

Centre for International and Public Law
ANU College of Law
The Case of Dr Haneef

The Character Test in Migration Law
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Main points

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

“Bad man”

“a thoroughly unpleasant man having been convicted of serious and odious crimes”

Justice Emmett in Full Federal Court in *Nystrom*
(in dissent)

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 1989

s.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)

s.501(6)

- (1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the 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; or**
 - (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**.*

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

“Administrative law doctrine is an accumulation – a wilderness of single instances, most cases turning ultimately on fine and often unique points of statutory interpretation or factual analysis... the goalposts are often hard to see through the mist” John McMillan (2001)

