Federal Court of Australia

Makarov v Minister for Home Affairs [2021] FCAFC 129

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| Appeal from: | *Makarov v Minister for Home Affairs (No 3)* [2020] FCA 1655 |
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| File number: | NSD 5 of 2021 |
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| Judgment of: | **LOGAN, BANKS-SMITH AND ANDERSON JJ** |
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| Date of judgment: | 28 July 2021 |
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| Catchwords: | **ADMINISTRATIVE LAW** – appellant emigrated from Ukraine to Australia, applied for Australian citizenship, and became an Australian citizen – appellant arrested and imprisoned in late 2004 – relevant Minister exercised power in s 34(2) of the *Citizenship Act 2007* (Cth) to revoke appellant’s Australian citizenship – appellant sought judicial review of that decision – primary judge dismissed the appellant’s application for judicial review**APPEAL AND NEW TRIAL** – appellant contends that primary judge erred in finding appellant had not given evidence to the effect that he was never asked to provide information about the status of Ukrainian citizenship or evidence that appellant had never been asked as to whether he had applied to renounce his citizenship – Minister accepts that this statement by primary judge was erroneous – no relevant error – erroneous statement about the absence of evidence had no bearing upon primary judge’s assessment of the substantive grounds or the way in which the primary judge exercised discretion to refuse relief**APPEAL AND NEW TRIAL** – alleged error in exercise of discretion – appellant contends primary judge erred in assessing the appellant’s explanation for delay in seeking judicial review of the relevant decision – appellant contends primary judge failed to adequately take into account relevant matters – appellant contends primary judge misunderstood or did not adequately consider appellant’s evidence – no error of principle in primary judge’s exercise of discretion **EVIDENCE** – alleged error in exercise of discretion – appellant alleges that the primary judge erred in making an order under s 136 of the *Evidence Act 1995* (Cth) limiting use of two expert reports addressing Ukrainian law – appellant contends primary judge failed to be properly satisfied of or consider relevant matters in s 136 – appellant contends there is an injustice in permitting Minister to adduce evidence regarding appellant’s Ukrainian citizenship status while preventing appellant from doing so – primary judge did not err in making an order under s 136 of the *Evidence Act 1995* (Cth)**ADMINISTRATIVE LAW** – respondents’ notice of contention – respondents challenge primary judge’s finding that relevant Minister did not give active intellectual consideration to appellant’s prospective statelessness – in light of material before Minister, relevant Minister engaged in active intellectual consideration of whether revoking the appellant’s Australian citizenship would render the appellant stateless – respondents’ notice of contention upheld  |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), s 25D*Citizenship Act 2007* (Cth), ss 34(2), 34(3), 47(3), 47(5)*Evidence Act 1995* (Cth), s 136*Judiciary Act* *1903* (Cth), s 39B*Federal Court Rules 2011* (Cth), Division 23.2  |
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| Cases cited: | *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353*AXT19 v Minister For Home Affairs* [2020] FCAFC 32*Bryant, in the matter of Gunns Limited (in liq) (receivers and managers appointed) v Edenborn Pty Ltd* [2020] FCA 715*Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107*F Hoffnann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295*GBV18 v Minister for Home Affairs* [2020] FCAFC 17*House v The King* (1936) 55 CLR 499*Makarov v Minister for Home Affairs (No 2)* [2020] FCA 1275*Makarov v Minister for Home Affairs (No 3*) [2020] FCA 1655*Minister for Home Affairs v Buadromo* [2018] FCAFC 151*Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1*R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres* (1949) 78 CLR 389 at 400 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82*Seven Network Limited v News Limited (No 8)* [2005] FCA 1348*Stambe v Minister for Health* [2019] FCA 43  |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 93 |
|  |  |
| Date of hearing: | 10 June 2021  |
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| Counsel for the Appellant: | Simon Fuller |
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| Solicitor for the Appellant: | Human Rights for All |
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| Counsel for the Respondents: | Patrick Knowles |
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| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

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|  | NSD 5 of 2021 |
|   |
| BETWEEN: | VICTOR MAKAROVAppellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentMINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSSecond Respondent |

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| order made by: | LOGAN, BANKS-SMITH AND ANDERSON JJ |
| DATE OF ORDER: | 28 JULY 2021 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The respondents’ notice of contention is upheld.
3. The appellant will pay the respondents’ costs, to be taxed if not agreed.

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

REASONS FOR JUDGMENT

THE COURT:

# introduction

1. On 13 September 2007, the then Minister for Immigration and Citizenship (**Minister**) exercised the power in s 34(2) of the *Citizenship Act 2007* (Cth) (***Citizenship Act***) to revoke the Australian citizenship of Victor Makarov (**Appellant**) (**Decision**). The Minister revoked the Appellant’s Australian citizenship after the Appellant was convicted of 18 serious child sex abuse offences and sentenced to 12 years imprisonment with a non-parole period of 8 years.
2. By application first made on 15 November 2019 (and amended on 2 November 2020), the Appellant sought judicial review of the Decision pursuant to s 39B of the *Judiciary Act* *1903* (Cth) (***Judiciary Act***). By judgment delivered on 17 November 2020, *Makarov v Minister for Home Affairs (No 3*) [2020] FCA 1655 (**Reasons**), the primary judge dismissed the Appellant’s application for judicial review. The primary judge rejected the Appellant’s contention that the Minister erred by unreasonably failing to make inquiries about the status of the Appellant’s Ukrainian citizenship or that the Minister erred in misunderstanding the discretionary nature of the power in s 34(2) of the *Citizenship Act*. The primary judge did, however, accept that the Minister erred in giving incomplete consideration to the question of whether the Appellant continued to be a citizen of Ukraine. Notwithstanding that finding of error, the primary judge exercised her discretion to refuse relief on account of the “extraordinarily long delay” of more than 12 years, and “the prejudice to the Minister and the public interest”: Reasons at [135].
3. The Appellant appeals from the orders made by the primary judge on 17 November 2020 and relies on the grounds of appeal in the amended notice of appeal filed on 24 May 2021.
4. For the reasons that follow, the Appellant’s appeal will be dismissed with costs. We would also uphold the respondents’ notice of contention filed 13 May 2021.

# THE GROUNDS OF APPEAL

1. The grounds of appeal in the amended notice of appeal filed on 24 May 2021 are as follows:

1. The primary judge erred in finding at [24] that the Appellant had not given evidence to the effect that the Appellant was never asked to provide information about the status of his Ukrainian citizenship or whether he had applied to renounce his citizenship as the Appellant deposed in his affidavit of 6 October 2020, that at all relevant times, he was never asked or inquired by anyone as to whether he was a Ukrainian citizen or had applied for renunciation of that citizenship or in relation to his last address.

2. [Not pressed.]

3. The primary judge ~~failed to properly consider all the relevant circumstances in~~ erred in refusing relief for long delay, the prejudice to the Minister and public interest because:

a. That ~~it~~ the primary judge incorrectly found that the Appellant did not say in any of his affidavits that he did not seek to review the Minister’s decision within the prescribed time or, for that matter, within a reasonable time because he believed it to be futile, having regard to the basis for the decision (Federal Court [121]). The Appellant in his affidavit of 21 October 2020 deposed that after revocation of his Australian citizenship, his immediate understanding and reaction was to do everything that he possibly could to appeal his criminal convictions so that he could get his Australian citizenship back. He further deposed that he thought since his Australian citizenship was revoked because of his criminal convictions, he would focus all his time and attention on overturning those criminal convictions through the legal process in court, his understanding was that would lead to the return of his Australian citizenship;

b. [Not pressed.]

c. The primary erroneously found at [122] that there was no evidence to support the submission that the appellant was under a misconception that his ex-citizen visa entitled him to remain in Australia.

d. In reaching findings at [131] and [131] that the appellant made a conscious choice not to challenge the decision, the primary judge failed to consider, failed to adequately consider, or failed to afford sufficient weight to the whole of the appellant’s circumstances including:

[(i)] The limitations placed on the appellant by reason of his imprisonment;

[(ii)] The further limitations placed on the appellant by reason of his 4.5 stay in segregation;

[(iii)] The trauma suffered by the appellant during assaults whilst in detention;

[(iv)] The limitation placed on the appellant’s ability to lawfully challenge the Minister’s decision in circumstances where he was engaged in numerous criminal appeals and reviews;

[(v)] The fact the appellant laboured under a misconception that his ex-citizen visa entitled him to remain in Australia;

[(vi)] The fact the appellant laboured under a misconception that successful criminal appeals and reviews would lead to the return of his citizenship; and

[(vii)] The fact the appellant acted quickly after learning of the automatic termination of his Ukrainian citizenship in 2019; and

[(viii)] The effect of the 2.5 year delay in the Minister making a decision on the appellant’s request to revoke the cancellation decision made on 26 October 2015.

e. In limiting the use of the appellant’s [sic] pursuant to s 136 *Evidence Act 1995* (Cth), the primary judge failed to consider the mandatory elements of that section, namely that that the evidence “might” be either “unfairly prejudicial” or “misleading or confusing” and whether or not there was a “danger” of the evidence having those effects.

f. In the alternative to (e), the primary judge erred in admitting the affidavit evidence of Dale Watson made and filed on 27 October 2020 in circumstances where the substance of that evidence was contrary to the primary judge’s earlier determination in *Makarov v Minister for Home Affairs (No 2)* [2020] FCA 1275.

g. In the alternative to (e) and (f), the primary judge erred in failing at [134] to weight [sic] and assess the competing evidence on the appellant’s Ukrainian citizenship status.

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l. The primary judge failed to adequately consider that the injustice that would ensue as a result of the Appellant potentially becoming stateless outweighs the prejudice to the Minister and need for finality, based on the maxim that finality is good, but justice is better (*Ras Behari Lal and Others v Emperor* (1933) PC per Lord Atkin);

m. That s 34(3) of *Australian Citizenship Act 2007* (Cth) was a legislative enactment of Australia’s international obligation under Art 8(1) of the Convention on the Reduction of Statelessness, opened for signature on 30 August 1961 and entered into force on 13 December 1975, not to “deprive a person of its nationality if such deprivation would render him stateless” (Federal Court [85]).  ~~Given the serious consequences that revocation of citizenship entails and finding of the Federal Court that “…the Minister did not consider all the materials before him in making his decision. There was a material error in that, had he done so, it could have made a difference to his decision. He could have deferred making the decision until advice had been obtained from the Ukraine about the status of Mr Makarov’s nationality.” (Federal Court [103]),~~ The primary judge failed to consider or afford adequate weight to the principle [that there is a] public interest [in] Australia’s international obligations [being] respected with a view to avoid[ing] [the] possibilit[y] of rendering the Appellant stateless [which] ought to [have] take[n] precedence over [the] finality of ministerial decision-making.

(Underlined and strikethrough text in the original.)

1. The Appellant does not press grounds of appeal 2 and 3(b) of the amended notice of appeal.
2. By notice of contention, the Respondents challenged the primary judge’s conclusion that the Minister erred by not giving proper consideration to the question of whether the Appellant remained a Ukrainian citizen.

# background facts

1. It was common ground on the hearing of the appeal that the factual background to the proceedings were conveniently summarised by the primary judge at [13]-[42] of the Reasons, save for the challenge which the Appellant makes in this appeal to the findings made at [24] of the Reasons. At [13]-[42] of the Reasons, the primary judge stated:

13 Mr Makarov was born in the former USSR in 1953. When he was three years old his family moved to the Ukraine and he lived there until 1998 when he emigrated with his family in order to take up a position at the Australian Institute of Music.

14 It was common ground that, at the time Mr Makarov emigrated from the Ukraine to Australia he was a Ukrainian national, that he applied for Australian citizenship, and that he became an Australian citizen on 8 February 2001. The respondents did not suggest, and there is no evidence to indicate, that at the time the Minister revoked his Australian citizenship he might have been a citizen of any other country.

15 Mr Makarov was arrested and imprisoned in late 2004. The circumstances of his imprisonment are discussed below. He was tried on nine charges and convicted of eight: three charges of aggravated indecent assault; two charges of sexual intercourse with a person under authority aged between 10 and 16; and three charges of homosexual intercourse by a teacher of a pupil between the ages of 10 and 16. The following year he was convicted of multiple sexual offences of a similar nature following another two trials. He was sentenced to a total of 12 years imprisonment with a non-parole period of eight years.

16 Each of the three trials involved different complainants, all students: *Application of Victor Makarov pursuant to s 78 of the Crimes (Appeal and Review) Act 2001* (*NSW)* [2013] NSWSC 1468.

17 Mr Makarov appealed to the Court of Criminal Appeal. The appeals from the convictions entered after the first and second trials were dismissed in consecutive decisions in 2008. The appeal from the convictions entered after the third trial were quashed and new, separate trials were ordered. Mr Makarov was acquitted in both those trials.

18 Before the appeals were heard, the Minister began investigating revocation of Mr Makarov’s Australian citizenship.

19 On 4 April 2007, apparently in response to an inquiry from the Department of Immigration and Citizenship to the Ukrainian Embassy, the Ukrainian Vice Consul, Natalia Lopatina, informed the Department that:

Ukrainian citizens who acquired foreign citizenship do not lose Ukrainian citizenship automatically. To lose Ukrainian citizenship, one has to apply accordingly.

20 The recipient of the email, Emma Knapp, acknowledged the response but queried whether the law had changed since 2001 when Article 19.1 of *The Law of Ukraine On Citizenship* of 18 January 2001 reportedly provided that:

The citizenship of Ukraine is lost if a citizen of Ukraine has voluntarily acquired the citizenship of another state after attaining his/her majority.

21 Ms Knapp explained that the reason for the query was that the Department had a case in which a Ukrainian citizen had obtained Australian citizenship in February 2001. Mr Makarov’s name was not mentioned in the email or in any of the later emails passing between her and the Vice Consul. But it is obvious that the case in question concerned him.

22 Ms Lopatina replied:

It is the same law. The only thing is that translation does not report the nuance saying that the person can be eligible for the loss of the citizenship but does not lose it automatically.

23 Ms Knapp then asked the Vice Consul whether, if she were to give her the name and details of an individual, Ms Lopatina would be able to ascertain whether the individual was still a Ukrainian citizen. Ms Lopatina said she would but that she would also need information regarding the person’s last known address in the Ukraine.

24 The email chain ends abruptly at this point. Before Mr Makarov’s citizenship was revoked, it appears that the Department did not supply any such information to the Ukrainian Embassy and Mr Makarov was not asked for the information. Nor was he asked for “evidence or document” to indicate whether or not he remained a citizen of the Ukraine or whether he had applied to renounce his citizenship. In neither of his affidavits, however, did Mr Makarov say that he was never asked to provide information about any of these matters.

25 On 28 May 2007 a letter was sent to Mr Makarov by the Director of the Citizenship Services Section of the Department which put him on notice of the possible deprivation of his Australian citizenship and asked him to provide reasons as to why that action should not be taken.

26 On 14 June 2007 Mr Makarov provided a two-page response. In the letter he proclaimed his innocence, his good reputation, and lofty status within the music community, both in Australia and overseas. He declared his intention to appeal against his convictions. He claimed he had ongoing support from family, friends, teachers, former students, and colleagues. He urged the Minister not to make a decision on the question at that stage since he had not exhausted all avenues of appeal or review. A little over two weeks later the letter was resubmitted, this time accompanied by over 80 letters of support.

27 The letter said nothing about the status of his Ukrainian citizenship. Mr Makarov made no submission to the effect that depriving him of his Australian citizenship would render him stateless.

28 On 22 August 2007 a lawyer acting for Mr Makarov wrote to the Department noting that Mr Makarov was currently “in the process of” appealing his convictions and obtaining legal advice from the Ukraine about “the current status of his Ukrainian nationality”. The lawyer, Katie Malyon, said she would advise the Department when further details were available.

29 On 28 August 2007, six days after Ms Malyon’s letter, the Department wrote to the Minister recommending that he revoke Mr Makarov’s Australian citizenship. The full Departmental submission was annexed to Ms Watson’s first affidavit. The Department advised the Minister of the relevant terms of the Citizenship Act and the facts concerning Mr Makarov’s conferral of Australian citizenship and his criminal convictions and sentence. It noted that the convictions brought Mr Makarov “within the scope of the revocation provisions”. It proceeded to state:

[2] On 10 April 2007, the Department was advised by the Ukrainian Consul, Canberra, that according to Article 19.1 of *The Law of Ukraine on The Citizenship of Ukraine (2001)*, “Ukrainian citizens who acquire foreign citizenship do not lose Ukrainian citizenship; one has to apply accordingly.” Therefore, Mr Makarov would not have automatically lost his Ukrainian citizenship upon obtaining Australian citizenship.

[3] On 28 May 2007, the Department contacted Mr Makarov concerning his liability for deprivation of his Australian citizenship (as it was referred to under the previous *Australian Citizenship Act* 1948) and asked him to present reasons as to why he should not be deprived of his citizenship. The reply, dated 14 June 2007 and at **Attachment B**, refers to Mr Makarov’s proclamation of his innocence; his upstanding reputation and status within the music community (both in Australia and internationally); ongoing support from family, friends and former students; and his intentions to appeal against his convictions resulting to his third trial. On 2 July 2007, the Department received another copy of Mr Makarov’s earlier correspondence, accompanied by approximately 80 letters which had been presented to the court. The letters were from former students, colleagues, friends and parents of former students attesting his capabilities as an excellent musician and piano teacher. Also included was a video entitled, *Young Piano Stars. Professor Victor Makarov.*

[4] Applicants for Australian citizenship are required to be “of good character”. Policy states that the seriousness of any offences committed should be considered in the context of ordinary community standards. Crimes including those of sexual abuse, crimes against children, offences committed as part of an ongoing pattern of behaviour, and crimes that incurred a prison sentence totalling 12 months or more, are ordinarily considered to be serious and should be given due weight in an assessment. Had the Department been aware of Mr Makarov’s offences, his citizenship application would have been refused on the grounds that he was not of good character.

[5] To revoke Mr Makarov’s Australian citizenship, you would need to be satisfied that it would be contrary to the public interest for him to remain an Australian citizen. The term “public interest” (Paragraph 34(2)(c) above refers), is not defined in the Act or in policy and judicial interpretation in this context is limited. In *Bijai Prasad v The Minister Assisting the Minister for Immigration, Local Government and Ethnic Affairs* (1993) at the Administrative Appeals Tribunal (AAT), Deputy President I. R. Thompson referred to the Supreme Court of Victoria as aptly describing “the public interest” in the Director of Public Prosecutions v Smith (1991) as follows:

*‘(It) is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members.’*

(Original emphasis.)

30 The submissions went on to provide more detail about the offences and Mr Makarov’s protestations of innocence. They also referred to some of the remarks of the sentencing judges, including the absence of evidence of “possible rehabilitation” and the prospect of reoffending, and evidence given by one of the complainants.

31 At [8]–[11] the submissions stated:

[8] Revoking Mr Makarov’s Australian citizenship would send a strong message to the community that people who commit serious offences, prior to becoming Australian citizens will not be allowed to continue to enjoy the benefits that status entails.

[9] The advantages to the Australian community in revoking Mr Makarov’s Australian citizenship should be balanced against the disadvantages and hardship likely to be caused to Mr Makarov as a result of his revocation. Revocation would remove Australian citizenship status from Mr Makarov, who was convicted of serious offences, thus depriving him of the benefits citizenship bestows.

[10] If Mr Makarov’s Australian citizenship is revoked, he would automatically become the holder of an ex-citizen visa, a permanent visa which allows the holder to remain in Australia, but not re-enter. The principal disadvantage to Mr Makarov and his family is that revocation would cause him, and perhaps his wife and daughter, personal sadness and disappointment and possibly hardship.

[11] Having balanced the advantages to Australian society, against the disadvantages likely to be caused to Mr Makarov and his family, the Department is of the view that the advantages to Australian society outweigh any disadvantages to Mr Makarov and his family.

32 The submissions included the recommendations of the author that Mr Makarov’s citizenship be revoked by signing the attached notice of revocation and that reasons be provided. Underneath the recommendation the following appears:

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33 Three documents were attached to the submissions: a list of convictions; Mr Makarov’s letter of 14 June 2007; and a notice of revocation. Evidently, neither the video nor the 80 odd testimonials to which the Department referred in its submissions were provided to the Minister. Nor did the Department provide the Minister with Ms Malyon’s letter or apprise him of its contents. In each case, the Department’s conduct is inexplicable.

34 On 24 September 2007 the Department wrote to Mr Makarov’s lawyer notifying him of the Minister’s decision, attaching a copy of the notice signed by the Minister and dated, presumably in his hand, 13 September 2007. The notice reads:

I, KEVIN ANDREWS, Minister for Immigration and Citizenship, having determined that Mr Victor MAKAROV, born on 13 September 1953, is a person to whom subparagraph 34(2)(b)(ii)(c) of the *Australian Citizenship Act 2007* (the Act) applies, and being satisfied that it would be contrary to the public interest for Mr MAKAROV to continue to be an Australian citizen, have, by this order, exercised my discretion under subsection 34(2) of the Act and deprived Mr MAKAROV of Australian citizenship.

35 In the covering letter the Department advised Mr Makarov that, by s 35(3) of the *Migration Act 1958* (Cth), he was taken to have been granted an ex-citizen visa and explained that that was a permanent visa which allows the holder to remain in, but not re-enter, Australia. At the same time, however, the Department also advised him that, in view of his convictions, the ex-citizen visa could be considered for cancellation on character grounds under s 501 of the Migration Act, that in that event he would not be eligible to reapply for a grant of Australian citizenship for 12 months, and that any new application would be considered against the then applicable criteria, including any character requirements. The letter concluded by informing Mr Makarov of his right to seek review of the decision in the AAT, providing him with the AAT’s address and phone number, and directing him to the AAT’s website for information on how to apply.

36 On 13 October 2007 the Department received a representation from a member of the public pleading that the Minister reconsider his decision. The Department replied on 26 October 2007 on behalf of the Minister pointing out that Mr Makarov had been advised of his eligibility to seek a review of the decision in the AAT. But no application for review was filed at this time.

37 On 26 October 2015 Mr Makarov received a notice informing him that a decision had been made on 12 October 2015 to cancel his ex-citizen visa under s 501CA of the *Migration Act,* inviting him to make representations to the responsible Minister to revoke the cancellation decision. He made representations but the Minister was unmoved. On 1 May 2018, Mr Makarov was informed that the Minister would not revoke the cancellation decision.

38 Mr Makarov served the full term of his prison sentence. He was released in late 2018 and immediately taken into immigration detention. He then began to search for pro bono legal assistance.

39 In May 2019 his present solicitors agreed to act for him and he instructed them to gather information and prepare a case to challenge the Minister’s decision to revoke his Australian citizenship.

40 On 8 August 2019 Ms Battinson wrote to the Department of Home Affairs requesting written reasons for the Minister’s decision. That request was rejected.

41 In about September and October 2019 Mr Makarov became aware of the opinions of two Ukrainian lawyers and, based on those opinions, formed the view that he had lost his Ukrainian citizenship when he acquired Australian citizenship.

42 On 11 November 2019, armed with the material gathered by his lawyers, Mr Makarov applied to the AAT for the Minister’s decision to be reviewed on its merits and shortly thereafter he filed the application in this Court. As I mentioned in my introductory remarks, the application for merits review was dismissed by the AAT and the appeal from the AAT’s decision was also dismissed.

# ground 1 – alleged error in assessment of evidence

1. The Appellant contends that the primary judge erred in finding at [24] of the Reasons (extracted above) that the Appellant had not given evidence to the effect that he was never asked to provide information about the status of his Ukrainian citizenship nor evidence that he had never been asked as to whether he had applied to renounce his citizenship. The Appellant submits that the finding at [24] of the Reasons is contrary to the evidence of the Appellant at [3] of his affidavit of 6 October 2020, where the Appellant deposed that he was never asked by anyone from any department of either a federal or state government, nor asked to provide documents as to whether he was still a citizen of Ukraine nor whether he had applied to renounce such citizenship.
2. The Minister accepts that the primary judge was in error at [24] of the Reasons where the primary judge stated: “In neither of his affidavits, however, did Mr Makarov say that he was never asked to provide information about any of these matters.” The Minister accepts that, in his affidavit of 6 October 2020 at [3] and [4], the Appellant did give evidence that he was never asked about his Ukrainian citizenship, nor whether he had renounced his citizenship, or his last address in Ukraine. The Minister submits, however, that the erroneous statement about the absence of evidence had no bearing on the substantive reasoning of the primary judge. The Minister submits that the primary judge’s statement about the absence of evidence in the Appellant’s affidavit did not prevent her from making the finding of fact in the first two sentences of Reasons at [24]. That finding was to the effect that no request of the Appellant was made.
3. The Minister further submits that the primary judge correctly held that the Appellant’s affidavit was “noticeably silent on the question of whether he would have provided the information had he been asked in 2007”: Reasons, [67]. This reasoning, in the Minister’s submission, accepts that the Appellant was not asked to provide information about his Ukrainian citizenship.
4. For these reasons, the Minister submits that the error in the primary judge’s Reasons at [24] had no bearing upon the primary judge’s assessment of the substantive grounds or the exercise of the discretion to refuse relief.

# consideration of ground 1

1. To recall, the entirety of [24] of the Reasons reads as follows:

The email chain ends abruptly at this point. Before Mr Makarov’s citizenship was revoked, it appears that the Department did not supply any such information to the Ukrainian Embassy and Mr Makarov was not asked for the information. Nor was he asked for “evidence or document” to indicate whether or not he remained a citizen of the Ukraine or whether he had applied to renounce his citizenship. In neither of his affidavits, however, did Mr Makarov say that he was never asked to provide information about any of these matters.

1. The error in the primary judge’s Reasons at [24] was the statement that “[i]n neither of his affidavits … did Mr Makarov say that he was never asked to provide information about any of these matters”, when the facts were that the Appellant was not asked to provide information about his Ukrainian citizenship nor was he asked whether he had renounced his citizenship or for his last address in Ukraine.
2. However, the erroneous statement about the absence of evidence had no bearing upon the primary judge’s assessment of the substantive grounds or the way in which the primary judge exercised the primary judge’s discretion to refuse relief. That is because the reasoning of the primary judge proceeds on the basis that the Appellant was not asked to provide that information. The primary judge’s Reasons were therefore based on findings that were correct. For this reason, ground 1 must be rejected as the erroneous statement about the Appellant’s affidavit had no bearing on her Honour’s reasoning and the outcome.

# ground 3 – alleged error in the exercise of the discretion

1. The Appellant by ground 3 points to two alleged errors in the primary judge’s exercise of discretion. First, it is said that the primary judge erred in assessing the Appellant’s explanation for the delay in seeking judicial review of the Decision pursuant to s 39B of the *Judiciary Act*. Second, the Appellant alleges that the primary judge erred in making an order under s 136 of the *Evidence Act 1995* (Cth) (***Evidence Act***) limiting the use of two expert reports addressing Ukrainian law.
2. It should be noted that ground 3(b) of the amended notice of appeal has been expressly abandoned. The Appellant’s written and oral submissions also do not advance any submission in support of grounds 3(l) and (m).
3. The Appellant’s submissions identified a number of factors which were identified in the primary judge’s Reasons which pointed against the grant of relief:
4. the first factor was the length of delay of 12 years: Reasons at [125] and [126];
5. the second factor was the prejudice to the Minister and the public interest. As to the public interest, the Appellant contended that the primary judge considered that it was met by the desirability of finality in administrative decisions: Reasons at [127] and [128];
6. third, the primary judge held that, whilst the Appellant had provided an explanation for the delay, he did not explain all of the delay: Reasons at [129]-[132];
7. fourth, the primary judge preferred the Minister’s evidence that the government of Ukraine recognised the Appellant as a citizen of that country: Reasons at [134].
8. The Appellant made the following submissions in respect to the third and fourth of these reasons, which are the matters that are the subject of this appeal.

## Explanation for delay

1. The primary judge’s analysis of the explanation for delay is at Reasons [129] to [132].

### Appellant’s submissions

1. The Appellant submits that a review of the whole of the primary judge’s Reasons reveal that, notwithstanding the use of the word “all” in [129] of the Reasons, the primary judge was concerned with the principle of “unwarrantable” delay. The Appellant submitted to the primary judge that he could never explain every day of the 12 year delay period. The Appellant submitted that whether a delay is “unwarrantable” depends on the specific circumstances of the case. The Appellant submitted that he merely needed to provide a reasonable explanation for the period of time that had elapsed.
2. The Appellant points to the primary judge’s finding that it was the Appellant’s choice not to initially pursue judicial review of the Minister’s decision. The primary judge stated at [131] of the Reasons:

Mr Makarov could have pursued both the legal battles over his convictions and judicial review of the Minister’s decision. They were not mutually exclusive. It was Mr Makarov’s choice not to challenge the Minister’s decision.

1. The Appellant submits that, in reaching that finding, the primary judge failed to take into account, either adequately or at all, the limitations placed on the Appellant’s realistic ability to initiate an application for judicial review. The Appellant advanced at least six reasons why his ability to do that was hampered or affected:
2. First, an initial limitation on his abilities by reason of simply being in prison between 2004 and 2018 and then in immigration detention.
3. Second, further limitations on his abilities during his stay in prison as a result of being placed in a segregation unit for four and a half years. He deposed that he did not have access to internet and that he had limited access to telephone and visitors.
4. Third, the trauma associated with three assaults which he sustained whilst in prison.
5. Fourth, his pre-occupation with, and participation in, his criminal trials, appeals and reviews.
6. Fifth, that the appellant laboured under the misconception that his ex-citizen visa meant he could remain in Australia.
7. Sixth, he had exhausted his and his family’s financial resources and searched for legal representation.
8. The Appellant submits that the six reasons above cumulatively present a picture of an individual in exceptional circumstances.
9. The Appellant submits that the primary judge’s Reasons do not reveal a consideration of these factors. The Appellant submits that they were relevant matters which were advanced in support of the argument that there was a reasonable explanation for the 12 year period and ought to have been properly considered or alternatively afforded weight by the primary judge.
10. The Appellant refers to the actions which the primary judge identified at [131] and [132] of the Reasons which the Appellant could have taken, namely:
11. there was no reason why he could not have instructed lawyers to challenge the decision at least at a much earlier point in time;
12. there was no reason why he could not have written to the Minister notifying him that he intended to challenge the decision when he was in a position to do so;
13. he could have raised the matter with the Minister when he was invited to make submissions about why the ex-citizen visa cancellation should be revoked;
14. he could have taken action after being informed of the decision not to revoke cancellation of the visa.
15. The Appellant submits that the primary judge’s Reasons do not reveal that the primary judge took into account the six reasons identified above which were advanced by the Appellant before the primary judge.
16. The primary judge did not accept the argument that the Appellant was under a misconception that his ex-citizen visa entitled him to remain in Australia. The primary judge considered that there was no evidence to support such an argument: Reasons at [122]. The primary judge stated at [122]:

Doubtless Mr Makarov was focussed on the legal battles over his convictions for much of the period in question. His unchallenged evidence was that he devoted all his time and energy to appealing his convictions. But there is no evidence to support the submission that he was under any misconception that his ex-citizen visa entitled him to remain in Australia. He was informed that it was vulnerable to cancellation on character grounds.

1. The Appellant submits that, in so finding, the primary judge misunderstood or did not adequately consider the Appellant’s evidence. The Appellant submits that the evidence discloses two misunderstandings by the Appellant which are apparent from his affidavit filed 21 October 2020 at [5]. The Appellant submits that the first misunderstanding is the Appellant’s misunderstanding that his citizenship would be restored if he could successfully challenge his criminal convictions. The Appellant submits that the second misunderstanding is the erroneous assumption that his ex-citizen visa meant he could safely remain in Australia, given the Appellant deposed in his affidavit at [5] that he “relied” on that visa to remain in Australia.
2. The Appellant further submits that, even if, contrary to the Appellant’s primary submission, it is accepted that the Appellant made a conscious choice that a challenge to the Minister’s decision was futile, the Appellant acted quickly after learning in September and October 2019 of the automatic termination of his Ukrainian citizenship, and this was a relevant consideration. The Appellant submits that there was a short period of time between obtaining legal representation and seeking judicial review (from May to November 2019). The Appellant submits that it was the knowledge that the Minister’s decision had in fact rendered him stateless that essentially crystallised the basis for his ability to challenge the Decision. The Appellant submits that the primary judge’s Reasons do not reveal that the primary judge took this matter into account or placed any weight on it, despite the Appellant advancing this submission. The Appellant contends that this was a relevant consideration towards the exercise of the discretion.
3. The Appellant further contends that the primary judge’s Reasons do not reveal whether she considered or otherwise placed weight on the fact that the Minister took two and half years to respond to the Appellant’s submissions in response to his visa cancellation. The primary judge merely stated this issue as a fact but did not take it into account in the assessment of the discretion: Reasons at [37] and [117].

### Minister’s submissions

1. The Minister submits that the Appellant’s submissions with respect to the explanation for the delay simply point to reasons why the primary judge could have exercised the discretion differently. The Minister contends that such submissions cannot succeed having regard to the principles of appellate review set out in *House v The King* (1936) 55 CLR 499 at 504-505.
2. The Minister submits that the primary judge’s Reasons contain a careful summary of the evidence advanced by the Appellant seeking to explain his delay in commencing the proceedings. The Minister submits that, contrary to the submissions of the Appellant, the primary judge was not required to individually analyse and attribute weight to each matter advanced by the Appellant.
3. The Minister submits that it was open for the primary judge, having set out the reasons put forward by the Appellant, to assess the countervailing circumstances favouring the refusal of relief. The Minister submits that the primary judge explained why the explanation for the delay was inadequate. The Appellant submits that the reasons for this conclusion by the primary judge included that:
4. the Appellant had access to lawyers during his imprisonment and was, in fact, able to conduct appeals of his convictions and, subsequently, seek review of the convictions;
5. his then lawyers were aware as early as 2007 of the potential relevance of his ongoing status as a Ukrainian citizen;
6. no explanation had been given as to the outcome of his then lawyers’ enquiries regarding his Ukrainian citizenship;
7. the Appellant could have pursued a challenge to citizenship revocation at the same time as appealing criminal convictions; and
8. the apparent reason for the Appellant’s failure to bring a challenge to the decision was a choice by him not to challenge the decision on the basis that the challenge lacked utility.
9. The Minister submits that the primary judge’s Reasons can only sensibly be understood as involving a balance of the above factors against the factors advanced in the Appellant’s evidence which had previously been cited in her Honour’s judgment. The Minister submits that, understood in this way, it is not correct to contend, as the Appellant does, that the primary judge’s Reasons do not reveal a consideration of the matters raised by the Appellant in the Court below.

### Consideration of the primary judge’s assessment of the Appellant’s explanation for delay

1. The Appellant must identify some error that has been made by the primary judge in exercising the discretion to refuse to grant the relief sought for “unwarrantable delay”. The Appellant must establish that the primary judge acted on a wrong principle or allowed extraneous or irrelevant matters to guide the manner in which the discretion was exercised. In *House v The King* (1936) 55 CLR 499, Dixon, Evatt and McTiernan JJ stated at 504-505:

... The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

1. The primary judge considered the Appellant’s explanation for delay at Reasons [129] to [132] as follows:

129 Third, while Mr Makarov provided an explanation for the delay, he did not explain all the delay.

130 There were some notable omissions from his evidence. The letter from Ms Malyon in August 2007, for example, said that they were then in the process of appealing the convictions and obtaining legal advice from the Ukraine in relation to the current status of his Ukrainian nationality. She informed the Department that they would advise the relevant office in the Department when they had further details in relation to those matters. While the evidence reveals what happened with the convictions, it is silent about what happened with the legal advice.

131 Mr Makarov could have pursued both the legal battles over his convictions and judicial review of the Minister’s decision. They were not mutually exclusive. It was Mr Makarov’s choice not to challenge the Minister’s decision.

132 Since he had lawyers acting for him in 2007 and there is no evidence to indicate that he was denied access to them at any time, there is no apparent reason why he could not have instructed them to challenge the decision at that time or at least at a much earlier point in time. Nor is there any apparent reason why he (directly or indirectly, whether through his lawyers or otherwise) could not have written to the Minister notifying him that he intended to challenge the decision when he was in a position to do so. At the very least he could have raised the matter with the Minister at the time he was invited to make representations as to why the decision to cancel his ex-citizen’s visa should be revoked. Even when he was informed of the decision not to revoke the cancellation of the visa, he took no action. The most plausible explanation for his inaction throughout this period is that he considered a challenge to be futile.

1. We detect no error of principle in the manner in which the primary judge exercised the primary judge’s discretion. The primary judge at [111] to [123] of the Reasons undertook a detailed analysis of the evidence advanced by the Appellant to explain the 12 year delay in commencing judicial review. Counsel for the Appellant did not submit that the primary judge omitted to refer to any relevant evidence. We do not accept that there was any error of principle in the primary judge not referring explicitly to the six reasons advanced by the Appellant which it was submitted hampered or affected his ability to initiate a judicial review. The primary judge, having considered the evidence, rejected those reasons as providing a reasonable explanation for all of the delay in commencing judicial review. The primary judge did so by identifying in the Reasons at [129] to [132] what steps the Appellant could have taken to initiate judicial review, but failed to do. Understood in this way, the primary judge’s Reasons reject the six reasons advanced by the Appellant as providing an adequate explanation for the 12 year delay. There was no error of principle in the manner in which the primary judge exercised the primary judge’s discretion.
2. As to the other grounds advanced to contend that the discretion to refuse relief for “unwarranted delay” miscarried, we do not detect any error of principle in the manner in which the primary judge at [122] of the Reasons rejected the Appellant’s argument that he was under a misconception that his ex-citizen visa entitled him to remain in Australia.
3. We also do not accept the Appellant’s submission that the primary judge, in exercising her discretion, failed to consider the fact that the Appellant had acted quickly after learning, in September or October 2019, of the automatic termination of his Ukrainian citizenship. The primary judge at [133] and [134] of the Reasons makes express reference to the two Ukrainian legal experts and their opinion, if correct, that the Appellant would be stateless. Notwithstanding, the primary judge at [135] of her Reasons stated that, “[i]n all the circumstances, having regard to the extraordinarily long delay, the prejudice to the Minister and the public interest, relief should be refused.” We see no error of principle in the manner in which the primary judge exercised the primary judge’s discretion. “Unwarrantable delay” is a basis upon which, in particular circumstances, any of the remedies sought by the Appellant under s 39B of the *Judiciary Act* might, in the exercise of a judicial discretion, be refused, in the same way in which the remedies for which s 75(v) of the Constitution provides might be refused: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (***Aala***) at [56] – [57] per Gaudron and Gummow JJ (with whom in this regard Gleeson CJ and Hayne J agreed), citing *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres* (1949) 78 CLR 389 at 400 and *F Hoffnann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 320 (CA); affd [1975] AC 329; see also in *Aala*, at [149] per Kirby J.

## Section 136 of the *Evidence Act 1995* (Cth) – evidence of the Appellant’s Ukrainian citizenship

1. Prior to the hearing of the Appellant’s substantive application, the primary judge heard the matter on a separate question: *Makarov v Minister for Home Affairs (No 2)* [2020] FCA 1275 (**August 2020 Judgment**). At that hearing, the Court was asked to determine whether the fact that the Appellant would become a “person who is not a national or citizen of any country” for the purposes of s 34 of the *Citizenship Act* was a jurisdictional fact so that the Court could receive evidence on that fact. The Court answered the separate question in the negative: August 2020 Judgment, [25]. The effect of this determination was that the Appellant could not adduce evidence to prove that he had, in fact, been rendered stateless by the Minister’s decision.
2. Before the primary judge, the Appellant sought to read into evidence three affidavits. The Minister sought to challenge one of those affidavits, being an affidavit made and filed by the Appellant on 21 October 2020. The Appellant submitted that the evidence went to the issue of delay. The Minister challenged two reports exhibited to that affidavit, being ‘Annexure 2’ and ‘Annexure 3’. The reports contained opinions from two Ukrainian legal academics on the effect of the attainment of Australian citizenship in 2001 on the Appellant’s Ukrainian citizenship. The Minister objected to the reports being tendered into evidence on the basis of hearsay, relevance and that it was contrary to the August 2020 Judgment. At the Minister’s request, the Court made an order pursuant to s 136 of the *Evidence Act* that the evidence at [10] of the affidavit be limited to proving that the Appellant received the reports and became aware of their contents at or around September and/or October 2019 and that the reports contained the opinions that are set out in them. The effect of the limitation was that the evidence could not be used to prove the status of the Appellant’s Ukrainian citizenship and the importance of that fact towards the exercise of the discretion.
3. Before the primary judge, the Minister sought to admit two affidavits into evidence made by a lawyer from the Australian Government Solicitor. The Appellant objected to the second of those affidavits which was made and filed by Dale Watson on 27 October 2020, specifically exhibits “DW-9” and “DW-10”, which contained representations by the Ukrainian Embassy that they considered the Appellant to still have Ukrainian citizenship. The Appellant’s objection was primarily on the basis of relevance in that the evidence sought to prove the truth of his Ukrainian citizenship.

### Appellant’s submissions

1. In this appeal, the Appellant asserts that the primary judge’s error is twofold.
2. First, in making the s 136 limitation on the use of the Appellant’s evidence, the Appellant submits that the primary judge failed to satisfy herself of, or even consider, the relevant matters in s 136. The Appellant submits that neither the Reasons nor the transcript reveal that the primary judge considered that the evidence “might” be either “unfairly prejudicial” or “misleading or confusing”. The Appellant further submits that the primary judge did not consider whether or not there was a “danger” of the evidence having those effects. The Appellant submits that “considerable care” is needed before making a s 136 limitation order and that the primary judge did not exercise “considerable care” nor take into account the relevant requirements of the section: *Seven Network Limited v News Limited (No 8)* [2005] FCA 1348; 224 ALR 317 per Sackville J at [16] and [21].
3. Second, the Appellant submits that there is an apparent injustice in permitting the Minister to adduce evidence which goes to the Appellant’s Ukrainian citizenship status but at the same time preventing the Appellant from doing so. The primary judge accepted the evidence sought to be tendered by the Minister that was relevant to both discretion and materiality. The Appellant submits that, by reason of the primary judge’s approach, the parties were not on an even playing field from an evidential perspective.

### Minister’s submissions

1. The Minister submits that the order made under s 136 of the *Evidence Act* did not cause the primary judge’s discretion to refuse relief to miscarry for the following five reasons.
2. First, the Minister submits that the effect of the primary judge’s August 2020 Judgment on a separate question meant that the Appellant could not adduce evidence to prove that he had, in fact, been rendered stateless by the Minister’s decision. The Minister submits that the Appellant acknowledged as much at [22] of his written submissions. Given that concession, the Minister submits that it is difficult to see how the Appellant could complain about the s 136 limitation given the limitation prevented the evidence from being used to prove that the Appellant was not a Ukrainian citizen.
3. Second, the Minister submits that the expert opinions were not adduced as expert reports and did not comply with Division 23.2 of the *Federal Court Rules 2011* (Cth). The “reports”, in the Minister’s submission, were hearsay annexures to the affidavit of the Appellant which was served approximately one week before the hearing. The Minister submits that the form of the reports and their late service resulted in the Minister not being in a position to cross-examine the experts on their opinions. Nor, given the time of service, could the Minister respond to the substance of the opinions in so far as they expressed views on Ukrainian law. The opinions were untested either by cross-examination or by responsive evidence. The Minister submits that it is well established that the inability to test hearsay evidence may render evidence “unfairly prejudicial” and be a sufficient basis to make an order under s 136 of the *Evidence Act* limiting its use: *Bryant, in the matter of Gunns Limited (in liq) (receivers and managers appointed) v Edenborn Pty Ltd* [2020] FCA 715; 381 ALR 190 at [36].
4. Third, the Minister submits that the Appellant, in fact, accepted the limitation before the primary judge. Counsel for the Appellant, before the primary judge, indicated that the purpose of the evidence was to establish the Appellant’s state of mind (when he became aware of a potential issue of statelessness), and relevantly said that “it is not intended to prove the truth of the matters asserted and I accept any limitation under s 13[6]”: Transcript 6.39-41. The primary judge framed the ultimate order under s 136 to permit the Appellant to maintain an argument that the discretion to refuse relief should not be exercised because, based on the opinions of the expert reports, there was a risk of injustice based on the possibility the Appellant would be rendered stateless: Transcript, 7.6-19 and 8.1-15. The primary judge stated at p 8 of the Transcript:

Yes. I will allow the applicant to read the affidavit of Mr Makarov of 21 October 2020. I will however, limit the use to be made of the evidence in paragraph 10 of that affidavit to proving that Mr Makarov received the reports identified in that paragraph and became aware of their contents at or around September and or October 2019 and that the reports contained the opinions that are set out in them.

1. The Minister submits that this was precisely the submission addressed by the primary judge at Reasons [119] to [134].
2. The Minister submits that it is apparent from the Transcript before the primary judge that, far from opposing an order under s 136 of the *Evidence Act*, the Appellant in the Court below eschewed use of the reports for a hearsay purpose and actually embraced an order limiting the use of the expert opinions.
3. Fourth, the Minister submits that the order under s 136 was framed to permit the Appellant to argue that there was a risk of injustice based on the possibility that the Appellant would be rendered stateless: Transcript 7.6-19 and Transcript 8.1-15. The Minister submits that the Appellant was wrong to assert that “the effect of the limitation was that the evidence could not be used to prove the status of the Appellant’s Ukrainian citizenship and the importance of that fact towards the exercise of the discretion”: Appellant’s written submissions at [23].
4. Fifth, the Minister referred to the Appellant’s submission that the primary judge’s discretion under s 136 of the *Evidence Act* miscarried because no similar order was made over evidence adduced by the Minister in the form of a Ukrainian travel document issued in respect of the Appellant and an email from the Ukrainian Embassy stating that the Appellant was a citizen of Ukraine: Affidavit of Dale Watson filed 27 October 2020, Annexures “DW-9” and “DW-10”. The Minister submits that the Appellant’s submission ignores that Annexures “DW-9” and “DW-10” were not adduced to prove the truth of the facts asserted – ie that the Appellant was in fact a Ukrainian citizen. Rather, the Minister submits that Annexures ‘DW-9’ and ‘DW-10’ were adduced so that there was no injustice to the Appellant because, regardless of the actual position under Ukrainian law, the Ukrainian government continued to treat the Appellant as a citizen: Transcript, 61.44 – 62.14. The Minister submits that is how the primary judge treated the evidence: Reasons at [134]. The Minister submits that the primary judge did not give the Appellant’s evidence less weight by reason of the s 136 limitation order. The Minister submits that, rather, the primary judge weighed the risk of prejudice to the Appellant, in the form of the potential for statelessness, against the fact that the Appellant was in fact being treated as a national of Ukraine.

### Consideration of s 136 of the Evidence Act – evidence of the appellant’s Ukrainian citizenship

1. This ground of appeal must be rejected for the reasons submitted by the Minister.
2. Section 136 of the *Evidence Act* provides:

**136 General discretion to limit use of evidence**

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing.

1. First, the effect of the primary judge’s August 2020 Judgment prevented the Appellant adducing evidence that he was not a Ukrainian citizen and therefore rendered stateless by the Minister’s decision.
2. Second, where the “reports” were served approximately one week before the hearing, and in circumstances where the Minister was not in a position to cross-examine the makers of the reports or to obtain responsive evidence, then the reports could be unfairly prejudicial to the Minister. In these circumstances, the general discretion to limit the use of evidence under s 136 of the *Evidence Act* was enlivened.
3. Third, we are satisfied that, on a fair reading of the transcript, counsel for the Appellant accepted that the “reports” were not intended to prove the truth of the matters asserted and that counsel accepted the limitation framed by the primary judge under s 136 of the *Evidence Act*.
4. Fourth, we do not accept that the primary judge’s discretion under s 136 of the *Evidence Act* miscarried because no limitation order was made in respect to the evidence adduced by the Minister in the form of the Ukrainian travel document and an email from the Ukrainian Embassy stating that the Appellant was a citizen of Ukraine: Annexures “DW-9” and “DW-10” of the Affidavit of Dale Watson filed 27 October 2020. The primary judge did not admit these documents into evidence on the basis of the truth of their content. Rather, the primary judge considered the risk of indefinite detention as a consequence of the Appellant’s potential statelessness. There was, therefore, no inconsistency in the manner in which the primary judge treated, on the one hand, the reports tendered by the Appellant and, on the other hand, annexures “DW-9” and “DW-10” tendered by the Minister.
5. Fifth, it is apparent from the transcript before the primary judge that, far from opposing an order under s 136 of the *Evidence Act*, the Appellant in the Court below eschewed use of the reports for a hearsay purpose and actually embraced an order limiting the use of the expert opinions.
6. For these reasons, the primary judge’s discretion under s 136 of the *Evidence Act* did not miscarry.

# notice of contention – failure to give active intellectual consideration

1. By notice of contention filed 13 May 2021,the Minister challenges the primary judge’s finding that the Minister did not in fact give active intellectual consideration to the Appellant’s prospective statelessness.

## Minister’s submissions

1. The Minister who made the revocation decision did not give reasons for the decision in the manner required by s 47(3) of the *Citizenship Act* when read with s 25D of the *Acts Interpretation Act 1901* (Cth) (as it stood at the time of the decision). However, the Minister submits that s 47(5) of the *Citizenship Act* expressly provided that a failure to comply with the obligation to give reasons for a decision taken under that Act did not result in the invalidity of the decision. As a result, it was submitted that the failure by the then Minister to comply with the obligation to give reasons could not, of itself, justify an order for certiorari: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56; 216 CLR 212at [41]-[49].
2. The Minister submits that a finding that the then Minister had not applied active intellectual process to a question he or she was required to consider should “not lightly be made and must be supported by clear evidence”: *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 at [58]. The Minister submits that, in the absence of reasons, it was for the Appellant to establish by inference that the Minister failed to give consideration to the matters required by the statute having regard to the factual context, including the material before the Minister and the decision itself: *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120; *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437 at [45].
3. The Minister submits that, before the then Minister made the relevant decision, he had a departmental submission before him which accurately dealt with the relevant requirements of s 34 of the *Citizenship Act*. The submission stated that the Ukrainian consul had advised that, under Ukrainian law, Ukrainian citizens who acquire foreign citizenship do not lose their Ukrainian citizenship automatically, but need to make an application to lose their citizenship. The Minister submits that the submission accurately reflected the correspondence from the Ukrainian Vice-Consul. The Minister submits that the Minister may be taken to have read that submission, especially in circumstances where he approved it, wrote brief notes upon it and signed it: *Stambe v Minister for Health* [2019] FCA 43; 270 FCR 173 at [74].
4. In these circumstances, it was submitted that the then Minister did engage and applied active intellectual consideration to the question of statelessness.

## Appellant’s submissions

1. The Appellant submits that, having regard to the material that was available to the Minister, [102] of the Reasons recorded three matters.
2. First, the Appellant submits that the advice conveyed to the Minister was in general terms that did not deal with the Appellant’s personal circumstances.
3. Second, the Appellant submits that the Minister, in making the decision, needed to know whether the Appellant himself, rather than a general unnamed individual, had actually lost Ukrainian citizenship. The Appellant submits that the Minister was required to determine whether the Appellant would be rendered stateless by the decision and, in doing so, the Minister needed more information as to whether the Appellant had made a relevant application which meant he had lost his Ukrainian citizenship.
4. Third, the Appellant submits that, by reason of a letter to the department from the Appellant’s lawyers dated 22 August 2007, the Minister was aware, at least constructively, that there was an effort on foot to obtain further legal information about the Appellant’s status in Ukraine.
5. The Appellant submits that the Minister could not make the relevant decision without first ascertaining whether the Appellant had lost his Ukrainian citizenship. The Appellant submits that the Minister was required to consider whether the Appellant would be made stateless by the Minister’s decision, that was a critical fact to the Minister’s decision-making process, and, in the Appellant’s submission, the Minister did not engage with that critical fact in the manner that the Minister should have.

## Consideration of notice of contention

1. The primary judge found that the Minister did not give active intellectual consideration to the Appellant’s prospective statelessness. The primary judge found that the Minister did not consider all the materials before him in making his decision. In particular, the primary judge found that the Minister could have deferred making the decision until advice had been obtained from Ukraine about the status of the Appellant’s nationality. The primary judge stated at [102]-[103]:

There was no evidence one way or the other that Mr Makarov had made an application which would have resulted in the loss of his Ukrainian citizenship. The advice to the Department, conveyed to the Minister, was in general terms. It did not deal with Mr Makarov’s personal circumstances. The Department provided no information to the Minister on the question. In those circumstances, it must be taken that the Minister’s consideration of the issue raised by s 34(3) of the Act was incomplete. Before he could decide whether his decision would render Mr Makarov stateless, the Minister needed to know whether Mr Makarov had lost his [Ukrainian] citizenship. The advice from the Ukrainian Vice Consul did not answer that question. It was generic. All it told him was that a grant of Australian citizenship did not automatically result in revocation of Ukrainian citizenship. In order to determine whether Mr Makarov would be rendered stateless if his Australian citizenship were revoked, the Minister needed to know whether Mr Makarov had “applied accordingly”, to pick up on the words used by the Vice Consul in her email of 4 April 2007. He did not have that information. Ms Malyon told the Department before it briefed the Minister that Mr Makarov was obtaining legal advice from the Ukraine in relation to the status of his Ukrainian nationality. Despite the Department’s failure to provide them to the Minister, the respondents accepted that the Minister had constructive notice of Ms Malyon’s letter and the emails between the Department and the Embassy. But by the time the Minister received the Departmental submission he did not know what that advice was. Having regard to the paucity of information in the Departmental submission and the other documents of which he had constructive knowledge, I am satisfied that the Minister could not have applied his mind to the question of Mr Makarov’s prospective statelessness, that is to say, any consideration of this question did not involve an active intellectual process.

To this extent, I am persuaded that the Minister did not consider all the materials before him in making his decision. There was a material error in that, had he done so, it could have made a difference to his decision. He could have deferred making the decision until advice had been obtained from the Ukraine about the status of Mr Makarov’s nationality. It follows that ground 2 should be upheld.

1. For those reasons, the primary judge found that the Minister made a jurisdictional error.
2. In *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; 267 FCR 320, the Full Court stated at [46]:

Insofar as the primary judge is suggesting in [42] of his reasons … that a decision-maker is required to make a finding of fact with respect to every claim made or issue raised by an applicant, we do not agree. A finding of fact may not be required if the claim or issue is irrelevant or if it is subsumed within a claim or issue of greater generality or, to use an example advanced by the appellant in the course of submissions in this case, even assuming fact or proposition A, I (the decision-maker) do not accept that fact or proposition B follows. These are only examples and it is not possible to be comprehensive.

1. In *GBV18 v Minister for Home Affairs* [2020] FCAFC 17; 274 FCR 202, the Full Court stated at [32(g)] that “[a] finding that a decision-maker has not engaged in a meaningful or active intellectual process will not lightly be made” (citations omitted).
2. In *AXT19 v Minister For Home Affairs* [2020] FCAFC 32 (***AXT19***), the Full Court stated at [56]:

Considerable caution needs to be exercised in resolving an argument that a claim has been made in sufficiently clear terms that it should in turn be considered by the [decision-maker]. The greater the degree of clarity in which a claim has been made and advanced for consideration, the greater may be the need for the [decision-maker] to consider the claim in clear terms. Conversely, the more obscure and less certain a claim is said to have been made, the less may be the need for the [decision-maker] to consider the claim. The need for caution arises lest a reviewing Court is propelled from its sole task of undertaking judicial review and into the murky waters of impermissible merits review. The task of a court undertaking judicial review is not to elevate a statement that may have been made in passing by a claimant into a clearly articulated claim in need of resolution. For a Court undertaking judicial review to engage in such a process has all the dangers of the Court resolving a different factual case to the one advanced to the Tribunal and thereby trespassing into merits — and not judicial — review.

1. Having regard to those principles, the following matters should be noted.
2. First, there was no evidence before the Minister that the Appellant had renounced his citizenship of Ukraine.
3. Second, the Appellant was the person who would most know whether he had renounced, or sought to renounce, his Ukrainian citizenship.
4. Third, the Appellant did not represent to the Minister that he did not have Ukrainian citizenship and the cancellation of his ex-citizen visa would render him stateless.
5. In these circumstances, there was no obligation on the Minister to make any further inquiries of the Ukrainian government concerning the Appellant’s nationality. As the Full Court stated in *AXT19* at [56], “the more obscure and less certain a claim is said to have been made, the less may be the need for the [decision-maker] to consider the claim”.
6. The Minister had the following information before him at the time of making his decision. There was before the Minister an email dated 4 April 2007 from the Vice Consul of the Embassy of Ukraine in Australia which stated:

Please be advised that Ukrainian citizens who require foreign citizenship do not lose Ukrainian citizenship automatically. To lose Ukrainian citizenship, one has to apply accordingly.

1. In addition, before the Minister was a facsimile dated 22 August 2007 from the Appellant’s solicitors, Katie Malyon & Associates, sent to the Director, Citizen Services Centre, which stated:

Dear Ms Forbes,

**Victor Makarov**

We act for Victor Makarov and his wife …

In relation to your letter of 26 May 2007 addressed to Mr Makarov regarding *Possible Deprivation of Australian Citizenship,* we are instructed to advise that our client is currently in the process of:

(a) appealing his criminal convictions in the NSW District Court; and

(b) obtaining legal advice from the Ukraine in relation to the current status of his Ukrainian nationality.

We will advise your office when we have further details in relation to these matters …

1. The Minister also had a briefing memorandum from the Department of Immigration and Citizenship providing advice in relation to the revocation of Australian citizenship for the Appellant which appeared to have been received by the Second Respondent on 28 August 2007. That briefing memorandum relevantly stated:

Subsection 34(2) of the *Australian Citizenship Act 2007* (Cth) (the Act) provides that the Minister may, by writing, revoke a person’s Australian citizenship if the person is a citizen by conferral and:

(b)(ii) the person has, at any time after making the application to become an Australian citizen, been convicted of a serious offence within the meaning of subsection (5);

(c) the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

Subsection (5) provides that for the purposes of section 34, a person has been convicted of a serious offence if:

(a)  the person has been convicted of an offence against an Australian law or a foreign law, for which the person has been sentenced to death or to a serious prison sentence; and

(b)  the person committed the offence at any time before the person became an Australian citizen.

Paragraph 34(3)(b) provides that the Minister must not decide under subsection (2) to revoke a person’s Australian citizenship “if they would become a person who is not a natural or citizen of any country”.

1. The memorandum further stated that:

On 10 April 2007, the Department was advised by the Ukrainian Consul, Canberra, that according to Article 19.1 of the *Law of Ukraine on the Citizenship of Ukraine (2001)*, ‘Ukrainian citizens who acquire foreign citizenship do not lose Ukrainian citizenship; one has to apply according’. Therefore, [the Appellant] would not have automatically lost his Ukrainian citizenship upon obtaining Australian citizenship.

1. The above correspondence and briefing memorandum are sufficient to demonstrate that the Minister did engage in an active intellectual consideration of whether revoking the Appellant’s Australian citizenship would render the Appellant stateless. The advice from the Ukrainian Vice-Consul was that a grant of Australian citizenship did not automatically result in revocation of Ukrainian citizenship. The advice before the Minister was that, to lose Ukrainian citizenship, one “has to apply accordingly”. Notwithstanding that the Ukrainian Vice Consul did not specifically address whether the Appellant had in fact applied to renounce his Ukrainian citizenship, that was not a matter raised by the Appellant.
2. In addition, the departmental submission was accurate and dealt with the relevant requirements of s 34 of the *Citizenship Act*. It provided an accurate reflection of the correspondence from the Vice-Consul. The submission concluded from this correspondence that the Appellant would not have automatically lost his citizenship of Ukraine upon acquiring Australian citizenship. The relevant Minister may be taken to have read this departmental submission, especially in circumstances where he approved it, wrote brief notes upon it, and signed it. As Mortimer J stated in *Stambe v Minister for Health* [2019] FCA 43; 270 FCR 173 at [74]:

As a general principle, I consider it reliable and appropriate to infer, consistently with the purpose and practice of ministerial briefing notes, that a Minister reads a briefing note with which she or he is provided, where that briefing note is intended to provide the Minister with sufficient information to make a decision about whether or how to exercise a statutory power …

1. We do not consider that the departmental submission erroneously relied on advice from the Vice Consul that was in general terms, and which did not specifically address whether the Appellant had in fact applied to renounce his Ukrainian citizenship. This is because there was evidence before the Minister that advice had been received that there was no automatic loss of citizenship, and the Appellant, in his submissions to the Minister, did not raise any issue of his Ukrainian citizenship or possible statelessness. In those circumstances, the Minister could be satisfied of the matters required by s 34(3) of the *Citizenship Act*.
2. As to the letter from the Appellant’s then solicitor dated 22 August 2007 (which indicated that the Appellant was obtaining advice about the current status of his Ukrainian citizenship), that letter can properly be characterised as a holding response. There is no evidence that any further substantive correspondence addressing the Appellant’s Ukrainian citizenship status was received. There is no reason to suspect that the Minister was required to defer making a decision on account of the possibility that further advice might be forthcoming from the Appellant’s solicitors. This is particularly so given the Appellant had been on notice since on or around 28 May 2007 that the Minister was considering revocation of his citizenship.
3. In addition, the 22 August 2007 letter from the Appellant’s then solicitors merely stated that the Appellant was “in the process of … obtaining legal advice from the Ukraine in relation to the current status of his Ukrainian nationality”, and that the relevant solicitors would “advise … [they had] further details in relation to these matters”. That correspondence imposed no obligation on the Minister to inquire further as to the status of that legal advice.
4. For the reasons given, we would uphold the Minister’s notice of contention.

# disposition

1. The appeal will be dismissed with costs. We would also uphold the Minister’s notice of contention.

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| I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, Banks-Smith and Anderson. |

Associate:

Dated: 28 July 2021