Federal Court of Australia

Hillis v Minister for Home Affairs [2021] FCA 892

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| File number: |  |
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| Judgment of: | **WIGNEY J** |
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| Date of judgment: | 3 August 2021 |
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| Catchwords: | **MIGRATION** – where prerogative relief sought in respect of cancellation of applicant’s visa – whether Minister’s discretion to cancel visa was a lawful exercise of jurisdiction – whether serious errors made in Minister’s reasoning – whether Minister’s discretion was unlawful because it was unreasonable – where decision illogical and irrational – where decision based on factual findings not open on the evidence – writs of prohibition and mandamus granted – respondent to pay applicant’s costs of the application  |
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| Legislation: | *Australian Citizenship Act 2007* (Cth), ss 21(2)(h), 26(3), 26(3)(a)*Migration Act* *1958* (Cth), ss 476A, 499, 501, 501(2), 501(6), 501(6)(b)*Judiciary Act 1903* (Cth), s 39B*Australian Constitution*, s 75(v) |
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| Cases cited: | *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595; [2019] FCAFC 132*BFH16 v Minister for Immigration and Border Protection* (2020) 274 FCR 532; [2020] FCAFC 54*BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420; [2020] FCAFC 94*Brett Cattle Company Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337; [2020] FCA 732*CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496; [2016] FCAFC 146*Minister for Home Affairs v Omar* (2019) 272 FCR 589; [2019] FCAFC 188*Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158; [2016] FCAFC 28*Minister for Immigration and Border Protection v Haq* (2019) 267 FCR 513; [2019] FCAFC 7*Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437; [2014] FCAFC 1*Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11*Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516*Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16*Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; [2013] FCA 317*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*Muggeridge v Minister for Immigration and Border Protection* (2017) 255 FCR 81; [2017] FCAFC 200*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2*Singh v Minister for Home Affairs* (2020) 274 FCR 506; [2020] FCAFC 7*SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451; [2015] FCA 1089*SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 |
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| Date of hearing: | 3 March 2021  |
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| Counsel for the Applicant: | Ms T Baw |
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| Counsel for the Respondent:  | Ms R Francois  |
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ORDERS

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|  | NSD 119 of 2020 |
|   |
| BETWEEN: | JAAHN CHARLES HILLISApplicant |
| AND: | MINISTER FOR HOME AFFAIRSRespondent |

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| order made by: | WIGNEY J |
| DATE OF ORDER: | 3 aUGUST 2021 |

THE COURT ORDERS THAT:

1. The decision made by the respondent on 20 December 2019 to cancel the applicant’s TY Subclass 444 Special Category (Temporary) visa be quashed.
2. The respondent pay the applicant’s costs.

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

REASONS FOR JUDGMENT

WIGNEY J:

1. The Parliament of the Commonwealth of Australia has conferred on the **Minister** for Home Affairs the discretion to cancel a person’s visa if the Minister suspects that they do not satisfy the “character test” and the person is unable to satisfy the Minister that they do: s 501(2) of the ***Migration Act*** *1958* (Cth). There are a very wide range of circumstances, set out at in s 501(6) of the Migration Act, which may result in a person not passing the character test. Once a person falls foul of one or more of the circumstances listed in s 501(6), the Minister’s discretion to cancel their visa is essentially unfettered. It is also not subject to any form of merits review or appeal. Where the Minister exercises his discretion and cancels a person’s visa in those circumstances, their only real recourse is to seek prerogative relief, usually in this Court, on the basis that the Minister did not exercise his jurisdiction lawfully: see s 75(v) of the *Constitution*; s 39B of the *Judiciary Act 1903* (Cth); s 476A of the Migration Act. The jurisdiction to grant relief in such circumstances cannot be entirely excluded: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2 at [104].
2. One of the circumstances which, if found to exist, will result in a person failing the character test is where the Minister reasonably suspects that the person “has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person” and “that the group, organisation or person has been or is involved in criminal conduct”: s 501(6)(b) of the Migration Act. The applicant in this matter, Mr Jaahn Charles **Hillis**, was found to be such a person.
3. Mr Hillis is a citizen of New Zealand, but has lived in Australia for almost his entire life pursuant to visas granted under the Migration Act. His application for Australian citizenship had also been approved, though he had not been able to take the final formal step which he needed to take to become an Australian citizen. Importantly, the Minister responsible for approving Mr Hillis’ citizenship application had plainly accepted that Mr Hillis was a person of good character. The Minister responsible for the decision the subject of this proceeding, however, suspected that Mr Hillis had been a member of a motorcycle club or gang called the “Mongols”. The Mongols was said to be an Outlaw Motor Cycle Gang or “OMCG”, though it had not in fact been outlawed in any way in New South Wales, which is where Mr Hillis resided. In any event, the Minister suspected that the Mongols, as an organisation, had been involved in criminal activity. Mr Hillis did not dispute that he had been a member of the Mongols and there was ultimately no dispute that the Minister had grounds to suspect that the Mongols had been involved in criminal activity. The Minister’s discretion to cancel Mr Hillis’ visa was therefore enlivened.
4. The Minister exercised his discretion adversely to Mr Hillis and cancelled his visa. That was despite the fact that, amongst other things, the Minister accepted that Mr Hillis: was no longer a member of the Mongols; had not been found to have committed any criminal offence himself; had lived almost his entire life in, and had significant ties to, Australia; had a partner who was an Australian citizen and with whom he had four young children whose interests were best served by permitting Mr Hillis to retain his visa; had made a positive contribution to the Australian community; would suffer hardship and emotional distress if separated from his family in Australia; and would experience significant hardship in establishing himself in New Zealand. The Minister considered that while those considerations weighed against the cancellation of Mr Hillis’ visa, they were outweighed by the fact that the Minister could not “rule out the possibility of further serious conduct” by Mr Hillis which could “result in physical and/or psychological harm to members of the Australian community”.
5. Mr Hillis sought prerogative relief in this Court in respect of the cancellation of his visa. He alleged that the Minister’s exercise of the discretion to cancel his visa was unlawful because it was legally unreasonable. To the uninitiated, that complaint would appear to expose the merits of the Minister’s decision to review generally. That is, however, far from the case. The Court’s task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory and limited to determining whether the discretion was exercised lawfully and within jurisdiction. It does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision’s reasonableness, or the Court substituting its own view as to how the decision should be exercised for that of the decision-maker. Nor does it involve the Court remaking the decision according to its own view of what is or is not reasonable. The threshold involved in establishing legal unreasonableness is very high, particularly where the challenge involves the exercise of an unfettered discretion conferred by Parliament on a Minister.
6. The question in this case is whether, as contended by Mr Hillis, that threshold has been reached both because there were serious errors in the Minister’s decision-making process and because the cancellation outcome was, in any event, outside the range of possible lawful outcomes.

# BACKGROUND facts

1. It is necessary to provide slightly more detail concerning the background facts and the context in which the cancellation decision was made.
2. Mr Hillis is a citizen of New Zealand. He was born in New Zealand in 1986. In 1987, when he was only one year old, he immigrated to Australia with his family. He has resided in Australia continuously since that time. He is married to an Australian citizen and has four minor children ranging in age from four years to 12 years. He has never been charged, let alone convicted, of a criminal offence.
3. In February 2016, Mr Hillis applied for Australian citizenship.
4. Over a year and a half later, on 13 September 2017, the Minister’s then department, the **Department** of Immigration and Border Protection, wrote to Mr Hillis and invited him to comment on what was said to be “adverse information that may lead to a decision to refuse to approve [Mr Hillis] becoming an Australian citizen”. The letter noted the applicability of s 21(2)(h) of the *Australian* ***Citizenship Act*** *2007* (Cth), which provides that a person is eligible to become an Australian citizen if the Minister is satisfied that the person “is of good character at the time of the Minister’s decision on the application”.
5. The adverse information identified in the letter was, in summary, that: the New South Wales Police had provided the Department with information that Mr Hillis was “a patched member of the Mongols Outlaw Motor Cycle Gang (OMCG)”; in May 2014 during a “vehicle stop”, Mr Hillis told police that he rode with and had been accepted as a member of the Mongols; in May 2015, Mr Hillis was seen leaving the Mongols Blacktown Clubhouse wearing a Mongols hooded jumper; and, in January 2017, the police had seen Mr Hillis at a “family function day” in Narrabeen wearing “Mongols OMCG colours” which identified him as being a member of the “North Shore Chapter” of the Mongols. The letter also referred to information from various sources that suggested that the Mongols motorcycle club was involved in or associated with organised crime.
6. The letter concluded by noting that the fact that Mr Hillis was a “patched member of the Mongols” may indicate that he was “sympathetic to and supportive of criminal conduct undertaken by the Mongols” and that may in turn indicate that he was not of good character for the purposes of the Citizenship Act.
7. Mr Hillis responded in detail to the Department’s letter, including by providing a statutory declaration in which he declared, in summary, that: while he had been a member of the Mongols Motorcycle Club North Shore Chapter, he had since left the club for financial and family reasons and because he and the club were “heading in different directions”; his mere association with the club provided no basis for concluding that he was sympathetic and supporting of any criminal conduct that may have been engaged in by the Mongols, a suggestion which he emphatically denied; he was undergoing treatment to remove the tattoo which may have associated him with the Mongols and had sold his motorbike, thus indicating that he had no intention of rejoining; he was a law-abiding citizen and his life had changed for the better since having a family. Further information and supporting material was provided to the Minister by Mr Hillis, including a number of statutory declarations from persons attesting to Mr Hillis’ good character.
8. On 9 March 2018, Mr Hillis was advised that a delegate of the Minister had decided to refuse his application for Australian citizenship. The delegate’s “Decision Record” recorded that Mr Hillis had satisfied all of the criteria for the grant of citizenship other than the criteria in s 21(2)(h) of the Citizenship Act which, as noted earlier, provided that a person must be of good character at the time of the decision. The basis for finding that Mr Hillis was not of good character was that Mr Hillis had been a member of the Mongols. The information that was said to support that finding was essentially the same information, summarised earlier, which had been referred to in the Department’s letter dated 13 September 2017.
9. It is important to emphasise, in this context, that the delegate referred to the “Department’s Policy” in respect of s 501(6)(b) of the Migration Act and set out the terms of that provision. The suggestion appeared to be that Mr Hillis was found to not be of good character for the purposes of the Citizenship Act by reason of s 501(6)(b) of the Migration Act. That is despite the fact that the “character test” in s 501(6) applies only to visa cancellations and refusals on character grounds pursuant to s 501 of the Migration Act. It is not applicable to any decisions under the Citizenship Act.
10. Mr Hillis applied to the Administrative Appeals **Tribunal** for a review of the adverse decision in respect of his citizenship application. That application was resolved in Mr Hillis’ favour, essentially because the Minister (for Home Affairs) agreed that the Tribunal should make a decision or order in the following terms:

The decision of the delegate of [the Minister] is set aside and the matter remitted for reconsideration with a direction that [Mr Hillis] should not be regarded as not being of good character because of his former membership of the Mongols Outlaw Motorcycle Gang, and a direction that a decision be made under subsection 24(1) of the Australian Citizenship Act 2007 by 24 December 2018.

1. It may be inferred that the Tribunal subsequently made a decision or order in those terms. The Minister did not contend otherwise.
2. On 21 December 2018, the then Minister for Immigration, Citizenship and Multicultural Affairs (hereafter, the **Minister for Citizenship**) personally wrote to Mr Hillis and advised that his application for Australian citizenship had been approved. The letter noted, however, that before becoming an Australian citizen, Mr Hillis had to take the “final step” of making a “Pledge of Commitment at an Australian citizenship ceremony”.
3. On the very same day that the Minister for Citizenship advised Mr Hillis that his application to become an Australian citizen had been approved, 21 December 2018, the Department wrote to Mr Hillis and gave him notice that the Minister intended to consider cancelling the visa pursuant to which he was permitted to reside in Australia. The basis of that intention was said to be that the Department held information which suggested that Mr Hillis did not pass the character test by virtue of s 501(6)(b) of the Migration Act for the very same reasons that had been accepted by the Minister, and found by the Tribunal, to be incapable of supporting a finding that Mr Hillis was not of good character for the purposes of his citizenship application; that he had been or was a member of a group, namely the Mongols motorcycle club, which the Minister suspected had been or was involved in criminal conduct.
4. It is worth pausing at this point to recapitulate.
5. The Ministerhad, in the context of Mr Hillis’ review application in respect of the decision not to approve his citizenship application, formally agreed to a direction by the Tribunal that Mr Hillis should not be regarded as not being of good character because of his former membership of the Mongols motorcycle club. The Minister for Citizenship subsequently approved Mr Hillis’ citizenship application. It follows that the Minister for Citizenship must have been satisfied that, despite Mr Hillis’ former membership of the Mongols, he was a person of good character. On the very same day that Mr Hillis was advised by the Minister for Citizenship that his citizenship application had been approved, Mr Hillis was advised that the Minister (for Home Affairs) intended to consider cancelling his visa on the basis that the Minister suspected that Mr Hillis did not pass the character test in s 501(6) of the Migration Act because he had been a member of the Mongols. It is readily apparent that the information that was said to found that suspicion was the very same information which had initially been relied on as the basis for refusing Mr Hillis’ application for Australian citizenship and the very same information that the Minister subsequently formally conceded did not provide a basis for finding that Mr Hillis was not of good character for the purposes of the Citizenship Act.
6. On 28 December 2018, Mr Hillis was advised that the Minister had decided, pursuant to s 26(3) of the Citizenship Act, to “defer” Mr Hillis’ pledge of commitment. Subsection 26(3)(a) of the Citizenship Act relevantly provides that the Minister may determine that a person cannot make a pledge of commitment until the end of a specified period if the Minister is satisfied that a visa held by the person may be cancelled under the Migration Act.
7. Correspondence flowed between the Department and Mr Hillis’ legal representative throughout 2019. It included a detailed response by Mr Hillis to the Department’s letter dated 28 December 2018. It is unnecessary to refer in detail to Mr Hillis’ response and the information provided. It will, for the most part, be referred to later in the context of the Minister’s decision. It suffices to note that, as perhaps might be expected, Mr Hillis relied on the same evidence, claims and submissions that he had relied on in support of his citizenship application and his successful review of the Minister’s initial decision to refuse that application on character grounds. As will be seen, the Minister ultimately did not expressly or explicitly reject any of Mr Hillis’ evidence, claims or submissions save for one. The exception was Mr Hillis’ claim that during the duration of his membership of the Mongols, he was unaware of the connection between the Mongols and criminal activity.

# STATUTORY PROVISIONS

1. Subsection 501(2) of the Migration Act provides as follows:

(2) The Minister may cancel a visa that has been granted to a person if:

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

(b) the person does not satisfy the Minister that the person passes the character test.

1. The “character test” is effectively defined by s 501(6) of the Migration Act. Subsection 501(6)(b) provides as follows:

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

…

(b) the Minister reasonably suspects:

(i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

(ii) that the group, organisation or person has been or is involved in criminal conduct; …

1. As has already been noted, Mr Hillis ultimately did not dispute that it was open to the Minister to find, in effect, that he did not pass the character test. The central issue is whether the Minister’s exercise of the discretion adversely to Mr Hillis miscarried in a jurisdictional sense. The Minister did not, in that context, dispute that the discretion to cancel a visa was subject to the implied condition that it be exercised reasonably.

# THE MINISTER’S DECISION

1. The Minister’s Statement of **Reasons** for Cancellation of Visa Under s 501(2) of the Migration Act 1958 in respect of Mr Hillis is dated 20 December 2019 and signed by the Minister.
2. The Reasons can be divided into two parts. The first part deals with whether or not Mr Hillis passed the character test and the second part deals with the Minister’s exercise of the discretion to cancel his visa, it having been found that Mr Hillis did not pass the character test.

## Reasons concerning the character test

1. It is unnecessary to refer at length to the first part of the Reasons. As has already been noted, Mr Hillis ultimately did not contend that it was not open to the Minister to find that he did not pass the character test. It suffices to note the following.
2. First, the Minister adverted to the apparent contradiction between the position that had been taken in respect of Mr Hillis’ application for citizenship and the cancellation of his visa, but did so in a way that was somewhat incomplete and misleading, if not disingenuous. The Minister simply referred to what was said to be Mr Hillis’ submission that “he and the Department signed a document stating the Department would no longer consider his association with the Mongols towards his character”: Reasons at [7]. That is, at best, a highly questionable characterisation of Mr Hillis’ submission. In any event, it is certainly not a complete or accurate characterisation of what had in fact occurred in respect of Mr Hillis’ citizenship application.
3. The Minister and the Department did far more than merely sign a document which indicated that the Department would not consider Mr Hillis’ association with the Mongols “towards his character”. In fact, the Minister, as a party to the Tribunal proceeding, had consented to the Tribunal making an order which included a direction that Mr Hillis “should not be regarded as not being of good character because of his former membership of the Mongols Outlaw Motorcycle Gang”. Moreover, the Minister for Citizenship, not merely the Department, had subsequently in fact decided that Mr Hillis was of good character. That is apparent from the fact that Mr Hillis’ citizenship application was approved by that Minister in circumstances where good character was an essential criterion for citizenship.
4. It is also important to emphasise that this is the only reference in the Reasons to the decision which the Minister had made in respect of Mr Hillis’ citizenship. The second part of the Reasons, which deals with the exercise of the discretion, did not advert at all to the Minister’s decision that Mr Hillis was of good character for the purposes of his citizenship application. It may be inferred that the Minister did not consider that to be a relevant consideration in respect of the exercise of his discretion. More will be said about this later.
5. Second, the Minister noted that Mr Hillis acknowledged that he had previously been a member of the Mongols. The only remaining question, in terms of the character test in s 501(6)(b) of the Migration Act, was whether the Mongols “has been or is involved in criminal conduct”. The Minister found, in that regard, that “the Mongols are a criminal organisation”: Reasons at [27].

## The discretion

1. The Minister has given a direction pursuant to s 499 of the Migration Act in relation to, inter alia, the exercise of the power to cancel a visa pursuant to s 501 of the Migration Act: Direction no. 79 given on 20 December 2018. That direction does not bind the Minister when making decisions personally. It is, however, readily apparent from the Minister’s reasons that, in considering whether to exercise the discretion to cancel Mr Hillis’ visa, the Minister had regard to the primary and other considerations referred to in paragraphs 9 and 10 of Direction no. 79, or at least employed the terminology which is used in those paragraphs. As will be seen, however, the use of that terminology in Mr Hillis’ case is problematic and makes some elements of the Minister’s reasons difficult to understand.
2. In considering whether to exercise the discretion to cancel Mr Hillis’ visa, the Minister first had regard to the “Government’s commitment to protecting the Australian community from harm as a result of criminal activity by non-citizens”: Reasons at [31]. That is said to be a primary consideration under Direction no. 79: Direction no. 79 at [9]. Under Direction no. 79, there are said to be two elements or aspects to the primary consideration of protecting the Australian community: first, the nature and seriousness of the non-citizen’s “criminal offending or other conduct”; and second, the “risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct”: Direction no. 79 at [9.1.1] and [9.1.2].
3. The Minister’s reasons concerning the exercise of the discretion do not directly or separately deal with the nature and seriousness of Mr Hillis’ “offending or other conduct”, perhaps because Mr Hillis had not committed any offences. The only “other conduct” he had engaged in was having previously been a member of the Mongols. The Minister did, however, purport to deal with the supposed risk to the Australian community: Reasons at [32]-[50].
4. At [32] to [44] of the Reasons, the Minister stated that he had “considered”, or “had regard for”, or that he acknowledged, various parts of, or statements in, Mr Hillis’ statutory declaration and submissions, including, in summary: his reasons for initially joining the Mongols, including that he shared their common interest in riding motorcycles; his claim that, to his knowledge, no members of the Mongols had “committed criminal offending associated to the club” and that he saw the club as “nothing more than a social club with an overseas name”; his evidence that he was no longer a member of, and had “parted ways” with, the Mongols; his reasons for leaving the Mongols, including “financial situation, family conflict” and a realisation that he and the club were “heading in different directions”; his evidence that he had undergone treatment to remove a tattoo that “would be associated with being a member of an outlaw motorcycle club”; his submission that he was a law-abiding citizen and had never been charged with a criminal offence, gone to court, or been convicted of any offence; his evidence that his employment required police and background tests, which he had passed; his submission that he had changed his ways and was now a different person, having re-evaluated his life after the birth of his fourth child; and his submission that he can be a role model for his children.
5. Importantly, with one exception, there is nothing in the Minister’s reasons to suggest that he rejected, or did not accept, any of the evidence or submissions made by Mr Hillis. The one exception is that the Minister did not accept Mr Hillis’ claim that he was unaware of the Mongols’ connection with criminal activity during his two and a half year membership: Reasons at [47]. Save for that finding, the Minister did not reject, or indicate that he did not accept, Mr Hillis’ clear and unequivocal evidence to the effect that he had left the Mongols and had no intention of rejoining as he had entered a new phase of his life. He no longer even owned a motorcycle.
6. Yet despite taking into account and not rejecting all of the other evidence and submissions, the combined effect of which was that Mr Hillis had never committed an offence, that he was no longer a member of the Mongols and had no intention of rejoining, the Minister somehow concluded that there was a risk, albeit a low risk, that Mr Hillis “will offend or engage in other serious conduct”: Reasons at [48]. The Minister also concluded that should Mr Hillis “offend or engage in other serious conduct, it could result in physical and/or psychological harm to members of the Australian community”: Reasons at [49].
7. The Minister’s reasons for so concluding should be set out in full (Reasons at [45]-[50]):

45. Taking into account the above information, I have considered whether Mr HILLIS’ presence in Australia poses a risk to the community.

46. I accept assessments from publicly available documentation from government authorities which details the financial and social costs to the Australian community from serious and organised crime, including that of OMCGs. I find that conduct involving serious and organised crime is highly detrimental to the Australian community. I find that Mr HILLIS was a member of an OMCG and that his membership of an OMCG is serious conduct.

47. I acknowledge that Mr HILLIS does not have a criminal record in Australia or New Zealand. However, his previous membership of an OMCG, the Mongols, is of great concern. This concern is heightened by Mr HILLIS’ continued assertions that the Mongols was not involved with criminal activity. Open source information demonstrates the Mongols is known to be connected to criminal activity. I do not accept that Mr HILLIS was unaware of this connection during his at least two and half year membership of the Mongols.

48. I find that there is a low risk that Mr HILLIS will offend or engage in other serious conduct.

49. I consider that should Mr HILLIS offend or engage [in] other serious conduct, it could result in physical and/or psychological harm to members of the Australian community.

50. Having given full consideration to all the information before me in his case, I find that if Mr HILLIS were allowed to remain in Australia there is a risk that he would engage in criminal or other serious conduct in Australia in the future. Although I consider this risk to be low, I consider it to be more than a minimal or remote chance.

1. As will be seen, Mr Hillis’ primary contention in support of his plea that the Minister’s decision was legally unreasonable was that the Minister’s findings that there was a low risk that he “will offend or engage in other serious conduct” and that, if he does so, that “could result in physical and/or psychological harm to members of the Australian community” are findings that were unsupported by any probative material, or are otherwise irrational or illogical.
2. The only other finding made by the Minister which was adverse to Mr Hillis was the rather curious, and largely unexplained, finding that there was a “principle” that the “Australian community, given the link between OMCGs and organised crime in Australia, would expect that a non-citizen who is a former member of an OMCG, should not hold a visa”: Reasons at [58]. The nature and provenance of this supposed principle was not the subject of further elaboration.
3. The Minister’s other findings were all favourable to Mr Hillis. In particular, the Minister accepted that it was in the best interests of Mr Hillis’ four minor children, as well as his nieces, nephews and second cousins, not to cancel Mr Hillis’ visa. The best interests of minor children in Australia who would be affected by the decision is a primary consideration under Direction no. 79: Direction no. 79 at [9.2]. The Minister also found that Mr Hillis “has been making a positive contribution to the community for some 15 years” (Reasons at [73]), that Mr Hillis will “suffer hardship and emotional distress if separated from his family in Australia” (Reasons at [78]) and that he would “experience significant hardship in establishing himself in New Zealand”: Reasons at [79].
4. The Minister returned to the theme of the risk that Mr Hillis would engage in “criminal or other serious conduct in Australia in the future” and thereby cause “physical and/or psychological harm to members of the Australian community” in the concluding paragraphs of his reasons. The Minister summed up his conclusions in that regard as follows (Reasons at [81]-[82] and [86]-[87]):

81. I considered all relevant matters including an assessment against the character test as defined by s 501(6) of the Act.

82. Mr HILLIS has engaged in serious conduct, that of being a former member of the Mongols OMCG. Mr HILLIS and non-citizens who engage in serious conduct of this nature should not generally expect to be permitted to remain in Australia.

…

86. I also considered the risk posed to the Australian community by Mr HILLIS’ continued presence in Australia, taking into consideration his previous involvement in serious conduct and the critical public interest in combatting gang activity and discouraging participation in such activity at any level, even where that participation seems to be largely innocent and not otherwise unlawful.

87. I find that the Australian community could be exposed to significant harm should Mr HILLIS continue an association or membership with an outlaw motorcycle gang. I could not rule out the possibility of criminal or other serious conduct by Mr HILLIS. The Australian community should not tolerate any risk of further harm.

1. A few points should be made concerning the Minister’s conclusions.
2. First, it would seem that the only “serious conduct” that the Minister found Mr Hillis to have engaged in was his prior membership of the Mongols.
3. Second, the Minister acknowledged that Mr Hillis’ previous membership of the Mongols was “largely innocent and not otherwise unlawful”. That acknowledgement was, however, unjustifiably qualified by the use of the words “largely” and “otherwise”. In fact, Mr Hillis’ membership of the Mongols was entirely lawful because, as the Minister noted earlier in the Reasons, the Mongols motorcycle club was not unlawful in New South Wales. Mr Hillis resided in New South Wales and was a member of a chapter of the club based in Sydney. Mr Hillis had also never been charged, let alone convicted, of any offence, let alone an offence which was in any way connected with his past membership with the Mongols.
4. Third, the finding that there was a risk that Mr Hillis will “offend” is difficult to comprehend given that there was no evidence or even suggestion that Mr Hillis had offended in the past. As for “serious conduct”, the Minister’s finding that there was a risk that Mr Hillis would engage in “similar serious conduct” in the future would appear to be a finding that Mr Hillis might rejoin or re-associate himself with the Mongols in the future: Reasons at [83]. It is difficult to see any other basis for the finding. Given that Mr Hillis’ previous association with the Mongols was “largely innocent and not otherwise unlawful”, the finding that there was a risk of “similar serious conduct” by Mr Hillis in the future may be taken to amount to a finding that any future association Mr Hillis might have with the Mongols would also be similarly innocent and not otherwise unlawful.
5. Fourth, the Minister’s finding that there was a “risk of further harm” to the Australian community would appear to be a finding that the Australian community would somehow be harmed should Mr Hillis rejoin or re-associate himself with the Mongols in the future, even if that association was again largely innocent and not otherwise unlawful.
6. Fifth, the Minister found that the “unacceptable risk of harm” to the Australian community should Mr Hillis rejoin the Mongols outweighed all of the countervailing considerations, including the best interests of Mr Hillis’ four minor children and the hardship and emotional distress that Mr Hillis would suffer if separated from his family.
7. Sixth, nowhere in the Minister’s Reasons concerning the exercise of the discretion adversely to Mr Hillis is there a reference to the fact that the Minister had previously consented to an order by the Tribunal, in the context of a review of the adverse decision made in relation to Mr Hillis’ citizenship application, that included a direction to the Minister the effect of which was that Mr Hillis’ prior membership of the Mongols did not mean that he was not of good character and did not prevent him from qualifying for Australian citizenship. There is also no reference in this part of the Reasons to the fact that the Minister for Citizenship had approved Mr Hillis’ application, which carried with it an acceptance that Mr Hillis was a person of good character.

# REVIEW GROUNDS AND SUBMISSIONS

1. Mr Hillis’ originating application in this Court contained 10 grounds of review. Only one of those grounds was pressed by Mr Hillis. That ground was that the Minister’s decision was unreasonable.
2. Mr Hillis argued that the Minister’s decision was legally unreasonable both because there were major errors and deficiencies in the decision-making process and because the outcome of the decision – cancellation of Mr Hillis’ visa – was manifestly unreasonable and lacking any intelligible justification.
3. Three major errors in the decision-making process were identified. The first error was that there was no logical, probative or rational basis for the Minister’s finding that there was a risk that Mr Hillis would rejoin the Mongols. The second error was that there was no logical, probative or rational basis for the Minister’s finding that members of the Australian community would suffer “physical and/or psychological harm” should Mr Hillis rejoin the Mongols in the future. The third error was that it was legally unreasonable for the Minister to ignore, when it came to exercising his discretion, the concession by the Minister in the Tribunal, and the implicit acceptance by the Minister for Citizenship, that Mr Hillis’ previous membership of the Mongols was incapable of supporting a finding that Mr Hillis was not of good character for the purposes of his application for Australian citizenship.
4. In relation to the outcome, Mr Hillis’ main contention was that there was no evident or intelligible justification for the decision to cancel Mr Hillis’ visa, particularly given the prior finding that Mr Hillis was a person of good character for the purposes of Australian citizenship. That was all the more so given that virtually all of the other relevant considerations, in particular the best interests of Mr Hillis’ four minor children, were accepted to militate against cancellation of Mr Hillis’ visa.
5. The Minister, not surprisingly, submitted that the findings relating to the risk of harm in the future were logical and supported by probative material. The Minister emphasised, in that regard, the rejection of Mr Hillis’ claim that he was unaware of the Mongols’ connection with criminal activity while he was a member. That was said to provide the basis for the finding that there was a risk that Mr Hillis would rejoin the Mongols. In the Minister’s submission, Mr Hillis’ denial that he knew of the criminal activities amounted to consciousness of guilt or an admission.
6. As for the finding that “physical and/or psychological harm” could result if Mr Hillis did rejoin the Mongols, the basis for that finding was said to be that mere membership of a so-called Outlaw Motor Cycle Gang amounted to support for the unlawful activities of that gang. It followed, so the Minister submitted, that it was open to find that physical or psychological harm to the Australian community could result if Mr Hillis did rejoin the Mongols at some point in the future.
7. In relation to the outcome of the decision, the Minister submitted that the finding that had been made concerning Mr Hillis’ character in the context of his application for Australian citizenship was essentially irrelevant to the question whether his visa should be cancelled. That was said to be because “good character” is not defined in the Citizenship Act, so there was no question that Mr Hillis failed the character test for the purposes of s 501 of the Migration Act, and the Minister who approved Mr Hillis’ citizenship application gave no reasons for his finding that Mr Hillis was of good character.

# RELEVANT PRINCIPLES

1. The parties did not make any detailed submissions in relation to the principles that apply when considering whether an administrative decision was legally unreasonable. It is, nevertheless, appropriate to briefly outline those principles.
2. It is now well settled that a discretionary power which is conferred by statute is subject to the implied condition or presumption that it be exercised reasonably. A decision-maker who fails to exercise a discretionary power reasonably thereby fails to exercise the discretion within jurisdiction or, to use the now familiar language employed in such cases, commits a jurisdictional error. It is also well accepted that, in certain circumstances, a decision-maker may commit a jurisdictional error if they make material findings of fact in the absence of probative evidence, or otherwise engage in illogical or irrational reasoning. That is particularly so where the faulty findings or reasoning relate to a jurisdictional fact, or are otherwise material to the ultimate conclusion or exercise of the relevant discretionary power.
3. The relevant principles in relation to legal unreasonableness have been given detailed consideration and analysis in many cases in recent times: see, in particular, *Minister for Immigration and Citizenship v* ***Li*** (2013) 249 CLR 332; [2013] HCA 18; *Minister for Immigration and Border Protection v* ***Singh*** (2014) 231 FCR 437; [2014] FCAFC 1; *Minister for Immigration and Border Protection v* ***Stretton*** (2016) 237 FCR 1; [2016] FCAFC 11; *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158; [2016] FCAFC 28; ***Muggeridge*** *v Minister for Immigration and Border Protection* (2017) 255 FCR 81; [2017] FCAFC 200; *Minister for Immigration and Border Protection v* ***SZVFW*** (2018) 264 CLR 541; [2018] HCA 30; *Minister for Immigration and Border Protection v Haq* (2019) 267 FCR 513; [2019] FCAFC 7; *Singh v Minister for Home Affairs* (2020) 274 FCR 506; [2020] FCAFC 7; *BFH16 v Minister for Immigration and Border Protection* (2020) 274 FCR 532; [2020] FCAFC 54.
4. The general principles which emerge from the authorities may be summarised as follows: see *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420; [2020] FCAFC 94 at [129]-[146].
5. First, the concept of legal unreasonableness concerns the lawful exercise of power. Legal reasonableness, or an absence of legal unreasonableness, is an essential element in the lawfulness of decision-making.
6. Second, the Court’s task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory. It does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision’s reasonableness, or the Court substituting its own view as to how the decision should be exercised for that of the decision-maker. Nor does it involve the Court remaking the decision according to its own view of reasonableness.
7. Third, there are two contexts in which the concept of legal unreasonableness may be employed. The first involves a conclusion after the identification of a recognised species of jurisdictional error in the decision-making process, such as failing to have regard to a mandatory consideration, or having regard to an irrelevant consideration. The second involves an “outcome focused” conclusion without any specific jurisdictional error being identified: *Singh* at [44].
8. Mr Hillis contended that the Minister’s decision was unreasonable in both respects: there were jurisdictional errors within the decision-making process and the outcome was manifestly unreasonable in all the circumstances.
9. Fourth, in assessing whether a particular outcome is unreasonable, it is necessary to bear in mind that, within the boundaries of power, there is an area of “decisional freedom” within which a decision-maker has a genuinely free discretion: *Li* at [28]; *Singh* at [44]. Within that area, reasonable minds might differ as to the correct decision or outcome, but any decision or outcome within that area is within the bounds of legal reasonableness. Such a decision falls within the range of possible lawful outcomes of the exercise of the power. It is only if the outcome falls outside the area of decisional freedom that it can be said to be legally unreasonable.
10. Fifth, in order to identify or define the width and boundaries of this area of decisional freedom and the bounds of legal reasonableness, it is necessary to construe the provisions of the statute which confer the relevant power. The task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope, and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making. The evaluation is also likely to be fact dependant and to require careful attention to the evidence.
11. Sixth, where reasons for the decision are available, the reasons are likely to provide the main focus for the evaluation of whether the decision is legally unreasonable. Where the reasons provide an evident and intelligible justification for the decision, it is unlikely that the decision could be considered to be legally unreasonable. However, an inference or conclusion of legal unreasonableness may be drawn even if no error in the reasons can be identified. In such a case, the Court may not be able to comprehend from the reasons how the decision was arrived at, or the justification in the reasons may not be sufficient to outweigh the inference that the decision is otherwise outside the bounds of legal reasonableness or outside the range of possible lawful outcomes.
12. Seventh, the evaluation of whether a decision is legally unreasonable should not be approached by way of the application of particular definitions, fixed formulae, categorisations, or verbal descriptions. “[T]he concept of legal unreasonableness is not amenable to rigidly defined categorisation or precise textural formulary”: *Stretton* at [10]. That said, the consideration of whether a decision is legally unreasonable may be assisted by reference to descriptive expressions that have been used in previous cases to describe the particular qualities of decisions that exceed the limits and boundaries of statutory power. The expressions that have been utilised in past cases include decisions which are “plainly unjust”, “arbitrary”, “capricious”, “irrational”, “lacking ‘an evident or intelligible justification’”, and “obviously disproportionate”: *Muggeridge* at [35] citing *Stretton* at [11]; *Singh* at [44]; *Li* at [74]. It must be emphasised, however, that the task is not an a priori definitional or “checklist” exercise: *Singh* at [42]. Rather, it involves the Court evaluating the decision with a view to determining whether, having regard to the terms, scope, and purpose of the relevant statutory power, the decision possesses one or more of those sorts of qualities such that it falls outside the range of lawful outcomes.
13. Eighth, defective, illogical, or irrational reasoning or fact finding may support a finding that the ultimate decision or exercise of discretion was legally unreasonable, particularly where the illogicality relates to a critical matter upon which the decision or exercise of discretion turned: *Minister for Immigration and Citizenship v* ***SZMDS*** (2010) 240 CLR 611; [2010] HCA 16 at [132]; see also *Minister for Immigration and Citizenship v* ***SZRKT*** (2013) 212 FCR 99; [2013] FCA 317 at [151]-[153]; *SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 at [61]-[62]; *Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516 at [54].
14. Ninth, illogicality or irrationality in this context, however, must mean something more than emphatic disagreement with the reasoning or findings: *SZMDS* at [124]; *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496; [2016] FCAFC 146 at [61]. If “probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion”: *SZMDS* at [131].
15. Tenth, for an administrative decision to be vitiated for jurisdictional error based on illogical or irrational findings of fact or reasoning, “extreme” illogicality or irrationality must generally be shown, “measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions”: *SZRKT* at [148]. The “critical question” whether an administrative decision is irrational, illogical, and not based on findings or inferences of facts supported by logical grounds, “should not receive an affirmative answer that is lightly given”: *SZMDS* at [40]. A high degree of caution must be exercised before concluding that a finding is irrational or illogical in order to ensure that the Court does not embark impermissibly on “merits review”: *SZMDS* at [96]; *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451; [2015] FCA 1089 at [14]-[15].
16. Eleventh, in considering whether an administrative decision-maker’s decision or exercise of discretion was the product of, or was materially affected by, illogical or irrational reasoning or factual findings, the decision-maker’s reasons should not be the subject of overzealous scrutiny: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

# WAS THE MINISTER’S DECISION LEGALLY UNREASONaBLE?

1. A finding that a Minister of State has made a decision which is legally unreasonable is not a finding that can or should be made lightly: *Li* at [106]; *SZVFW* at [11].
2. As the preceding discussions of the relevant principles makes clear, the concept of legal unreasonableness in the context of judicial review cannot be used as a backdoor way of reviewing the merits of an administrative decision, or as a way of substituting the Court’s views or opinions for those of the decision-maker: *Li* at [66]; *Stretton* at [12]. Further, as has already been explained, only cases of extreme illogicality or irrationality will generally qualify as giving rise to a legally unreasonable decision. A finding cannot be said to be illogical or irrational in this context if there is at least some probative material upon which the finding could be logically based, even if reasonable minds might differ – even strongly differ – about the availability of the finding. It is also a serious and exceptional step to conclude that a Minister’s decision to cancel a visa in the circumstances of a case is a decision outside the bounds of legal reasonableness or outside the range of possible lawful outcomes. A high degree of caution must be exercised lest the Court stray into merits review. Emphatic disagreement with the findings and decision plainly does not suffice.
3. Accepting these cautionary observations, and giving them full weight, the circumstances of this case are nonetheless such as to support a finding that the Minister’s decision was legally unreasonable. That is both because there are serious and material errors in the decision-making process and because, all things considered, the outcome falls outside the bounds of legal reasonableness.
4. The primary, if not sole, justification for the decision to cancel Mr Hillis’ visa was that Mr Hillis represented an unacceptable risk of harm to the Australian community. Although masked in somewhat obscure and opaque language, the finding that there was a risk to the Australian community was apparently based on two critical findings: first, that there was a risk, albeit a low risk, that Mr Hillis would rejoin the Mongols at some point in the future; and second, that if Mr Hillis did rejoin the Mongols, that could result in physical or psychological harm, or both, to members of the Australian community. On close analysis, however, neither finding was open on the material before the Minister. Neither finding was rational or logical.
5. The Minister’s finding that there was a “low risk that Mr Hillis will offend or engage in other serious conduct” (Reasons at [48]) was effectively unexplained by any reasoning, or at least any logical or rational reasoning. The reference to “offend” was particularly baffling since the Minister had accepted that Mr Hillis had never been charged with or convicted of any offence. The Minister accepted, in his submissions, that while this finding was couched in terms of Mr Hillis offending or engaging in “serious conduct”, it amounted to no more than a finding that there was a risk that Mr Hillis might rejoin the Mongols. Be that as it may, the finding appears to have been based on nothing more than the fact that Mr Hillis had been a member of, and had an association with, the Mongols in the past. That fact alone, however, did not and does not provide a logical or rational foundation for the finding in all the circumstances of this case.
6. While it may be accepted that an event or circumstance that occurred or existed in the past might in some cases reasonably inform, or provide a basis for predicting, what may happen in the future, that is not always the case. In most cases, the past event or circumstance should not be considered in isolation, but rather must be considered in context and in the light of all surrounding circumstances. When so considered, the past event or circumstance may not provide any logical or rational basis for a finding about what may happen in the future.
7. In *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595; [2019] FCAFC 132, for example, Mortimer J, with whom Moshinsky J agreed, stated as follows (at [78]) in relation to the question whether a past conviction alone could provide a probative basis for a finding that there was a risk of reoffending in the context of a case involving the cancellation of a visa:

The nature and circumstances of past offending are integral to any assessment of the risk, or likelihood, of future offending. Also of relevance are a range of other factors about the present circumstances of an individual which may bear on a risk of whether past offending conduct might or might not be repeated. It is these matters, and not the mere specification of a criminal record, which provide the probative basis for an assessment about the nature and extent of any risk of further offending. In these processes, a court acts on more than the bare historical fact of when and where a person committed offences and the legal description of those offences. Otherwise, the prejudicial and impermissible kind of reasoning to which Gageler J referred in *Hughes* is what can dominate any reasoning process.

1. There was no dispute that Mr Hillis had been a member of the Mongols in the past. Considered in the context of the evidence as a whole, however, that fact did not provide a probative or logical basis for the Minister’s finding that there was a risk that Mr Hillis would rejoin the Mongols at some point in the future. Indeed, all of the evidence before the Minister pointed the other way. In particular, Mr Hillis had provided evidence, in the form of a statutory declaration, which explained why he had left the Mongols and made it clear that he had moved on and had no intention of rejoining that club in the future. Amongst other things, he had re-evaluated his life after the birth of his fourth child, had sold his motorcycle and undergone treatment to remove a tattoo which might associate him with an Outlaw Motor Cycle Gang. He was also gainfully employed in a position of trust that had required police and background checks. Mr Hillis’ evidence in that regard was supported by statutory declarations by other people that attested to Mr Hillis’ character.
2. As has already been noted, the Minister acknowledged all that evidence and Mr Hillis’ submissions concerning it. The difficulty, however, is that the Minister did not engage in any “active intellectual process” in respect of that evidence, or make any findings concerning it: cf *Minister for Home Affairs v Omar* (2019) 272 FCR 589; [2019] FCAFC 188 at [37]. He did not explicitly or expressly reject Mr Hillis’ evidence in relation to those matters, or give any reasons or bases for rejecting it. In light of that uncontroversial and uncontroverted evidence, and all the surrounding circumstances, the mere fact of Mr Hillis’ past membership provided no probative basis for a finding that he might rejoin the Mongols in the future, or even that there was a low risk that he might do so. In all the circumstances, the finding that there was a low risk of Mr Hillis rejoining was pure speculation, entirely against the weight of the evidence and unsupported by any reasoning, or at least any rational or logical reasoning. It amounted to nothing more than mere ipse dixit.
3. As noted earlier, the Minister contended that the finding that Mr Hillis might rejoin the Mongols was supported by the Minister’s non-acceptance that Mr Hillis was unaware of the Mongols’ connection with criminal activity while he was a member. The first point to note about that contention is that the Minister’s rejection of Mr Hillis’ claim in that regard was itself fairly dubious. The basis of it was said to be that “open source information demonstrates the Mongols is known to be connected to criminal activity”: Reasons at [47]. That “open source information” was apparently reports from the Australian Criminal Intelligence Commission, the Australian Institute of Criminology and other “government authorities” which detailed the connection between so-called Outlaw Motor Cycle Gangs generally (not the Mongols specifically) and criminal activity: Reasons at [13], [15] and [47]. There was, however, nothing to suggest that Mr Hillis knew about those reports. Nor could it be said to be likely that Mr Hillis was aware of them. The only other “open source information” was apparently some media articles. Mr Hillis provided a detailed response to the information contained in those articles.
4. In any event, even accepting that it may have been open to reject Mr Hillis’ claim that he did not know of the connection, that alone did not provide any probative or logical basis for a finding that Mr Hillis might rejoin the Mongols in the future. The Minister’s submission that Mr Hillis’ claim in that regard somehow constituted an admission or consciousness of guilt has no merit and is rejected. What, it might be asked rhetorically, could that claim amount to an admission of? It is difficult to see how it could amount to an admission by Mr Hillis that he had been involved in any unlawful or criminal activity. In any event, the Minister accepted that Mr Hillis’ membership of the Mongols was not itself unlawful and that Mr Hillis had not himself committed any offences.
5. More significantly, it is impossible to see how Mr Hillis’ claim that he was not aware that the Mongols club was associated with criminal activity, if found to be untruthful, could somehow be treated as an admission by Mr Hillis that, despite his emphatic evidence to the contrary, he might rejoin the Mongols in the future. Even if Mr Hillis was being untruthful when he said that he was not aware of the Mongols’ connection with criminal activity when he was a member, it did not follow that Mr Hillis was lying when he said, in effect, that he had left the Mongols for good and had no intention of rejoining. Nor did the Minister make any such finding. As has already been noted, the Minister did not reject Mr Hillis’ evidence to the effect that he had moved on and had no intention of rejoining the Mongols in the future.
6. It should finally be noted that it is difficult, if not impossible, to reconcile the Minister’s finding that there was a risk that Mr Hillis might rejoin the Mongols with the implicit, if not explicit, finding by the Minister for Citizenship that Mr Hillis was a person of good character despite his previous association with the Mongols. The Minister made no attempt to reconcile his finding with that finding.
7. The Minister’s finding that “should Mr Hillis offend or engage [sic] other serious conduct, it could result in physical and/or psychological harm to members of the Australian community” similarly lacks any probative or logical basis. Indeed, it is even more unjustifiable.
8. The basis of that finding is entirely unclear from the Reasons. It is difficult, if not impossible, to reconcile with the Minister’s acceptance that Mr Hillis had never been convicted of an offence and that his past association with the Mongols was not itself unlawful. How, in those circumstances, could it be said that physical or psychological harm of some sort could result merely from Mr Hillis rejoining the Mongols? Even if it be accepted that the Mongols club was engaged in, or associated with, criminal activity generally, that criminal activity was likely to continue whether Mr Hillis rejoined or not.
9. This finding is also impossible to reconcile with the finding that Mr Hillis was of good character for the purposes of his application for Australian citizenship. How could the Minister logically find that there was a risk that Mr Hillis might, at some point in the future, engage in serious conduct which could result in physical and/or psychological harm to the Australian community in circumstances where his Department and the Minister for Citizenship had accepted, on the basis of the same material, that Mr Hillis was a person of good character despite his past association with the Mongols.
10. The Minister sought to justify or support this finding on the basis that membership of an Outlaw Motor Cycle Gang alone contributed to the risks faced by the Australian community arising from organised crime. The argument was that if Mr Hillis rejoined the Mongols, his association with the Mongols alone would somehow result in physical or psychological harm to the community, even if Mr Hillis himself did not engage in any unlawful conduct. It may of course be accepted that mere membership of a group which has been or is involved in criminal activity will result in a person failing the character test by reason of s 501(6)(b) of the Migration Act. It was on that basis that Mr Hillis was found to have failed the character test. It does not follow, however, that mere membership of such an organisation can be said to necessarily result in physical or psychological harm to the Australian community. Such a finding is all the more speculative in this case given that Mr Hillis’ past association with the Mongols was accepted to be innocent and not unlawful and that there was, at most, said to be only a low risk that he might rejoin in the future. It should also be noted that there is nothing in the Reasons to suggest that the Minister in fact based his finding of possible physical or psychological harm on Mr Hillis’ mere membership of, or association with, the Mongols at some point in the future.
11. Once it is accepted that there is, in all the circumstances, no probative or logical basis for the finding that Mr Hillis represented an “an unacceptable risk of harm to the Australian community” on the basis of his past association with the Mongols, there could not be said to be any evident or intelligible justification for the cancellation of Mr Hillis’ visa. That is particularly so given that every other relevant consideration weighed heavily against the cancellation of his visa. Mr Hillis had lived almost his entire life in Australia. Not surprisingly, in those circumstances, he had significant ties with Australia and the cancellation of his visa would be contrary to the best interests of his four minor children. It would cause him, and no doubt them, significant hardship and emotional distress. So much so was accepted by the Minister.
12. Even putting those considerations to one side, it is impossible to see any evident and intelligible justification for the cancellation of Mr Hillis’ visa in circumstances where it had been accepted, by the Minister for Citizenship, that Mr Hillis was of good character and qualified for Australian citizenship. It may be accepted, as the Minister contended, that no reasons were given for that decision. One thing is clear, however: the Minister for Citizenship knew that Mr Hillis had previously been a member of the Mongols and must ultimately have accepted that that fact alone did not mean that Mr Hillis was not of good character.
13. It is equally true that there is no test for, or definition of, ‘good character’ for the purposes of the Citizenship Act, whereas there is a specific character test in s 501(6) of the Migration Act for the purposes of visa refusal and cancellation decisions. It does not follow, however, that the finding that Mr Hillis was of good character for the purposes of the Citizenship Act was entirely irrelevant to the question whether Mr Hillis’ visa should be cancelled as a result of him failing the character test in the Migration Act.
14. The Minister made no attempt to reconcile his decision with the prior decision to approve Mr Hillis’ application for Australian citizenship. As already noted, the Minister’s reference to the Department having “signed a document stating the Department would no longer consider his association with the Mongols towards his character” was at best disingenuous and, in any event, was only in that part of the Minister’s reasons that dealt with the character test. The Minister said nothing about the approval of Mr Hillis’ citizenship application, carrying with it a finding that he was of good character, when it came to considering the exercise of his discretion. Ignoring or failing to have regard to that fact in relation to the exercise of the discretion was, on just about any view, arbitrary and unjustifiable. Coupled with the other identified defects and deficiencies in the Minister’s decision-making and reasoning process, it clearly exposes the decision as being outside the bounds of legal reasonableness.

# CONCLUSION AND DISPOSITION

1. The Minister’s decision to cancel Mr Hillis’ visa was legally unreasonable. It was based on factual findings which were not open on the material and were devoid of any probative or logical basis. The decision was also, in all the circumstances, devoid of any intelligible justification, particularly having regard to the Ministerial decision to approve Mr Hillis’ application for Australian citizenship.
2. An order in the nature of a writ of certiorari quashing the Minister’s decision to cancel Mr Hillis’ visa should be made. Mr Hillis sought other forms of prerogative relief. Given that the cancellation decision is to be quashed, I do not consider that it is necessary to make any order in the nature of a writ of prohibition restraining the Minister from taking any action consequent upon the cancellation decision, such as removing Mr Hillis from Australia. Equally, I do not consider that it is necessary to make any order in the nature of a writ of mandamus compelling the Minister to reinstate the cancelled visa. One would expect that reinstatement would necessarily follow from the quashing of the cancellation decision. It is, however, appropriate to order the Minister to pay Mr Hillis’ costs of this application.

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| I certify that the preceding ninety-seven (97) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney. |

Associate:

Dated: 3 August 2021