Federal Court of Australia

Mackie v Minister for Home Affairs [2022] FCAFC 120

|  |  |
| --- | --- |
| Appeal from: | *Mackie v Minister for Home Affairs* [2021] FCA 1326 |
|  |  |
| File number(s): | SAD 212 of 2021  SAD 213 of 2021 |
|  |  |
| Judgment of: | **RARES, MORTIMER AND O'SULLIVAN JJ** |
|  |  |
| Date of judgment: | 15 July 2022 |
|  |  |
| Catchwords: | **MIGRATION** – two appeals heard together – decisions to cancel appellants’ visas under s 501(3) of *Migration Act 1958* (Cth) – where Minister decided cancellation of the visas was in the national interest – appellants found to be senior members of an “outlaw motorcycle gang” – where Minister made findings about opposition to “anti-biker” legislation and appellants’ “willingness to disobey Australian laws” in the future – whether primary judge correct to find Minister’s reasoning not affected by jurisdictional error – appeals dismissed |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) ss 501(3), 501(6)  *Serious and Organised Crime (Control) Act 2008* (SA) |
|  |  |
| Cases cited: | *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123  *Mackie v Minister for Home Affairs* [2021] FCA 1326  *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153; 287 FCR 181  *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | South Australia |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 63 |
|  |  |
| Date of hearing: | 23 May 2022 |
|  |  |
| Counsel for the Appellants: | Mr B Walker SC with Mr S McDonald SC and Ms N Wootton |
|  |  |
| Solicitor for the Appellants: | Patsouris & Associates |
|  |  |
| Counsel for the Respondent: | Mr C Lenehan SC with Ms H Tonkin |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | SAD 212 of 2021 |
|  | | |
| BETWEEN: | THOMAS MACKIE  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  Respondent | |

|  |  |
| --- | --- |
| order made by: | RARES, MORTIMER AND O'SULLIVAN JJ |
| DATE OF ORDER: | 15 July 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs of the appeal, to be fixed by way of an agreed single lump sum for both this appeal and SAD 213 of 2021 or, in default of agreement, by way of a single lump sum fixed by a Registrar.

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

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | SAD 213 of 2021 |
|  | | |
| BETWEEN: | PERRY MACKIE  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  Respondent | |

|  |  |
| --- | --- |
| order made by: | RARES, MORTIMER AND O'SULLIVAN JJ |
| DATE OF ORDER: | 15 July 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs of the appeal, to be fixed by way of an agreed single lump sum for both this appeal and SAD 212 of 2021 or, in default of agreement, by way of a single lump sum fixed by a Registrar.

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

REASONS FOR JUDGMENT

RARES, MORTIMER AND O’SULLIVAN JJ:

1. These two appeals were heard together, as they were before the primary judge. The appellants are brothers, and New Zealand citizens. They have both resided in Australia since they were teenagers: that is, for more than 48 years. Both are senior members of the Descendants, an outlaw motorcycle gang (**OMCG**). Each appellant had his visa cancelled under s 501(3) of the ***Migration Act*** *1958* (Cth). By that provision, the responsible Minister is empowered to cancel a visa without affording the person affected natural justice:

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.

1. It was not in dispute before the primary judge, nor on the appeal, that each appellant did not pass the character test by reason of s 501(6)(a) of the Migration Act, so that the precondition in 501(3)(c) was not in issue. The question before the primary judge was whether the Minister’s decision in each visa cancellation was affected by jurisdictional error in the way he dealt with whether the visa cancellations were in the national interest.
2. Two jurisdictional errors were alleged before the primary judge, in respect of each visa cancellation decision. The two visa cancellation decisions were relevantly identical in their reasoning. The primary judge rejected both contentions put on behalf of the appellants: see *Mackie v Minister for Home Affairs* [2021] FCA 1326.
3. On appeal, the appellants pressed both contentions again. For the reasons set out below, the primary judge’s orders and decision were correct, and each appeal must be dismissed.

# The Minister’s reasons

1. The Minister’s reasons are summarised in detail by the primary judge at [10]-[33] of his Honour’s reasons, and it is not necessary to repeat that entire summary here. One paragraph that relates to the grounds of appeal (at [39] in the Minister’s reasons for Mr Thomas Mackie) does not appear in the Minister’s reasons for Mr Perry Mackie. That is the only material difference, and otherwise, as the primary judge noted at [32]:

many of the paragraphs of the two decisions, including the key paragraphs on which the applicant’s arguments rely, are identical in the two sets of reasons.

1. Unless otherwise indicated, we refer to the Minister’s reasons in relation to Mr Thomas Mackie. The appellants’ two grounds of appeal did not differentiate between the two appellants in terms of the application of their submissions to the Minister’s reasoning for each appellant.
2. Relevantly to the grounds of appeal, the following features of the Minister’s reasons should be noted.
3. In the assessment of whether visa cancellation was in the national interest, the Minister’s reasons are divided into five sections, headed “Criminal conduct”, “Other serious conduct”, “Pending charges”, “Risk to the Australian Community” and “Conclusion”. The reasons otherwise deal with topics outside the national interest criterion, and which might go to the general exercise of discretion (eg “Expectations of the Australian community”). The grounds of appeal concern only the reasoning about the national interest criterion.
4. In the national interest section, under the heading “Other serious conduct”, the Minister indicated (at [28]) he had taken into account a “visa cancellation referral package”, prepared by the **A**ustralian **F**ederal **P**olice, dated 12 November 2020, which was Attachment C to the Ministerial briefing paper provided to him.
5. The Minister found, on the basis of that referral package:

29. I note the AFP advises that Mr MACKIE and the Descendants OMCG have been the subject of significant Law Enforcement Agency attention for a number of years. Mr MACKIE is a foundation member of the club, having formed it with his brother, Perry Mackie, after his arrival from New Zealand in the early 1970’s. The club is a Declared Organisation under *the Serious and Organised Crime (Control) Act 2008*, with the declaration assented to on 6 August 2015.

…

32. I have taken into consideration further advice from the AFP that the Descendants OMCG has played a *‘strong role’* in unifying other OMCG’s, such as the Hells Angels MC [Motorcycle Club], Finks MC and Gypsy Jokers MC, against anti-biker legislation. This information is corroborated by open source information regarding meetings held in the Descendants OMCG clubrooms in 2009.

33. The AFP have provided a summary of the Descendants OMCG criminal activity, ranging from 1976 to 2020, which I have assessed and note frequent serious offences involving violence and weapons, illicit drug production and trafficking. Open source information also corroborates this information and that members of the Descendants OMCG have ongoing involvement in criminal activity.

34. I have taken into consideration the AFP referral that submits Mr MACKIE’s *‘criminal record and ongoing association with a declared organisation is highly likely to continue should he remain in Australia. This would pose a significant risk to South Australia and the Australian Community’*. The referral advises that the cancellation of Mr MACKIE’s visa is also *‘likely to cause significant disruption to the operation of the Descendants OMCG and reduce the potential for ongoing criminal activity, in particular gang related violence in community locations and other intimidation related offences*’.

(Original emphasis.)

1. The Minister then considered media reports provided to him:

38. I have also taken into consideration multiple newspaper articles linking Mr MACKIE with the Descendants OMCG and other OMCGs in South Australia. I note Mr MACKIE and his brother Perry Mackie were co-founders of the Descendants OMCG and current media releases indicate they both remain as not only members of the Descendants OMCG, but seemingly proud leaders and public representatives of OMCGs and their many members in South Australia.

39. I note comments attributed to Mr MACKIE during an interview, published in The Advertiser on 13 February 2019, in which he states in relation to the *Serious and Organised Crime (Control) Act 2008* *that ‘This is really an attempt to regulate who we can associate with….It's Big Brother determining our friendships which most people in a democracy would find pretty ordinary."*

(Original emphasis.)

1. It was common ground between the parties that the reference in [39] to “13 February 2019” should be a reference to ‘13 February 2009’, and that this slip did not indicate any material error in the Minister’s reasons.
2. At [43], the Minister made the following findings:

43. I find that Mr MACKIE has engaged in other serious conduct through his association and membership of the Descendants OMCG. I consider his conduct to be especially serious due to the integral position he holds as a founding member of the club. I find Mr MACKIE’s conduct through his OMCG membership to be very serious when also considering the significant harm caused to the community by the Descendants OMCG and other OMCGs.

1. Under the heading “Risk to the Australian Community”, the Minister found:

51. I have considered whether Mr MACKIE poses a risk to the Australian community through re-offending and his continuing membership with an OMCG.

…

54. I have taken into consideration the long list of very serious crimes attributed to members of the Descendants OMCG over more than 40 years in Australia. The AFP referral has summarised the involvement of Descendants OMCG members in crimes, including the discovery of more than $500,000 alleged proceeds of crime together with a large quantity of methamphetamine; the seizure of $151 million street value of drugs, including 21kg of methamphetamine and 21,000 ecstasy tablets; and several more arrests involving serious violent offences, large quantities of illicit drugs, weapons and proceeds of crime.

55. I note the Descendants OMCG is referred to by the AFP as *‘one of the most longstanding clubs in the state of South Australia’*. I further note the ACIC documents in relation to OMCGs details the links between OMCGs and organised crime in Australia. This material highlights the various police operations targeting OMCGs, the enormous costs of organised crime in Australia, the taxpayer savings from cancelling the visas of organised crime offenders, and the trends and issues in organised crime.

56. Although I acknowledge Mr MACKIE’s last sentence of imprisonment was in 1980, I am concerned with his ongoing role with the Descendants OMCG and the frequency and seriousness of the criminal acts associated with that group. The AFP advise that Mr MACKIE is a founding member of the Descendants OMCG, an OMCG that is a Declared Organisation under the *Serious and Organised Crime (Control) Act 2008* in South Australia. Not only is Mr MACKIE a founding, and ongoing, member of the Descendants OMCG, I note the Descendants OMCG has also played a ‘*strong role’* in unifying other OMCGs, such as the Hells Angels MC, Finks MC and Gypsy Jokers MC, against anti-biker legislation. I find this is a further example of Mr MACKIE’s willingness to disobey Australian laws, and is also an example of the position of power and/or respect he holds amongst other OMCGs.

57. I note the level of criminal activity attributable to the Descendants OMCG and other OMCGs, including very serious violent and drug related offending, and find that Mr MACKIE’s ongoing support and high-level representation of the Descendants OMCG is an example of his endorsement of this criminal behaviour. I further find that by wearing the Descendants OMCG colours and paraphernalia and by representing the Descendants OMCG with other OMCGs, Mr MACKIE is knowingly endorsing the criminal behaviours of his club and this in turn increases the risk of further criminal activity either directly by himself, or by members of the OMCG he founded and proudly represents.

58. I have given significant weight to the view of the AFP that the cancellation of Mr MACKIE’s visa is likely to *‘cause significant disruption to the operation of the Descendants OMCG and reduce the potential for ongoing criminal activity, in particular gang related violence in community locations and other intimidation related offences’*. I find that Mr MACKIE’s presence in the Australian community will increase the risk of the Descendants OMCG committing further criminal offending.

59. Given Mr MACKIE’s offending history, I find there is an ongoing risk that he will re-offend.

(Original emphasis.)

1. The Minister concluded at [63]:

63. Having regard to the above, and in particular the AFP visa cancellation referral package, I find there is an ongoing risk that Mr MACKIE will reoffend, which may include violence and/or drugs, or engage in other serious conduct in relation to an OMCG which may lead to criminal conduct. I find that if Mr MACKIE were to engage in further criminal conduct and/or other serious conduct, it could cause serious physical, psychological and/or financial harm to individuals and to the broader Australian community. I also find that if Mr MACKIE were to commit further violent offences, physical and emotional harm is likely to be caused to individual victims.

1. On the question of the national interest, the Minister’s overall conclusion was set out at [64]:

64. In sum, the information concerning Mr MACKIE’s engagement in criminal conduct, and other serious conduct through his association with an OMCG, together with my findings regarding the risk to the community posed by Mr MACKIE engaging in criminal or other serious conduct in the future, raised concerns that were of such a serious nature that I concluded that the use of my discretionary power to cancel Mr MACKIE’s Class TY Subclass 444 Special Category (Temporary) visa, without prior notice, is in the national interest.

1. Finally, at [88], in the section of his reasons where the Minister expresses his overall conclusion on why “the considerations favouring non-cancellation are insufficient to outweigh the serious national interest considerations”, the Minister finds:

86. I have weighed up the above countervailing circumstances against the national interest considerations. In particular, I considered the risk posed to the Australian community by Mr MACKIE's continued presence in Australia, taking into consideration his past criminal conduct, particularly that involving violence and the distribution of illicit drugs, as well as his involvement with the Descendants OMCG.

…

88. I find that the Australian community could be exposed to significant harm should Mr MACKIE reoffend in a similar fashion or continues to breach the law and judicial orders or also continues to engage in other serious conduct by his membership with an OMCG. I could not rule out the possibility of further criminal or other serious conduct by Mr MACKIE. The Australian community should not tolerate any risk of further harm.

# The primary judge’s reasons and the grounds of appeal

1. The primary judge described the challenge made on behalf of the appellants in the following way, which was not impugned on the appeal (at [5]):

5 The applicant in each case alleges that the Minister made two jurisdictional errors and those errors are pleaded in identical terms in each case and are said to have occurred as part of the Minister’s consideration of the national interest (s 501(3)(d)). As a broad description at this stage, both jurisdictional errors are said by the applicant in each case to arise from, or relate to, the Minister’s use and acceptance of information that the Descendants Outlaw Motorcycle Gang (OMCG) and the applicant as a member of that group played a strong role in unifying other OMCGs against anti-biker legislation.

1. On ground 1 of the judicial review, the primary judge rejected the contention that there was legal unreasonableness, illogicality or irrationality in the Minister’s finding at [56] of his reasons (and at [60] in the reasons relating to Mr Perry Mackie). His Honour found (at [48]-[49]):

48 I return to Ground 1 of the applications for judicial review. As I have said, the finding which is challenged appears in that section of the Minister’s reasons in each case which addresses other serious conduct by the applicant and the risk to the Australian community. The context includes findings by the Minister that OMCGs have links with organised crime (Minister’s reasons in the case of Thomas Mackie at [36]), the view of the Australian Criminal Intelligence Commission that OMCGs represent one of the most high profile manifestations of organised crime in Australia (Minister’s reasons in the case of Thomas Mackie at [35]) and that the Descendants OMCG and other OMCGs cause significant harm to the community (Minister’s reasons in the case of Thomas Mackie at [43]). The Serious and Organised Crime (Control) Act is an Act, as its long title indicates:

[T]o provide for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations, their members and associates; and for other purposes.

49 In my opinion, the finding challenged by the applicant, albeit made on a slender basis, does not involve the type of serious illogicality or irrationality required by the authorities before this ground of judicial review is held to have been made out (*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [130]–[131] per Crennan and Bell JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 207 ALR 12 at [38] per Gummow and Hayne JJ).

1. The primary judge then concluded that even if he was wrong on this matter, the error was not in any event material (and therefore not jurisdictional in character), in accordance with his Honour’s understanding of the principles set out by the High Court in *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123; *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421; ***MZAPC*** *v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590.
2. Having referred to a passage from the plurality’s reasons in *MZAPC* (at [38] of that decision) the primary judge concluded (at [55]):

55 The fact that an error has been made with respect to a piece of evidence that provides further support for a finding otherwise supported by strong evidence does not rule out a conclusion that the error has not been shown to be material as the decision in *SZMTA* illustrates. The Minister’s argument here was that the other evidence and findings of the Minister that the applicant had an unwillingness to obey Australian laws was so strong that there is no realistic possibility of a different result absent the finding of a further example. In my opinion, that is correct, both as to the assessment of the national interest and the weighing process against other considerations favouring non-cancellation of the applicant’s visa.

1. On those two bases, the primary judge rejected ground 1 of the judicial review.
2. On ground 2, the primary judge explained that the applicant was not contending that any law bearing on the case was itself constitutionally invalid (including s 501(3)): see [62]. That remained the position on appeal. Rather, the issue was one of statutory construction, and whether political communications and political organisations were matters which fell within the concept of the national interest for the purposes of the exercise of power in s 501(3).
3. The primary judge (at [65]-[66]) accepted the Minister’s two preliminary responses to ground 2. Those responses were, first, that the Minister did *not* rely on what Mr Thomas Mackie was reported to have said as a political statement made by Mr Thomas Mackie, but rather as evidence of his holding of a leadership role within the Descendants OMCG. Second, the Minister’s reference to the Descendants OMCG’s “strong role” in unifying other OMCG’s against the anti-biker legislation, together with the appellants’ positions within that group, went to a finding of willingness by the appellants to disobey Australian laws. Such willingness, if found to exist, is a matter capable of falling within the conception of the national interest. The primary judge found those conclusions were sufficient to dispose of ground 2: at [67].
4. On the assumption his Honour was incorrect in that conclusion, the primary judge considered the larger question of whether conduct by way of political communications or political organisation undertaken by a visa holder are matters which fall within the proper construction of the phrase “national interest” in s 501(3)(d). His Honour held that they did: see [81]. At [80], the primary judge found:

80 With these matters in mind, the applicant in each case argues that Parliament has used very general words or, more accurately, a very general concept of the national interest without any express indication that it is intended to encompass matters adverse to the person who is the subject of the assessment and relating to freedom of speech or expression. The principle of legality dictates a narrow construction to exclude such matters and, I might add, presumably matters relating to other common law rights and freedoms. The difficulty with this argument is that it seems to me that the very breadth of the concept of the national interest and the essentially political nature of the concept points firmly in the other direction and it is not possible to exclude from the assessment conduct which might be seen as speech or communication on a political matter. The Minister gave a good example of the appropriateness of limiting the range of matters the Minister might consider as part of the national interest by pointing to the conduct in issue in *Monis v The Queen* [2013] HCA 4; (2013) 249 CLR 92. It is inherently unlikely that, whether such conduct was criminal or not, Parliament intended that such conduct could not be taken into account by the Minister in his or her assessment of the national interest.

1. At [82], the primary judge repeated the materiality finding he had made in respect of ground 1.

# Grounds of appeal

1. On appeal, the appellants press both arguments put before the primary judge.
2. By ground 1, the appellants challenge the primary judge’s conclusion that there was no illogicality or irrationality attaching to the Minister’s reasoning at [56] of the Minister’s reasons (and [60] of the reasons in relation to Perry Mackie). They also challenge the primary judge’s finding that any error was not material.
3. By ground 2, the appellants challenge the primary judge’s conclusion described at [24] above, contending that the Minister’s reasons could not be construed in the way the primary judge had construed them, and that the Minister’s finding that the appellants’ conduct disclosed a “willingness to disobey Australian laws” inevitably engaged the appellants’ contention about the proper content of the term “national interest” in s 501(3)(d). They contend the conduct relied upon was no more than political opposition to a law, and involved no disobedience to any law.
4. Thus, the appellants contend ground 2 fundamentally concerns the primary judge’s finding extracted at [25] above. They contend the appellants’ engagement in non-violent political communication and organisation was not, and could not be, relevant to the assessment of the national interest in the cancellation of their visas:

Any “interest” the Minister might perceive in suppressing particular political activity (ie, political communication and organisation for political communication purposes) as an end in itself, is beyond the scope of statutory concept of “the national interest”, properly understood.

…

To simply regard the role attributed to the appellants in unifying OMCGs against certain legislation as contrary to the “national interest” was to misunderstand that statutory concept and, consequently, to proceed on a misunderstanding of the law and apply an incorrect test.

(Footnotes omitted.)

1. Finally, the appellants again challenge the primary judge’s alternative conclusion on materiality.

# Resolution: ground 1 of the appeal

1. Ground 1 impugns the same parts of the Minister’s reasons as ground 2, although on a different basis. The appellants submit (at [3]):

The Minister reasoned that the appellants’ role in organising political opposition to anti-biker legislation was an example of their “willingness to disobey Australian laws”. This reasoning was illogical, irrational and unreasonable. Non-violent political organisation is not only lawful in this country, and a fundamental freedom recognised by the common law; it is constitutionally protected.

1. The appellants continue (at [20]):

This conclusion “lacks an evident and intelligible justification”. It is irrational and illogical: it is simply a *non-sequitur*. The “finding” (example of willingness to disobey Australian laws) does not rationally follow from the premise (played a role in unifying OMCGs against anti-biker legislation).

(Footnotes omitted.)

1. The argument relies to a considerable extent on the use of the word “this” by the Minister at [56] of his reasons:

56. Not only is Mr MACKIE a founding, and ongoing, member of the Descendants OMCG, I note the Descendants OMCG has also played a *‘strong role’* in unifying other OMCGs, such as the Hells Angels MC, Finks MC and Gypsy Jokers MC, against anti-biker legislation. I find **this** is a further example of Mr MACKIE’s willingness to disobey Australian laws, and is also an example of the position of power and/or respect he holds amongst other OMCGs.

(Original emphasis; additional emphasis added in bold.)

1. We assume in favour of the appellants that taking such an approach is not “over-zealous” (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 272, Brennan CJ, Toohey, McHugh and Gummow JJ). As the respondent submitted, in this passage (and the similar passage in the reasons relating to Mr Perry Mackie) the Minister did not say that the appellants’ conduct was *in fact* a contravention of Australian laws nor that the appellants had *in fact* disobeyed the law, or *in fact* engaged in unlawful behaviour. His finding was that their conduct disclosed a “willingness” to disobey Australian laws, in the sense of an ‘openness’ to doing so. Another word here might be ‘preparedness’. We accept the respondent’s submission that this is the sense in which the Minister used the term “willingness”.
2. The Minister had previously identified as a fact (at [29] of his reasons) that the Descendants OMCG was a declared organisation under the ***S****erious and* ***O****rganised* ***C****rime (Control)* ***Act*** *2008* (SA). He had been given a summary by the AFP of the:

Descendants OMCG criminal activity, ranging from 1976 to 2020, which I have assessed and note frequent serious offences involving violence and weapons, illicit drug production and trafficking. Open source information also corroborates this information and that members of the Descendants OMCG have ongoing involvement in criminal activity. [(at [33])]

1. The Minister had been given information about:

the establishment of a national taskforce named Operation Morpheus by the Australian Criminal Intelligence Commission’s (ACIC) Serious and Organised Crime Co-ordination Committee and how the purpose of Operation Morpheus is to disrupt, disable and dismantle the criminal activities of Australia’s highest risk OMCGs and their members. This reflects the view of ACIC that OMCGs remain one of the most high profile manifestations of organised crime in Australia. [(at [35])]

1. The AFP report before the Minister stated:

In more recent years the Descendants have played a strong role in bringing together the many patched clubs that exist in Adelaide and South Australia in general including the Hells Angels MC, Finks MC and Gypsy Jokers MC in order to unite against the anti-biker legislation that has been passed. The anti-biker legislation attempts to identify and treat outlaw motorcycle clubs as criminal groups in order to prosecute them for associating with one another. The Descendants clubhouse has been used as a meeting place for the multiple clubs to discuss these matters due to be it being seen as neutral territory to a certain extent and the fact that the Descendants are one of the most longstanding clubs in the state of South Australia.

(Footnotes omitted.)

1. At [36], the Minister states:

I had regard to the ACIC reports and factsheets which detail the links between OMCGs and organised crime in Australia. This material highlights the various police operations targeting OMCGs, the enormous costs of organised crime in Australia, the taxpayer savings from cancelling the visas of organised crime offenders, and the trends and issues in organised crime.

1. The Minister returned to this material and incorporated it into his findings at [55] of his reasons ([59] of the reasons for Mr Perry Mackie). The appellants did not contend the Minister’s reliance on any of this source material was mistaken, misunderstood or that his reasoning was without a probative foundation.
2. It is important to note, in relation to both grounds of appeal, that the source material and primary findings related to the influence of the Descendants OMCG *as an organisation*, and then also to the appellants’ long time membership and leadership roles in that organisation.
3. In this context, there is nothing irrational or illogical in the Minister linking the appellants’ role within the Descendants OMCG with the garnering of support by that organisation amongst a number of other OMCGs to oppose legislation designed to curb their activities, as the information before the Minister described those activities. There was nothing irrational or illogical in the Minister then linking these findings with a preparedness on the part of the appellants in the future to disobey Australian laws. The Minister had found the appellants had in the past been prepared to disobey Australian laws, both as individuals and through their involvement with the Descendants OMCG. The Minister had made a number of findings about the activities of the Descendants OMCG as reported to him, in particular their contended participation in organised crime activities.
4. It is neither irrational nor legally unreasonable to infer in those circumstances that the appellants’ opposition, through the Descendants’ OMCG, to the anti-biker legislation itself was connected to a desire to continue involvement with the kinds of activities the information before the Minister had described as undertaken by OMCGs.
5. As the respondent submitted, the link is borne out by the Minister’s finding at [57] of his reasons:

I note the level of criminal activity attributable to the Descendants OMCG and other OMCGs, including very serious violent and drug related offending, and find that Mr MACKIE’s ongoing support and high-level representation of the Descendants OMCG **is an example of his endorsement** of this criminal behaviour.

(Emphasis added.)

1. The same finding was made in relation to Perry Mackie at [61]. The Minister was not using “non-violent political organisation” by the appellants, of itself, as a foundation for his conclusions about the national interest. He was using what he considered the factual information suggested about *why* the Descendants OMCG was publicly garnering support for opposition to the legislation, and why at least Mr Thomas Mackie had publicly endorsed his organisation’s position. The Minister found a link between the garnering of that support amongst other OMCGs, and the preparedness of the appellants to continue their involvement in the future in the kinds of activities the Minister found they had engaged in previously, notably organised crime. This was a rational form of reasoning. The primary judge was correct to so find. Ground 1 is not made out.

# Resolution: Ground 2 of the appeal

1. At [32] of his reasons, and on the basis of advice from the AFP, the Minister attributed to the Descendants OMCG a “strong role” in unifying other OMCGs, such as the Hells Angels **M**otorcycle **C**lub, Finks MC and Gypsy Jokers MC, against anti-biker legislation. This was said by the Minister at [32] to be “corroborated” by “open source” material. The parties agreed, and the Minister’s reasons at [39] make clear, that this is a reference to an article in 2009 in *The Advertiser*, which reports, relevantly:

Just to be here is remarkable; there are brawls that go back decades between these groups. One ill-chosen word, a misinterpreted gesture, even a spilt drink and the place could ignite.

If, as members believe, police eavesdrop through hidden listening devices in their clubs, you wonder what they will be making of this unprecedented gathering. Each club has taken a risk to be here, but they’ve done so because they feel there's a big principle at stake – the survival of all the club patches they wear.

They are meeting to explore the things that unite rather than divide them, and to understand how their peculiar ethos of brotherhood, with its tolerance of crime, has brought them into conflict with society.

“F\*\*\* me,” says a 25-year veteran of one club, before draining the first of countless beers. “We've punched on with some of these clubs and here we are drinking with ’em. Never thought I’d see this.”

All these clubs face extinction under Premier Mike Rann’s new Serious and Organised Crime (Control) Act. Police Commissioner Mal Hyde has sought the declaration of the Finks Motorcycle Club as a criminal gang and, if Attorney-General Michael Atkinson agrees, the Finks could be issued with control orders and face up to five years' jail for meeting again.

Police say the Finks are set up for crime and almost all have serious convictions. A lawyer for the Finks, Craig Caldicott, says that’s not true. He claims 80 per cent of the members have convictions that are mostly for minor or old crimes and only a few have been jailed for serious crimes.

Clearly, the bikies are worried; subsequently, they are more accessible. For the first time, they are discussing the make-up of their membership. The Descendants’ founder, 54-year-old Tom Mackie, claims the police have yet to prove clubs are set up for the purpose of organised crime.

“**This is really an attempt to regulate who we can associate with,**” **he says.** “**It’s Big Brother determining our friendships which most people in a democracy would find pretty ordinary.**”

(Emphasis added.)

1. See also the extract from the AFP report at [38] above.
2. Some of the language from the Minister’s reasons at [32] is repeated in the impugned part of the Minister’s reasons at [56], with a finding that Mr Thomas Mackie had a long standing and foundational role in the Descendants OMCG. The same finding was made at [60] of the Minister’s reasons about Mr Perry Mackie.
3. There is no specific reference in either paragraph to Mr Thomas Mackie’s media statement quoted above. The “strong role” reference in both paragraphs concerns the Descendants OMCG *as a whole*, not solely one or both of the appellants. Nevertheless, favourably to the appellants, we accept it could be inferred that in the “willingness” finding at [56] (and [60] in relation to Mr Perry Mackie), the Minister had incorporated the “serious conduct” findings and material from [38]-[42] (for Mr Thomas Mackie) and [40]-[44] (for Mr Perry Mackie) about the appellants’ membership of and role in the Descendants OMCG. Insofar as the particular reported statement of Mr Thomas Mackie is concerned, there is no suggestion in the reasons that was used in respect of Mr Perry Mackie, and the appellants did not submit otherwise. Yet their submissions did not distinguish between the error said to have been made in each set of reasons.
4. Therefore, and favourably to the appellants’ submissions, the relevant factual findings of the Minister involved consideration of a reported public statement by Mr Thomas Mackie, and reported conduct of both appellants in the Descendants OMCG in leadership roles over many years, together with the reported “strong role” *by the Descendants OMCG* in unifying other OMCGs against anti-biker legislation.
5. It might be said, as the appellants contended, that making a public statement opposing existing or proposed legislation *could* be understood as the taking of a political position. So too for conduct opposing existing or proposed legislation. Nevertheless, the questions posed by ground 2 of the appeal are not such abstract ones. The questions on ground 2 are:
6. should the Minister’s reasons be understood as involving a finding about one or both appellants taking a political position on the anti-biker legislation and the Minister deploying this political position adversely to them in deciding where the national interest lies; and
7. if so, is reasoning of that kind legally permissible in the Minister’s consideration of whether cancellation of the appellants’ visas is in the national interest.
8. As the primary judge found, the appellants’ contentions fail at the answer to the first question. Neither at [56] of his reasons for Mr Thomas Mackie, nor at [60] of his reasons in relation to Mr Perry Mackie, nor anywhere else, did the Minister make a finding or follow a path of reasoning about either appellant adopting a political position opposing anti-biker legislation which was then deployed against them in the Minister’s consideration of the national interest.
9. The primary judge was correct to determine there was no error in the Minister’s use of the findings we have described at [50] above to make a further finding about the appellants’ willingness – or preparedness – to disobey the law. The contextual factors which the primary judge identified in his reasons (see [19] above) are, with respect, correct. So is the primary judge’s finding that Mr Perry Mackie was *not* reported to have made any similar public statements yet the Minister deployed the same reasoning on his visa cancellation. That is because, as we have described, even in the specifically impugned passages the Minister did not rely on any statement by Mr Thomas Mackie. Rather, all he relied on was the “strong role” by the Descendants OMCG, and the appellants’ respective leadership roles in that organisation. Also correct is the primary judge’s finding (at [65]) that the more likely reason for this reference to a public statement was to demonstrate the leadership role played by Mr Thomas Mackie, and indeed also Mr Perry Mackie. That was the focus of the Minister’s findings – namely, the appellants’ role in the Descendants OMCG over a long period of time, and in turn the Descendants OMCG’s preparedness to engage in criminal activity.
10. The Minister took into account the objectives of the anti-biker legislation to disrupt the activities of declared organisations. He also focused on the positions held by the appellants in the Descendants OMCG. Drawing an inference favourably to the appellants, he *may* also have incorporated the reported public statement by Mr Thomas Mackie. In that context, it was open to the Minister to see the appellants’ position as essentially self-serving rather than as any political statement or conduct. That is, it was open to the Minister to see the appellants’ position as being driven by a desire to be able to continue the activities of the Descendants OMCG as they had been reported to the Minister in the briefing paper, being activities of a declared organisation under the SOC Act that “remain[s] one of the most high profile manifestations of organised crime in Australia” (Minister’s reasons at [35]).
11. We accept the respondent’s submissions on the appeal that the Minister’s finding:

lacks the embellishments about political communication that the appellants wish to attach to it, and upon which this ground depended.

1. None of the Minister’s findings concerned using political statements by Mr Thomas Mackie adversely to him in the visa cancellation process. For that reason, it is not necessary on the appeal to embark upon any discussion of whether, in the abstract, the Minister would be entitled to use the political statements (or conduct) of a person as material on which the Minister could form a view that it was in the national interest to cancel that person’s visa. On a proper construction of the Minister’s reasons in the cases of the appellants that issue does not arise. The primary judge was correct in his conclusions on this matter.

# Materiality

1. If contrary to our views the Minister’s reasons were irrational or illogical, or impermissibly employed a political statement or conduct by one or both of the appellants as a reason to find it was in the national interest to cancel their visas, and even if the appellants’ submissions on the construction of the “national interest” were accepted, in our opinion the primary judge was also correct to find, in the alternative, that neither alleged error was material.
2. His Honour’s reasoning on materiality was the same on each of the two grounds, and can be dealt with together. The appellants submit (at [23]):

The primary judge’s approach to materiality was at odds with settled principle, acceding again to the Minister’s submission that the “other evidence and findings” were “so strong that there is no realistic possibility of a different result”. This was to wade into the merits of the decision.

(Citations omitted.)

1. The appellants rely on an extract from the Full Court’s decision in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153; 287 FCR 181 at [174] (Kerr and Mortimer JJ, Allsop CJ agreeing at [1]).
2. The primary judge referred to the statement of principle by a plurality of the High Court in *MZAPC* at [38]. In that passage, the plurality described the findings of an administrative decision-maker whose decision is found to be affected by error as “historical facts”, and described the task of a supervising court in the following terms:

whether the decision that was in fact made could have been different had the condition been complied with falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined on the balance of probabilities.

1. The emphasis in that passage may be different to the emphasis in the Full Court’s passage. The primary judge noted at [53] that there are differently expressed views on the tests for materiality.
2. There could be nothing erroneous in his Honour applying the passage from *MZAPC*, and the consequent focus on the actual reasoning of the Minister as “historical facts”. It is true that his Honour’s description at [55] of the “other evidence and findings” of the Minister as “so strong” as to negate a realistic possibility of a different result is an evaluative statement. It is true this approach involves the supervising Court weighing the totality of the “historical facts” as represented by the reasons of the repository and making a judgment about the possibility of a different result if the error had not been made. That is what the plurality reasons in *MZAPC* indicate is required. This being a matter of “reasonable conjecture”, as the plurality put it in *MZAPC*, reasonable judicial minds might differ. But any difference will not necessarily reveal error.

# Conclusion

1. The appellants’ appeals must be dismissed. There is no basis for anything but the usual order as to costs, save that there should be only one set of costs, as the appeals have been prepared and dealt with together. In accordance with the Court’s preferred practice, costs should be fixed by way of a single lump sum. In default of agreement, the fixing of a single lump sum will be referred to a Registrar for determination.

|  |
| --- |
| I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Rares, Mortimer and O'Sullivan. |

Associate:

Dated: 15 July 2022