Court stated, at [71]:

> The Tribunal's task under s 501CA(4) of the Migration Act was evaluative. In deciding whether there is 'another reason' why a visa cancellation decision should be revoked, a decision-maker must evaluate representations made in response to an invitation issued under s 501CA(3)(b), assess and weigh relevant evidence and material, and weigh and balance considerations for and against revocation.

As already mentioned, the focus of s 501C(4) of the Act is narrower than s 501CA(4). Nonetheless, it seems to me necessarily to follow by analogy from this statement in *Nathanson* that the Minister's task under s 501C(4) of the Act was to evaluate representations made by or on behalf of Mr Nafady in response to an invitation issued under s 501C(3)(b) and assess and weigh relevant material to the end of deciding whether he was satisfied that Mr Nafady passed the character test as defined by s 501 of the Act.

11 *Nathanson* apart, in relation to the Minister's task under s 501C(4) of the Act where a representation is made, there is, in my view, also assistance by analogy in observations made by Kiefel CJ, Keane, Gordon and Steward JJ concerning the Minister's task under s 501CA(4) of the Act in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 (*Plaintiff M1/2021*), at [22] to [24]. Adapting what is there said and making allowance for the narrower focus of s 501C(4), the Minister undertakes the assessment of whether he is satisfied that a former visa holder passes the character test by reference to the case made by the former visa holder by their representations. He must read, identify, understand and evaluate those representations. The Minister must, "have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them": *Plaintiff M1/2021*, at [24]. The weight to afford particular material forming part of or adverted to in a representation is always one for the Minister. Moreover, as was also stated in *Plaintiff M1/2021*, at [25]:

> [The] requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to

> comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them.

12 And as was further stated in *Plaintiff M1/2021*, at [27], after sounding a cautionary note concerning the use of labels such as "active intellectual engagement" and "proper, genuine and realistic consideration":

> … if review of a decision-maker's reasons discloses that the decision-maker ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument; misunderstood the applicable law; or misunderstood the case being made by the former visa holder, that may give rise to jurisdictional error.

Ground 1

13 The criminal charges which precipitated the cancellation of Mr Nafady's student visa proceeded to a series of trials, six in all. In the result, he was found guilty of four charges of rape in relation to three complainants and acquitted of other charges relating to a different complainant. In consequence of that, other charges relating to two remaining complainants were discontinued. He was sentenced to a lengthy term of imprisonment in respect of the four charges which resulted in conviction.

14 Mr Nafady successfully challenged these convictions on appeal. The appeal was heard and determined via a procedure ordained for such cases, whereby a pseudonym was assigned to him for the purposes of that appeal. So as not to subvert the purpose of that procedure, I refrain from citing the appeal judgment concerned by name or even which appellate court quashed the convictions. Apart from ordering that the four convictions be quashed, the orders made on the appeal were that there be a retrial in respect of the four charges of rape. One of these cases was retried with the result on this occasion being an acquittal. Upon this occurring the prosecution discontinued the remaining cases. The end result is that there are no extant convictions in respect of the alleged conduct grounding the charges the laying of which occasioned the cancellation of the student visa.

15 The Minister's reasons reveal that he was aware of both the lower court convictions and sentence, the remarks made by the sentencing judge, the outcome of the appeal, the reason why the appeal was allowed (the receipt at trial of inadmissible evidence) and that there had been a retrial which resulted in an acquittal. In a passage of the non-revocation decision that is central to ground 1, the Minister stated:

10. I have considered the submissions stating that the Minister cannot take into consideration any previous rape charges or convictions against Mr NAFADY when analysing whether he meets the character test, and given Mr NAFADY is innocent in respect of the previous rape charges, it is not open to conclude that there is a risk of Mr NAFADY engaging in criminal conduct by virtue of the existence of those prior charges and guilty verdicts (Attachment O).

11. It is submitted that while Mr NAFADY faced a pending charge of rape at the time of his visa cancellation, he is entitled to the presumption of innocence, and a previous judicial finding has indicated that he is a credible and reliable person who tells the truth and can be believed. It is submitted that significant weight should be given in favour of Mr NAFADY; he has been found not guilty before, other cases have been voluntarily discontinued against him, and his bail breaches can only be described as minor (Attachment O).

12. However, the presumption of innocence does not mean that I have to accept that Mr NAFADY is innocent for the purpose of the present decision, and it is open to me to reach a conclusion inconsistent with that presumption. In this regard, I am cognisant that the presumption of innocence has limited direct relevance to an administrative law decision, noting that substantive and evidential law applicable in criminal proceedings is very different from that applying to the making of an administrative decision. In the context of administrative decision making, I note that a lower threshold than '*beyond reasonable doubt*' may be applied to support a finding, so long as the requisite satisfaction has been reasonably, rationally, and logically reached.

13. The fact that a criminal charge relying on certain material has not been proven '*beyond reasonable doubt*' does not mean that the material is not probative, and an acquittal, by itself, does not render the material irrelevant. In the present case, I find that there is material before me which tends to show that Mr NAFADY has engaged in criminal or inappropriate or otherwise harmful conduct in the past, and I find that material to be capable of rationally bearing on my assessment of the risk that Mr NAFADY would engage in criminal conduct in the future.

14. Having regard to the material in this case, while recognising that the Court of Appeal quashed his rape convictions and a re-trial acquitted Mr NAFADY of one those of convictions, I am unable to rule out the possibility that Mr NAFADY did, in fact, commit the acts of rape in question.

15. My conclusion in this regard is based upon my own analysis of the material available rather than the original convictions that have since been quashed. In particular, in considering the evidence against Mr NAFADY, I did not take into account that the evidence was considered by the jury to be sufficiently strong to result in his convictions at first instance, nor did I consider the original convictions of themselves to be demonstrative of the strength of the case against Mr NAFADY.

[Emphasis by italics in original]

16 The evidence discloses what material was before the Minister at the time when he made his decision. In relation to the quashed rape convictions, this comprised the sentencing remarks after the initial verdict and the reasons for judgment in respect of Mr Nafady's successful appeal. Notably, the evidence tendered at the trials which resulted in conviction was not

included in the material before the Minister; and neither was any of the evidence from the retrial which resulted in acquittal.

17 That retrial was conducted by judge alone. The reasons of the trial judge who conducted the retrial, and who acquitted Mr Nafady, were included in the material before the Minister. Annexed to those reasons was an exchange of text messages between the complainant and Mr Nafady after the alleged rape, which featured in the trial judge's reasoning as to why he was not satisfied beyond reasonable doubt that the rape charged was proved. That rape charge arose from an allegation that Mr Nafady had persisted in an initially consensual act of penile/vaginal intercourse after consent was withdrawn. Mr Nafady gave evidence at the retrial. He acknowledged the act of intercourse but stated that he had desisted after the complainant withdrew her consent.

18 Mr Nafady's submissions were made carefully and concisely by Mr Moxon of Counsel, commendably acting *pro bono* for him. They proceeded from the unquestionably correct premise that, although the exercise of the revocation power conferred by s 501C(4) of the Act is conditioned upon a subjective jurisdictional fact namely, ministerial satisfaction that the former visa holder satisfies the character test, that does not render the resultant decision immune from scrutiny on judicial review in the same way as described by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 (*Avon Downs*). In that case, at 360, in relation to another satisfaction based provision Dixon J stated:

> If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

As to the amenability to and basis of judicial review in respect of decisions made in the exercise of satisfaction based statutory powers, reference might also usefully be had to the discussion of pertinent authorities, including *Avon Downs*, in the joint judgment in *Minister*

for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 (*Wu Shan Liang*), at 275 – 276.

19 Accepting this, it was submitted on behalf of Mr Nafady that the Minister's reasons revealed that, however much he stated otherwise, he could only have taken into account, contrary to the prohibition in s 501(10) of the Act, the convictions which were quashed. So doing, it was submitted, constituted the taking into account of an irrelevant consideration which infected the Minister's ultimate conclusion.

20 Reliance was placed for Mr Nafady upon my judgment in *EVX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1079 (*EVX20*), at [26], in which I held that s 501(10) of the Act, "offers a paradigm example of a provision which expressly renders a subject an irrelevant consideration for the purposes of administrative decision making". Also in *EVX20*, I held, at [25], that, as used in s 501(10) of the Act, "conviction" applies not just to the formal judicial act or order of conviction, but also extends to the finding of guilt.

21 The Minister's riposte was that administrative decision-making did not require formal proof by admissible evidence and that the references in the Minimiser's reasons to the "material" before him in relation to these particular allegations of rape were, if read fairly, references to evidentiary summaries to be found in (a) the sentencing judge's remarks; (b) the reasons for judgment on the appeal; and (c) the reasons of the judge who heard and determined the subsequent retrial which resulted in an acquittal. It was put that the Minister's references to "material" before him must be read as a reference to such summaries. A difficulty with that submission is that nowhere in his reasons does the Minister actually state this. He has not exposed his analysis of the "material", including, as necessarily follows from the absence of an exposed analysis, identifying what material featured in that analysis and how it featured.

22 It may be readily accepted that there is no necessary, invariable inconsistency between a verdict of acquittal either at trial or on appeal in criminal law proceedings, and administrative satisfaction that alleged conduct the subject of the criminal charge concerned occurred. In relation to the legality of the conduct, there may be an inconsistency if a necessary element of the criminal conduct was an absence of lawful authority and, either at trial or on appeal, there has been a judicial determination that the conduct concerned was lawful. In such a case, it may not be permissible for an administrator to conclude that the conduct, though it occurred, was unlawful. Further, if, for example, the acquittal can be seen to be the result of evidence

that the accused was just not present at all at the time of the alleged offending conduct, it would not, in the absence of being seized with material to the contrary of such evidence, and an explained preference for such material, be open for an administrator to conclude that the accused person was present at that time, i.e. that the alleged conduct occurred at all.

23 Such types of case aside, the absence of necessary, invariable inconsistency flows from the very nature of administrative decision making. To adapt, in relation to administrative findings of satisfaction or absence of satisfaction in respect of conduct which would amount to an offence, what was stated in *Wu Shan Liang*, at 282, in respect of administrative fact finding generally, to conceive that it is necessary for such a finding that there be proof beyond reasonable doubt by admissible evidence is to borrow from a universe of very different discourse which has an exercise of judicial power in the criminal jurisdiction as its subject.

24 The Minister made observations to similar effect at [12] of his reasons, quoted above. For the reasons just given, I see no error of law these particular ministerial observations.

25 Subject to s 501(10) of the Act, exemplifying as he did par excellence, an administrative decision-maker, the Minister was in no way constrained to act only on evidence admissible in a judicial proceeding. Sometimes, in respect of particular administrative decision-makers, this common law position is confirmed by statute, as for example by s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) in relation to the Tribunal. In *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126; 107 ALD 316, at [17] – [19], Finkelstein J offers a helpful and instructive discussion of the different bases upon which judicial and administrative decision-making permissibly occurs, both at common law and where a confirmatory provision such as s 33(1)(c) of the AAT Act is present, including the uses which may be made in administrative decision-making of earlier factual conclusions by judges:

> 17 The second error (deference to the findings of the judge) requires some introductory comments. Proceedings in courts of law are bound by strict rules of evidence. In *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456, 488 Diplock LJ explained that "[f]or historical reasons, based on the fear that juries who might be illiterate would be incapable of differentiating between the probative values of different methods of proof, the practice of the common law courts has been to admit only what the judges then regarded as the best evidence of any disputed fact, and thereby to exclude much material which, as a matter of common sense, would assist a fact-finding tribunal to reach a correct conclusion." In contrast, unless otherwise provided by statute, rules of evidence do not bind administrative tribunals. Subject to an overriding duty of fairness (as to which see *Board of Education v Rice* [1911] AC 179, 182) a tribunal may

have regard to probative evidence of any kind and from any source. It may even act upon its own knowledge, whether it be factual or scientific: *Mahon v Air New Zealand* [1984] AC 808.

18 The evidence to which an administrative tribunal may have regard can include evidence that has been given in another proceeding, including a court proceeding, provided the evidence is relevant to an issue before the tribunal: In *re A Solicitor* [1993] QB 69, 77. A tribunal may also accept as evidence the reasons for judgment given by a judge in other proceedings. But if the tribunal takes the approach that it should not disagree with findings made by the judge then the tribunal has fallen into error. The general rule is that a tribunal that is required to decide an issue will be in breach of that obligation if it merely adopts the decision of the judge on the same issue. (I put to one side (a) decisions which are the trigger for administrative proceedings and (b) criminal convictions which operate in rem and may not be challenged in collateral proceedings.) I do not mean to imply that reasons for decision given by a judge are irrelevant to an administrative tribunal. First of all, those reasons may, as I have said, be received into evidence. They must then be given some weight. Indeed, the judge's findings may be treated as prime facie correct. On the other hand, if the judge's findings are challenged, the tribunal must decide the matter for itself on the evidence before it: *General Medical Council v Spackman* [1943] AC 627.

19 Of course, when the tribunal is required to decide the matter for itself it is entitled to have regard to the judge's findings. What weight it attaches to those findings will depend on a variety of considerations. Without in any way wishing to be exhaustive, the considerations can include:

(a) whether the tribunal has available to it more evidence than was before the judge;

(b) whether the arguments put to the tribunal were made to the judge; and

(c) whether the tribunal is a specialist body with expert knowledge of the subject matter.

26 I unreservedly accept, as I must in light of its provenance, the Minister's submission, grounded in *Wu Shan Liang*, that the reasons of an administrator must not, on judicial review, be read narrowly and with an eye for error. On their face, the Minister's reasons do not indicate that he has acted upon the findings of guilt, later quashed, thereby transgressing the prohibition in s 501(10) in respect of acting upon a "conviction", as construed by me in *EVX20*. Of course, if it could be concluded that the Minister must necessarily have so acted, a statement to the contrary in his reasons would not prevent a finding that he had committed the error of taking into account an irrelevant consideration. However, it is just not possible, on the basis of the reasons which the Minister chose to give, to conclude that, necessarily, he must have acted upon the findings of guilt.

27 While it follows from this conclusion that ground 1 is not made out, that very same conclusion exposes, as was alternatively put on behalf of Mr Nafady, that there is substance in the remaining grounds of review. These may conveniently be considered together.

Grounds 2 to 4

28 This was a not a case where terms of imprisonment in respect of convictions led, inexorably, to satisfaction that Mr Nafady did not, indeed could not, pass the character test (qv s 501(7) of the Act). That did not prevent administrative satisfaction that, nonetheless, Mr Nafady did not pass the character test. The Minister recognised this, with respect correctly, in his reference at [46] of his reasons to s 501(6)(d)(i) of the Act, which is directed to satisfaction as to a risk that a person would engage in criminal conduct if allowed to remain in Australia.

29 As mentioned above with reference to *Nathanson* and *Plaintiff M1/2021*, the Minister's task was one of assessing and weighing, to the end of deciding whether Mr Nafady had satisfied him that he passed the character test. In undertaking that task, the Minister might, permissibly, take into account a summary of evidence given at a trial prepared by officers of his department: *Viane*, at [19]. He was not obliged himself to undertake an analysis of that evidence. He might permissibly adopt an analysis undertaken by his department. The business of government would be quite impossible were this not so. Of course, if adoption of a departmental summary or analysis is conducive to a jurisdictional error, that the Minister did not personally perform the same is no obstacle to a conclusion that, by their adoption, he has committed such an error. To adopt a summary or analysis is to adopt not only its virtues but also its vices in terms of its fairness, comprehensiveness, rationality and logicality.

30 In the present case, the Minister neither had such a departmental summary nor such an analysis, although he did adopt draft reasons as prepared by his department.

31 The Minister might also, permissibly, take into account a summary of evidence offered not by his department but rather by a judge either at a sentencing stage or on appeal. As to acting on a summary at sentencing stage, the weight one might afford such a summary may be affected by the later quashing of the convictions concerned and the reasons why those convictions were quashed. In turn, the weight one affords an evidentiary summary offered in an appellate judgment the result of which was an order for a retrial may be affected by the evidence given on the retrial, the knowledge that an acquittal resulted and, as was the case here, by the reasons for acquittal given by the judge who conducted the retrial. Yet further, in each instance, the weight one gave a summary may well be affected by whether it was a summary

of the prosecution evidence alone or the whole of the evidence given at trial and, in the case of the charge that proceeded to a retrial, by whatever there was in the material concerning the evidence given at the retrial and any reasons given in respect of the outcome on the retrial.

32 The Minister also had before him a representation made on behalf of Mr Nafady in response to the statutory invitation. That representation, *inter alia*, made particular reference to the reasons for acquittal as to why it was the Minister should be satisfied that Mr Nafady passed the character test. That representation, was, as *Plaintiff M1/2021* confirms, a relevant consideration with what is necessary to yield a conclusion that it has been taken into account varying according to the circumstances of a given representation, as explained in the observations from *Plaintiff M1/2021* set out above.

33 The Minister does, as mentioned, state that he conducted an analysis of the material before him but, as also mentioned, gives no indication as to what was that analysis. He has not, as ordained in *Nathanson* and *Plaintiff M1/2021*, made particular reference to the material before him, exposing how he has evaluated and weighed that material insofar as it concerned the undertaking of the conduct the subject of the charges in respect of which convictions were quashed, which resulted in acquittal or which were not further proceeded with. Neither does the Minster engage with that part of the representation made to him which directed attention to the reasons of the trial judge as to why that judge acquitted Mr Nafady at the re-trial. Instead, all the Minister has specified is a resultant conclusion, flowing from whatever unspecified analysis he undertook, that he was "unable to rule out the possibility that Mr Nafady did, in fact, commit the acts of rape in question".

34 Reference was made on behalf of Mr Nafady to observations made by Jackson J in *MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1161, at [86], in relation to the difficulties which may beset the reaching of conclusions administratively that conduct which had been charged criminally occurred. While I respectfully agree with these observations, their place for present purposes is to underscore the deficiency inherent in the Minister's failing to expose at all his "analysis".

35 Mr Nafady's alternative case was that, although there was reference by the Minister, at [11], to a "judicial finding has indicated that he is a credible and reliable person who tells the truth and can be believed", and although the retrial evidence and judicial reasons featured in the representation made to the Minister, a review of the Minister's reasons showed he had not

disclosed why, in the face of this material and this representation he was not satisfied that Mr Nafady had not engaged in the conduct charged. I agree.

36 Mr Nafady's submissions to the Minister also put forward many ways in which one might develop the reasoning of the judge on retrial which led to an acquittal. These were repeated on his behalf on the judicial review application. It is not for me to accept or reject such a merits based submission. Rather, for present purposes, that such a submission was made to the Minister merely highlights the error of the Minister's failure to expose his analysis. The surmising undertaken in the submissions made on the Minister's behalf as to what the Minister might have been referring to in generic references to the material before him is no panacea for an absence of exposed analysis.

37 The absence of exposed analysis means that there is no logical or rational explanation in relation to what the Minister has made of the alleged conduct the subject of the six rape charges, having regard to the representation made to him and the material before him. There is no evaluation of the kind required by *Nathanson* and *Plaintiff M1/2021*.

38 The Minister's reasons reveal that his absence of satisfaction that Mr Nafady passed the character test was grounded in his inability to exclude the possibility that he had in fact committed the charged offences of rape ([14] and [46]), as well as a pattern of behaviour towards women that resulted in convictions for bail offences and the making against him of intervention orders. The unexposed analysis as to the alleged conduct the subject of rape charges has thus affected the ultimate absence of satisfaction as to passing the character test. That ultimate absence of satisfaction would not be illogical or irrational if it were one which a logical or rational decision-maker could reach on the material: *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, at [37] – [38], per Gummow and Hayne JJ; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, at [23] – [24], per Gummow ACJ and Kiefel J. In circumstances where reasons must be given, that requires that the reasons detail findings or inferences of fact supported by logical grounds. Hence the illogicality or irrationality created by an unexposed analysis. While the reasons which the Minister did give must be read with the observations made in *Wu Shan Liang* firmly in mind, it is not for me to supply reasons which the Minister did not.

39 It was also put on behalf of Mr Nafady that this was "perverse or even Kafkaesque" on the basis that, "In all but the most extreme cases, the mere existence of a complaint or statement (no matter how lacking in credibility the circumstances of the complaint or the complainant)

that a person has engaged in conduct raises at least the possibility that the conduct occurred." By Kafkaesque I understood Mr Moxon to mean that the Minister's approach meant that Mr Nafady faced the surreal predicament of a man presumed by our law to be innocent of any crime having to exclude the possibility that the was a risk that he would in the future engage in criminal conduct.

40 Yet, on closer examination of their text and context, some Kafkaesque qualities of the task that falls upon a non-citizen applying for revocation of this type of cancellation decision and of the Minister in deciding such an application follow from the cancellation and revocation scheme approved by Parliament.

41 As mentioned, *Graham* confirms that there is a linkage between the cancellation power in s 501(3) and the revocation of cancellation power in s 501C(4) of the Act. It was not necessary in *Graham* to explore that linkage in detail, only to make the observation, flowing from the text of s 501C(4) of the Act, that this provision made it necessary for the non-citizen to satisfy the Minister that he or she passed the character test. More detailed examination of the linkage in the context of the present case reveals a quite nuanced position.

42 Subsection 501(3), empowers the Minister to cancel a visa if the Minister reasonably suspects that the person does not pass the character test (s 501(3)(c)) and the Minister is satisfied that the cancellation is in the national interest (s 501(3)(d)). Here, the expressed basis for failure to satisfy the character test was grounded in s 501(6)(d)(i) of the Act. That failure occurs where there is a risk that the person would engage in criminal conduct in Australia. Yet all that s 501(3)(c) requires is a "reasonable suspicion" that the person does not pass the character test, not affirmative satisfaction as to that ground.

43 On the other hand, s 501C(4) of the Act imposes no obligation on the non-citizen to satisfy the Minister that it is in the national interest that the cancellation of the visa be revoked. All that is necessary is that the non-citizen satisfy the Minister that he or she passes the character test. Indeed, were the Minister so satisfied, the Minister would be obliged to revoke the cancellation, even though still satisfied that it is in the national interest for it to remain cancelled. The national interest is not a relevant consideration in respect of the exercise of the power conferred by s 501C(4) of the Act.

44 More relevantly for present purposes, although a criterion for cancellation of a visa by the Minister pursuant to s 501(3) is but reasonable suspicion that a person does not pass the

character test, revocation of cancellation does not entail a non-citizen satisfying the Minister that there is no basis for a reasonable suspicion that he or she fails the character test. Instead, it is both necessary and sufficient for the non-citizen to satisfy the Minister that he or she passes the character test.

45 The statutory touchstone in s 501(3)(c), "reasonable suspicion", in relation to the risk criterion in s 501(6)(d)(i) of the Act, at least requires that "some factual basis for the suspicion must be shown": see *George v Rockett* (1990) 170 CLR 104 (*George v Rockett*), at 115. But, as is made plain by the citation with approval in *George v Rockett*, at 115, of an observation made by Lord Devlin in *Hussien v Chong Fook Kam* [1970] AC 942, at 948, a suspicion "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" It is thus perfectly possible, given the differing tests posited by s 501(3)(c) and s 501C(4) of the Act, for the Minister to retain, even reasonably, a suspicion that the non-citizen does not pass the character test and yet not have before the Minister material which reasonably admits of satisfaction that the non-citizen does not pass the character test. That is so even though, as the Minister evidently considered, the relevant character test touchstone is a risk that the event the person were allowed to enter or to remain in Australia, that the person would engage in criminal conduct in Australia (s 501(6)(d)(i)).

46 There is a qualitative difference even between a reasonable suspicion and a reasonable belief. As was also observed in *George v Rockett*, at 115, "[t]he facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief …". As to a reasonable belief, and as was also stated in *George v Rockett*, at 116:

> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but *that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof*. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.
>
> [Emphasis added]

Even allowing, for reasons given below, that a reference to the balance of probabilities, as opposed to reasonable satisfaction, is inapt in relation to administrative decision-making, satisfaction that a person does not pass the character test does require reasonable satisfaction that foundational facts for such a conclusion exist. The assent of reasonable satisfaction does require material reasonably admitting of such proof.

47 In context, the proof concerned was reasonable satisfaction that there was not a risk that, in the event Mr Nafady were allowed to enter or to remain in Australia, he would engage in criminal conduct in Australia (s 501(6)(d)(i)).

48 Thus, on examination, although there is a link between s 501(3) and s 501C(4) of the Act in the sense that, the exercise of the cancellation power under s 501(3) may, if a representation is made, necessitate the making of a decision as to whether the exercise the revocation power under s 501C(4) in respect of that cancellation decision, there is no symmetry in relation to the role of the character test in relation to the respective decisions. That cancellation under s 501(3) need only be grounded in a reasonable suspicion may well be explained by a recognition by parliament of the limited materials that may initially be available to the Minister bearing upon whether a given visa holder passes the character test. So the bar has, correspondingly, not been set very high in relation to Ministerial cancellations. In contrast, where s 501C(4) is engaged, the non-citizen will, obviously, have first-hand knowledge about the conduct which occasioned cancellation and thus be better able, by representation and related materials, to persuade the Minister to be satisfied that that the position is not as suspected in relation to failing to pass the character test.

49 Yet in [46] of the Minister's reasons, he stated that he stated that he:

> … saw no reason to depart from his previous finding against the character test in Mr NAFADY's case, having regard to his pattern of behaviour towards women that resulted in his convictions for breaching bail conditions and the intervention orders issued against him, as well as the possibility that he did commit rape.

The Minister's previous finding was but a suspicion. Under s 501C(4), he had to be reasonably satisfied that Mr Nafady did not pass the character test.

50 In *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 (*Sabharwal*), at [58], and in the context of the criterion in s 501(6)(d)(i) of the Act, the Full Court held that a statement in the Minister's reasons that he "could not rule out the possibility of further offending by Mr Sabharwal" was, in substance a finding that there is a risk of him reoffending, approving a statement to that effect by Moshinsky J in *Coker v Minister for Immigration and Border Protection* [2017] FCA 929, at [62].

51 In this case, however, the Minister has assimilated the differing cancellation and revocation of cancellation tests – "no reason to depart". In context, that assimilation means that it is not possible to regard inability to exclude a possibility as in substance the same as satisfaction as to a risk. That provides another reason why the Minister's decision must be quashed.

52 A past pattern of behaviour can be a rational and logical basis on which to ground satisfaction as to a risk of future behaviour. Such predictive exercises in relation to future risk are well known in law with examples to be found in judicial as well as administrative decision-making: see *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, at [225] – [226] per Gummow J for examples in judicial decision-making. All such predictive exercises proceed by reference to a present factual foundation. In relation to administrative decision-making, that factual foundation need not be found in evidence admissible in criminal proceedings. But, in the face of competing material, reasoning as to a risk of engaging in future criminal conduct requires reasonable and rational findings that the foundational conduct occurred, more than what would engender a reasonable suspicion or even a reasonable belief as to the existence of such a risk.

53 Mr Nafady had to engender reasonable satisfaction that there was not a risk that he, if allowed to remain in Australia, would engage in criminal conduct. A risk is well short of a certainty. Allowing that it is satisfaction as to an absence of a risk, what is entailed is similar to, but the reverse of, the type of administrative satisfaction as to a "real chance" of persecution, described in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, especially at 389 by Mason CJ and at 429, by McHugh J; or the real and not remote chance to which Mason, Wilson and Deane JJ refer in *Boughey v The Queen* (1986) 161 CLR 10, at 21. Even so, satisfaction as to the absence of the legislatively ordained risk must proceed from facts established to reasonable satisfaction on the material before the Minister and by reference to the representation and any other submissions made by the non-citizen. Hence the cardinal importance of an exposed analysis. If none of the criteria in s 501(6) are satisfied, and the only one expressly identified is that in s 501(6)(d)(i), a person passes the character test. If so, a duty arises to revoke the original decision to cancel the visa: see *Yasmin v Attorney-General (Cth)* (2015) 236 FCR 169.

54 Cases such as the present, where there are no convictions in respect of allegedly criminal conduct but allegations of the commission on multiple occasions of such conduct undoubtedly present particular difficulties for administrative decision-makers in the face of denials by a non-citizen that any criminal conduct occurred. But they also touch on that non-citizen's ability to remain in Australia and not to be in immigration detention.

55 The Minister's finding that was "there is at least a possibility that Mr Nafady did commit rape (even though the evidence available was not considered sufficient to result in his conviction)"

([46], and see also to like effect, [12] of the Minister's reasons). Even though, as *Sabharwal* allows, such a turn of phrase may be regarded in substance as the same as a finding as to a risk of future conduct, it is not in substance the same as being reasonably satisfied that past conduct, upon which one is satisfied that there is a risk of future conduct, occurred. As is explained at length in relation to administrative decision-making in the joint judgement in *Sun*, at [61] and following, in keeping with the general observations in *Wu Shan Liang*, at 282, it is wrong to assimilate such decision-making with adversarial litigation in civil proceedings. It must, by parity of reasoning as I have already stated, be no less wrong to assimilate such decision-making with criminal jurisdiction litigation. In criminal jurisdiction litigation, where there must be proof beyond reasonable doubt by the prosecution, one basis upon which such a reasonable doubt must exist is "if you [the jury or other tribunal of fact] do not accept that evidence (account) [of the accused] but you consider that it might be true": see the modified "*Liberato*" direction counselled by Kiefel CJ, Bell, Gageler and Gordon JJ in *De Silva v The Queen* (2019) 268 CLR 57, at [12]. To reason as to foundational facts for satisfaction as to a future risk by reference to an "inability to exclude a possibility" is, in effect, to apply in reverse this part of the modified *Liberato* direction. Put another way, to engender Ministerial satisfaction as to foundational facts, an inability to exclude beyond reasonable doubt (exclusion of a possibility) that they occurred is insufficient to engender reasonable satisfaction that the foundational past conduct occurred.

56 The Minister also had material before him concerning other conduct in which Mr Nafady had allegedly engaged, both in relation to bail conditions and with respect to alleged conduct, never charged, in relation to other women. The latter was mentioned in police reports. As the Minister recorded, at [44] of his reasons, all of this other material was considered in conjunction with "the other available material".

57 Thus, the errors made in relation to the alleged rape conduct clearly persisted into and affected the Minister's ultimate failure to be satisfied that Mr Nafady passed the character test. In these circumstances, and contrary to a submission made for the Minister, it is impossible to say that the errors were not proved to be material. They at least deprived Mr Nafady of a successful outcome. They were therefore jurisdictional: *Nathanson*, at [1], [2], [30] and [32].

58 Mr Nafady also alleged that the Minister had merely acted upon untested allegations in police reports, including the report concerning a charge of rape which was withdrawn, because the

complainant "was not in a fit state to give evidence": Minister's reasons, [35]. Mr Nafady's submission (at [28]) in relation to this particular charge (then pending and later withdrawn) was that he "strongly denied" the charge. There is nothing in the Minister's reasons which discloses any analysis as to why, by reference to the police reports or otherwise, this denial should be discounted.

59 The Minister, at reasons, [43], expressed a concern about Mr Nafady's ability to "reach out and make contact in the community with women in the community, particularly through social media and online dating applications", if returned to the Australian community. Such "reaching out" had occasioned breach of bail conditions by Mr Nafady. Yet, absent any intrusion of bail conditions, such reaching out and making contact would not, in itself, be criminal conduct in Australia, only lawful conduct.

60 For reasons already given, the Minister, as an administrative decision-maker, was entitled to act on material such as statements in a police report. However, for reasons also already given, where a challenge was made in a representation in relation to conduct in such a report, the Minister was obliged to understand and evaluate that representation. This the Minister did not do in relation to the alleged conduct the subject of the charge which featured in a police report but which was ultimately withdrawn. Where, as here, a police report indicates that an investigation may be re-opened, it suggests that no concluded view has been reached by police. Even more that is so where, as is also the case here, it is apparent from a police report that Mr Nafady had not even been approached to offer him an opportunity to give his version in respect of a complaint.

61 Mr Nafady also relied in relation to findings based on nothing more than the contents of police reports on these observations, made by Colvin J in *HZCP v Minister for Immigration and Border Protection* (2019) 273 FCR 121, at [186]:

> … in any decision-making context (administrative or judicial) some modes of proof carry considerably more weight than others. Also, the weight to be afforded particular material depends upon the seriousness of the allegation the decision-maker is asked to accept, any inherent unlikelihood of its occurrence and the gravity of the consequences that may flow from making the finding. In the classic exposition of this point by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 363; [1938] ALR 334, his Honour captured its essence by saying 'the nature of the issue necessarily affects the process by which reasonable satisfaction is attained'. If there is no conviction and a party makes a claim that a crime has been committed by another then due 'weight is to be given to the presumption of innocence and exactness of proof is expected'. Likewise, if the claim made is that a person has been wrongly convicted or sentenced or the facts upon which that conviction or sentence were based were untrue then due weight must be given to the character of that claim

and its seriousness.

62 These observations, in their reference to *Briginshaw v Briginshaw* (1938) 60 CLR 336, are not, with respect, readily reconcilable with those of Flick and Perry JJ in *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555, although they are similar to those in my separate judgment in that case. Recalling the lesser evidentiary foundations necessary to engender a "reasonable suspicion" or a "reasonable belief", as mentioned above, there is nonetheless in my view enduring relevance in this observation by Deane J (with whom Evatt J agreed) in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41; 31 ALR 666 (at 62; 685) as with respect to administrative findings that grave conduct had occurred:

> In my view, the Tribunal was bound, as a matter of law, to act on the basis that any conduct alleged against Mr Pochi which was relied upon as a basis for sustaining the deportation order should be established, on the balance of probability, to its satisfaction by some rationally probative evidence and *not merely raised before it as a matter of suspicion or speculation or left, on the material before it, in the situation where the Tribunal considered that, while the conduct may have occurred, it was unable to conclude that it was more likely than not that it had*. It seems to me that this conclusion follows, as a matter of law, from the authorities referred to and the reasoning advanced by the Tribunal to establish the proposition as a general principle to be observed by it as a matter of administrative practice.
>
> [Emphasis added]

Even allowing that later authority (*Wu Shan Liang*) might regard "balance of probabilities" as borrowed from a universe of different discourse, it remains the case that reasonable satisfaction in administrative decision-making that past conduct has occurred requires more than speculation or inability to exclude a possibility that the conduct has occurred.

63 The point really is that, faced with competing accounts as to whether alleged criminal conduct occurred, one an emphatic denial and the other a hearsay statement in a police report, it was incumbent on the Minister, if he were to use such past conduct as a stepping stone to why it was that there was a risk that Mr Nafady would engage in criminal conduct in Australia in the future, to expose his reasoning by reference to material reasonably admitting of that conclusion, that, nonetheless, such conduct had, to his reasonable satisfaction, occurred.

64 Perhaps all that can be said, given that the decision-making is administrative, not judicial, is that, where a grave finding touching on personal liberty must be made, the evaluation as called for in *Plaintiff M1/2021* must be exposed, logical, rational and reasonably open on the material to which reference is made in the evaluation. To insist on more is inconsistent with the observations, quoted above, in *Plaintiff M1/2021* and, for that matter, with the

observations of Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, at 35 – 37; to tolerate less is conducive to arbitrariness in dealings by the executive with citizens and non-citizens. A recollection of history and attention to current affairs offers warning enough about why there should be no such toleration.

65 As to other conduct in police reports, Mr Nafady submitted that the Minister "appears to have uncritically accepted untested and uncorroborated accounts, some of which were not even drawn to the applicant's attention by [the police]." The Minister's reasons reveal he did so. Once again, the Minister was not bound by formal rules of evidence. But he was obliged to explain why he chose to act on such reports.

66 For these reasons, grounds 2, 3 and 4 of those in the amended originating application are made out. The Minister's decision must be quashed. A mandamus must issue requiring him a consider according to law whether to, under s 501C(4) of the Act, to revoke the cancellation of Mr Nafady's visa.

I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan.

Associate:

Dated: 30 November 2022