

## USEFUL SOURCES

For a useful description of the character test see the DIAC Fact sheet:  
<http://www.immi.gov.au/meda/factsheets/79characterhtm>

### Cases

*Haneef v MIAC* [2007] FCA 1273 (21 August 2007)  
[http://www.austlii.edu.au/cases/ctv/Federal\\_ct](http://www.austlii.edu.au/cases/ctv/Federal_ct)  
*MIMA v Wai Kuen Chan* [2001] FCA 1552; *Chan v MIMA* [2001] AATA 487 (Purvis D.P.)  
*MIMIA v Godley* (2004) ALD 411 (dicta of Lee J.); (2005) 141 FCR 552

*Ayan v MIMIA* (2003) 196 ALR 332  
*Hand v HAMC Inc* (1991) 25 ALD 667; (1991) 25 ALD 675  
*Jia Le Geng v MIMA (2001) 205 CLR 507*; [1999] FCA 951; (2001) 65 ALD 1 (IRT:austlii)  
*MIMIA v Godley* (2004) ALD 411; 2005) 141 FCR 552  
*MIMA v Paul William Gunner* (1998) 84 FCR 400; [1999] FCA 951  
*MIMIA v Stefan Nystrom* (2006) 230 ALR 370  
*McKinnon v Department of Treasury* (2006) 170 CLR 104 & *George v Rockett* (1990) 170 CLR 104 (reasonable suspicion).  
*O'Driscoll* [1994] IRTA 3532  
*Re MIMA: ex parte Lorenzo Ervin* transcript HCS B29/1997 <http://www.austlii.edu.au>  
*Re MIMIA; ex parte Thomas Palme* (2003) 216 CLR 212; 201 ALR 327  
*Charkaoui v Canada 2007 SCC 9* (February 23,2007)  
<http://scc.lexum.umontreal.ca/en/dn/2007>

### Legislation

*Migration Act 1958* s.501(6)(b)  
Legislative Instruments register: General Direction under s.499 – Visa Refusal under s.501  
<http://www.comlaw.gov.au>

### Books

Mary Crock *Immigration & Refugee Law in Australia* Federation Press 1998 p 62-67  
Kim Rubinstein *Australian Citizenship Law in Context* Lawbook 2003 p124-127, par 4.9  
Heidi Zogbaum *Kisch in Australia: the Untold Story* Scribe 2004 p.40

### Articles

- The Right Hon Lady Justice Mary Arden “Meeting the Challenge of Terrorism: the Experience of English and other courts” (2006) 80 *ALJ* 818  
<http://www.judiciary.gov.uk/docs/speeches>

- The Right Hon Lord Bingham of Cornhill “The Rule of Law” (2004) `5(3) *Commonwealth Lawyer* 22 cited in *Haneef* decision par 34; see also Rule of Law Lecture, Centre for Public Law, University of Cambridge, 16 November 2006 <http://cpl.law.acm.ac.uk> (MP3 download)

- Justice R S French “Judicial Review Rights” (2001) 28 *AIAL Forum* 30

- Oliver Wendell Holmes “The Path of the Law” (1897) 10 *Harvard Law Review* 457

- Laurence Maher “Migration Act Visitor Entry Controls and Free Speech: the Case of David Irving” (1994) 16 *Sydney Law Review* 358.

- John McMillan “The Role of Judicial Review in Australian Administrative Law” (2001) 30 *AIAL Forum* 47

### Papers

The Governance of Britain. A Consultation on the Role of the Attorney-General 25 July 2007  
<http://www.attorney.general.gov.uk>

### Reports

Senate Standing Committee Legal and Constitutional Affairs Report on Migration Legislation Amendment (Strengthening the Provisions Relating to Character and Conduct) Bill 1998  
[http://www.aph.gov.au/Senate/committe/legcon.ctte/completed\\_inquiries/1996-1999](http://www.aph.gov.au/Senate/committe/legcon.ctte/completed_inquiries/1996-1999)

### **Speeches**

- Hon Justice Brian Sully "Bias in Court/Tribunal Proceedings" AIAL COAT seminar Canberra 20 August 2007 forthcoming in *AIAL Forum* (see *Haneef* decision para 219-224).
- Hon Justice Richard Chisholm "Perceptions and Values: Their Role in Judicial Decisions" ANU College of Law Seminar 24 August 2007

### **COPY OF SLIDES**

- History of character test
  - The "bad man" in the law
  - uncertainty v prescription
  - a new group of character cases – the association cases
- Statutory interpretation in *Haneef*
- Judicial/tribunal values – the "metavalue" of risk assessment

#### *Immigration Restriction Act 1901 s.3*

immigration...of the persons described ..is prohibited  
(c) any person who has within 3 years been convicted of an offence, not being a mere political offence, and has been sentenced to imprisonment for one year or longer therefor, and has not received a pardon

*Migration Act 1958 s.7(1)* The Minister may, in his absolute discretion, cancel a temporary entry permit at any time by writing under his hand

*Migration Act 1989s.11G* The Minister may at any time, in his or her absolute discretion, cancel a valid visa.

### **Groups of character cases**

***Criminal conviction cases*** e.g. Nystrom, Palme

***Minister's reasons cases*** e.g. Ayan

***Tribunals "values" cases*** e.g. O'Driscoll (IRT), Jia (AAT)

***Criminal but long time Australian resident*** e.g. Nystrom

***"Free speech" cases*** e.g. Ervin, Irving, Kisch

Now

***Association cases*** – Haneef, Chan, Godley (dicta)

### **Statutory interpretation task - cases and tools to assist the court**

*Chan*

–single judge (Emmett J)

–Purvis DP in AAT

*Godley* (Lee J obiter comment, Full Court silent)

General Direction s.499

Extrinsic materials: 1998 Bill - second reading speech, ex memo, Senate Committee report

### **Judicial/Tribunal values**

The rule of law, values and statutory interpretation.

The "meta value" of risk assessment

## MIGRATION ACT 1958 - SECT 501

### Refusal or cancellation of visa on character grounds

Decision of Minister--natural justice does not apply

(3)The Minister may:

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

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

if:

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

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

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

Character test

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

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(b)the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct...

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

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

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

the person is not of good character; or

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

(i)engage in criminal conduct in Australia; or

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

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

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

or

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

Otherwise, the person passes the **character test** .