Federal Court of Australia

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CBW20 [2021] FCAFC 63

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **PERRAM, MOSHINSKY AND THAWLEY JJ** |
|  |  |
| Date of judgment: | 4 May 2021 |
|  |  |
| Catchwords: | **MIGRATION** – protection visa – where the first respondent entered Australia by boat and was taken to what was then thought to be a “proclaimed port” – where the first respondent’s case was dealt with for several years on the assumption he was an “unauthorised maritime arrival” – where that assumption was incorrect – where, purportedly pursuant to s 195A of the *Migration Act 1958* (Cth), the Minister granted the first respondent a temporary safe haven visa (for one week) and a bridging visa (for 12 months) – whether the grant of the temporary safe haven visa was valid – whether the first respondent’s application for a safe haven enterprise visa was valid – whether the Tribunal fell into jurisdictional error |
|  |  |
| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth)*Migration Act 1958* (Cth), ss 5, 5AA, 36, 37A, 46, 46A, 65, 91J, 91K, 91L, 189, 195A, 412, 415*Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth)  |
|  |  |
| Cases cited: | *Arnold v Minister Administering the Water Management Act 2000* [2014] NSWCA 386*Barrett v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 129*Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651*Brock v Minister for Home Affairs* [2010] FCA 1301*DBB16 v Minister for Immigration and Border Protection* (2018) 260 FCR 447*Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1*Hala v Minister for Justice* [2014] FCA 457*Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123*Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365*Oates v Attorney-General* (2001) 181 ALR 559*O’Donoghue v O’Connor (No 2)* (2011) 283 ALR 682*Plaintiff M61/2010E v Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319*Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336*Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219*Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57*Vasiljkovic v O’Connor* (2010) 276 ALR 326*Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22*Zentai v O’Connor (No 3)* (2010) 187 FCR 495 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 64 |
|  |  |
| Date of hearing: | 8 February 2021  |
|  |  |
| Counsel for the Applicant: | Mr S Lloyd SC with Mr BD Kaplan |
|  |  |
| Solicitor for the Applicant: | Australian Government Solicitor |
|  |  |
| Counsel for the First Respondent: | Mr J King |
|  |  |
| Solicitor for the First Respondent: | Legal Aid NSW |
|  |  |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |
|  |  |
| Counsel for the Intervener: | Mr C Lenehan SC with Ms K Pham |
|  |  |
| Solicitor for the Intervener: | Australian Human Rights Commission |

ORDERS

|  |  |
| --- | --- |
|  | NSD 1004 of 2020 |
|   |
| BETWEEN: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSApplicant |
| AND: | CBW20First RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |
|  | AUSTRALIAN HUMAN RIGHTS COMMISSIONIntervener |

|  |  |
| --- | --- |
| order made by: | PERRAM, MOSHINSKY AND THAWLEY JJ |
| DATE OF ORDER: | 4 MAY 2021 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. Subject to paragraph 3:
	1. the applicant pay the first respondent’s costs of the proceeding, to be fixed by way of a lump sum; and
	2. there be no order as to costs in relation to the costs of the intervener.
3. If any party or the intervener wishes to seek a different costs order, they may file and serve a written submission (of no more than two pages) within seven days. In that event, a responding submission (of no more than two pages) may be filed within a further seven days, and the issue of costs will be determined on the papers.

THE COURT DIRECTS THAT:

1. Subject to paragraph 3 above, within 14 days, the parties file any agreed proposed minutes of orders fixing a lump sum in relation to the first respondent’s costs.
2. In the absence of any agreement:
	1. within 21 days, the first respondent file and serve an affidavit constituting a Costs Summary in accordance with paragraphs 4.10 to 4.12 of the Court’s *Costs Practice Note* (*GPN-COSTS*);
	2. within a further 14 days, the applicant file and serve any Costs Response in accordance with paragraphs 4.13 to 4.14 of the *Costs Practice Note* (*GPN-COSTS*); and
	3. in the absence of any agreement having been reached within a further 14 days, the matter of an appropriate lump sum figure for the first respondent’s costs be referred to a Registrar for determination.

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. In this proceeding, which is in the Court’s original jurisdiction, the applicant, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the **Minister**) seeks judicial review of a decision of the Administrative Appeals Tribunal (the **Tribunal**) made on 8 April 2020. The proceeding was commenced in the Federal Circuit Court of Australia and transferred to this Court. The original jurisdiction of this Court is being exercised by a Full Court pursuant to a direction made by the Chief Justice.
2. In brief outline, the background to the proceeding is as follows. In April 2013, the first respondent (**CBW20**), a citizen of Vietnam, entered Australia by boat. He was taken to what was then thought to be a “proclaimed port” (as defined in the *Migration Act 1958* (Cth)) in the Territory of Ashmore and Cartier Islands.
3. For several years, CBW20’s case was dealt with on the assumption he was an “unauthorised maritime arrival” as defined in the *Migration Act*. However, that assumption was incorrect. On 6 August 2018, the Full Court of this Court gave judgment in *DBB16 v Minister for Immigration and Border Protection* (2018) 260 FCR 447 (***DBB16***). The Court held that the respondent Minister had no power to appoint the Western Lagoon at Ashmore Reef to be a “proclaimed port” for the purposes of s 5(5) of the *Migration Act*, and that a 2002 declaration purporting to do so was invalid. It is common ground in the present proceeding that, in light of the judgment of the Full Court in *DBB16*, CBW20 is not, and never has been, an unauthorised maritime arrival.
4. On 14 October 2014, the then Minister for Immigration and Border Protection (who it will be convenient also to refer to as the **Minister**) purported to exercise the power in s 195A of the *Migration Act* to grant a cohort of persons in immigration detention (including CBW20):
5. a Subclass 449 Humanitarian Stay (Temporary) visa (**Temporary Safe Haven visa**), which is a visa in the temporary safe haven visa class, for one week; and
6. a bridging visa, for 12 months.

At this time, it was thought that all those in the cohort were unauthorised maritime arrivals.

1. On 18 September 2017, CBW20 applied for a Safe Haven Enterprise visa (**SHEV**), which is a form of protection visa.
2. On 18 July 2018, a delegate of the Minister refused the application for a SHEV.
3. CBW20 applied to the Tribunal for review of the delegate’s decision under Pt 7 of the *Migration Act*.
4. One of the issues before the Tribunal concerned the validity of CBW20’s application for a SHEV. This turned on whether the earlier grant of the Temporary Safe Haven visa was valid. If the grant of the Temporary Safe Haven visa was *valid*, the effect of s 91K of the *Migration Act* was that CBW20 was barred from applying for any visa other than another Temporary Safe Haven visa and therefore was not entitled to apply for a SHEV. Conversely, if the grant of the Temporary Safe Haven visa was *invalid*, CBW20 was entitled to apply for a SHEV.
5. The Tribunal decided that the grant of the Temporary Safe Haven visa was *invalid* and, consequently, CBW20’s application for a SHEV was *valid.* The Tribunal also decided that CBW20 is a person in respect of whom Australia has protection obligations under s 36(2)(a) of the *Migration Act.* The Tribunal remitted the application for a SHEV to the Minister with a direction that CBW20 satisfied the criterion for the grant of a SHEV in s 36(2)(a).
6. In the present proceeding, the Minister contends that the Tribunal fell into jurisdictional error by failing to conclude that CBW20’s application for a SHEV was invalid.
7. For the reasons that follow, in our view the Tribunal was correct to conclude that the grant of the Temporary Safe Haven visa was *invalid* and, consequently, CBW20’s application for a SHEV was *valid.* It follows that the application is to be dismissed.

## Background

1. On 14 April 2013, CBW20 entered Australia by boat. He was taken to what was thought to be a “proclaimed port” in the Territory of Ashmore and Cartier Islands. At that time, CBW20 was thought to be an “offshore entry person” (as defined in s 5(1) of the *Migration Act*). The expression “offshore entry person” was then defined as follows:

***offshore entry person*** means a person who:

(a) has, at any time, entered Australia at an excised offshore place after the excision time for that offshore place; and

(b) became an unlawful non-citizen because of that entry.

1. With effect from 1 June 2013, the expression “offshore entry person” was replaced with the expression “unauthorised maritime arrival” by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth). The latter expression was relevantly defined in the *Migration Act* as follows:

**5AA Meaning of *unauthorised maritime arrival***

(1) For the purposes of this Act, a person is an ***unauthorised maritime arrival***if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

*Entered Australia by sea*

(2) A person ***entered Australia by sea*** if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F and being dealt with under paragraph 245F(9)(a); or

(c) the person entered the migration zone after being rescued at sea.

1. For several years following the introduction of that definition, CBW20 was thought to be an “unauthorised maritime arrival”.
2. On 10 October 2014, the Department of Immigration and Border Protection prepared a submission to the Minister (the **October 2014 Submission**) recommending that he exercise the power in s 195A of the *Migration Act* in relation to a cohort of persons in immigration detention (including CBW20), by granting them a Temporary Safe Haven visa (for one week) and a bridging visa (for 12 months). Before describing the submission in detail, we set out the key relevant provisions.
3. Section 37A of the *Migration Act* dealt with temporary safe haven visas. It provided in part as follows:

**37A Temporary safe haven visas**

(1) There is a class of temporary visas to travel to, enter and remain in Australia, to be known as temporary safe haven visas.

Note: A temporary safe haven visa is granted to a person to give the person temporary safe haven in Australia.

(2) The Minister may, by notice in the *Gazette*, extend the visa period of a temporary safe haven visa so that the visa ceases to be in effect on the day specified in the notice.

(3) The Minister may, by notice in the *Gazette*, shorten the visa period of a temporary safe haven visa so that the visa ceases to be in effect on the day specified in the notice if, in the Minister’s opinion, temporary safe haven in Australia is no longer necessary for the holder of the visa because of changes of a fundamental, durable and stable nature in the country concerned.

…

(5) If a notice under subsection (2) or (3) is published in the *Gazette* and has not been revoked, then the visa ceases to be in effect on the day specified in the notice, despite any other provision of this Act.

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

(7) In this section:

***country concerned*** means the country or countries in which the circumstances exist that give rise to the grant of temporary safe haven visas.

1. The background to the introduction of temporary safe haven visas was described in *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 (***Plaintiff M79/2012***) at [26]-[29] per French CJ, Crennan and Bell JJ. Some of the consequences of the grant of a temporary safe haven visa are dealt with in Subdiv AJ of Div 3 of Pt 2 of the *Migration Act*, which provided as follows:

**Subdivision AJ**—**Temporary safe haven visas**

**91H Reason for this Subdivision**

This Subdivision is enacted because the Parliament considers that a non-citizen who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than another temporary safe haven visa. Any such non-citizen who ceases to hold a visa will be subject to removal under Division 8.

Note: For temporary safe haven visas, see section 37A.

**91J Non-citizens to whom this Subdivision applies**

This Subdivision applies to a non-citizen in Australia at a particular time if, at that time, the non-citizen:

(a) holds a temporary safe haven visa; or

(b) has not left Australia since ceasing to hold a temporary safe haven visa.

**91K Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas**

Despite any other provision of this Act but subject to section 91L, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a visa (other than a temporary safe haven visa), then that application is not a valid application.

**91L Minister may determine that section 91K does not apply to a non-citizen**

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91K does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) The power under subsection (1) may only be exercised by the Minister personally.

…

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

1. Section 195A relevantly provided as follows:

**195A Minister may grant detainee visa (whether or not on application)**

*Persons to whom section applies*

(1) This section applies to a person who is in detention under section 189.

*Minister may grant visa*

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

*Minister not under duty to consider whether to exercise power*

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

*Minister to exercise power personally*

(5) The power under subsection (2) may only be exercised by the Minister personally.

1. The October 2014 Submission uses the expression “Illegal Maritime Arrivals” or “IMAs”. It is common ground in the present proceeding that those expressions are to be treated as synonymous with the expression “unauthorised maritime arrivals”, being the expression used in the *Migration Act*. The October 2014 Submission included the following:

**Key Issues**

1. **This submission is intended to give effect to the management of Illegal Maritime Arrivals (IMAs) in the legacy caseload who arrived after 13 August 2012 and who are barred from lodging Protection Visa applications.**

2. The submission asks that you consider Ministerial Intervention under section 195A of the *Migration Act 1958* to grant a Subclass 449 Humanitarian Stay (Temporary) visa (THSV) and Subclass 050 Bridging (General) visa (BVE) to a number of Illegal Maritime Arrivals (IMAs) included on this submission.

3. All IMAs at Attachment A have not had any recorded incidents of concern whilst in detention and are not persons of interest to police authorities.

4. The IMAs (listed at Attachment A) will be barred from lodging further onshore visa applications. The THSV and BVE will be granted simultaneously with the THSV ceasing one week after grant, at which time the BVE will come into effect. The BVE will be granted with a validity period of 12 months, and allow the IMA to access Medicare and financial support through the Asylum Seekers Assistance Scheme or Community Assistance Scheme (according to their individual needs assessments).

5. The IMAs referred to at Attachment A in Table 1 will have their THSV and BVE come into effect on Wednesday 15 October 2014, those referred to in Table 2 will have their THSV and BVE come into effect on Thursday 16 October 2014.

6. This submission includes adults, and family groups, who have been placed in a range of immigration detention locations. Attachment C provides a summary of nationalities, locations and the ages of minor children.

7. The department proposes that a discretionary condition be applied to the BVE requiring the IMA to notify the department two working days in advance of a change of address (condition 8506 *Migration Regulations 1994*). It is also proposed that a discretionary reporting condition be applied to ensure IMAs remain in contact with the department (condition 8401 *Migration Regulations 1994*).

8. In line with Regulation changes that came into effect on 29 June 2013, the department also proposes that a condition be applied requiring these IMAs do not engage in criminal conduct (condition 8564 *Migration Regulations 1994*).

9. The IMAs included in this submission arrived after 13 August 2012, and the department proposes that the ‘No Work’ condition (condition 8101 *Migration Regulations 1994*) is applied.

10. The IMAs aged 18 years or older included in this submission have agreed to abide by the Code of Behaviour while living in Australia on a BVE. The department proposes that a condition be applied requiring that these IMAs abide by the Code of Behaviour (condition 8566 *Migration Regulations 1994*).

11. IMAs included on this submission have engaged in Australia’s protection obligations (screened in) and have not had their claims for refugee status assessed.

**Background**

12. Records held in departmental systems do not indicate any known public health, character or identity [redacted in Court Book].

13. Attachment C provides a summary of nationalities, detention locations and ages of minor children.

Your power under section 195A of the *Migration Act 1958* - visa grant, release and notification

14. **As IMAs, they cannot make a valid application for a visa that can be granted to them while they are in detention.** Section 195A provides you the power to grant a visa to an IMA who is in immigration detention if you think it is in the public interest to do so.

15. Should you decide to use your s195A power and grant visas to these IMAs listed at Attachment A, the department has made arrangements to transition them out of detention. These IMAs will be provided with written notification of visa grant and the conditions attached including length of stay, reporting requirements, and behavioural expectations.

16. Any subsequent BVE grants, should they be required, will have to be granted through further use of your intervention powers due to the immigration status of these IMAs.

Code of Behaviour

17. As outlined by the Code of Behaviour, an IMA must agree to abide by the Code of Behaviour in order for a BVE to be granted using your s195A intervention power. All IMAs aged 18 years or older listed at Attachment A have agreed to abide by the code.

(Emphasis added.)

1. The Minister circled the word “agreed” alongside the following recommendation on the first page of the October 2014 Submission:

Indicate whether you are inclined to intervene under section 195A of the *Migration Act 1958* to grant a Subclass 449 Humanitarian Stay (Temporary) visa and Subclass 050 Bridging (General) visa to the Illegal Maritime Arrivals included on Attachment A:

* And impose conditions 8101, 8401, 8506, 8564 and 8566 as specified in Schedule 8 of the *Migration Regulations 1994*.
1. The Minister also signed the document. Thus, the Minister purported to exercise the power in s 195A to grant CBW20 a Temporary Safe Haven visa (for one week) and a bridging visa (for 12 months).
2. On 1 December 2015, the Minister purported to exercise his power under s 46A(2) of the *Migration Act* in respect of a group of persons (including CBW20) to determine that the bar in s 46A(1) to the making of a valid application for a visa did not apply to them if they applied for, relevantly, a SHEV. At this time, it was believed that CBW20 was an unauthorised maritime arrival. Section 46A relevantly provided:

**46A Visa applications by unauthorised maritime arrivals**

(1) An application for a visa is not a valid application if it is made by an unauthorised maritime arrival who:

(a) is in Australia; and

(b) either:

(i) is an unlawful non-citizen; or

(ii) holds a bridging visa or a temporary protection visa, or a temporary visa of a kind (however described) prescribed for the purposes of this subparagraph.

Note: Temporary protection visas are provided for by subsection 35A(3).

…

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that subsection (1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

…

(3) The power under subsection (2) or (2C) may only be exercised by the Minister personally.

…

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) or (2C) in respect of any unauthorised maritime arrival whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

1. On 18 September 2017, CBW20 applied for a SHEV.
2. On 18 July 2018, a delegate of the Minister made a decision, pursuant to s 65(1)(b) of the *Migration Act*, to refuse to grant a SHEV to CBW20. Because it was thought that CBW20 was an unauthorised maritime arrival, he was informed that the delegate’s decision would be referred by the Minister to the Immigration Assessment Authority for review under Pt 7AA of the *Migration Act*.
3. On 6 August 2018, the Full Court gave judgment in *DBB16*, relevantly declaring that the purported appointment of an area of waters within the Territory of Ashmore and Cartier Islands as a “proclaimed port”, by notice published in the *Gazette* on 23 January 2002, was invalid. It is common ground that, in light of the judgment in *DBB16*, CBW20 is not, and has never been, an unauthorised maritime arrival.
4. Following the judgment in *DBB16*, on 25 March 2019 the Department re-notified CBW20 of the delegate’s decision to refuse the application for a SHEV. CBW20 then applied to the Tribunal for review of the delegate’s decision.

## The Tribunal decision

1. On 8 April 2020, the Tribunal decided to remit the matter for reconsideration with the direction that CBW20 satisfies s 36(2)(a) of the *Migration Act*. The Tribunal provided a statement of decision and reasons (the **Tribunal’s reasons**).
2. The Tribunal set out the background to the application for review at [10]-[27] of its reasons. The Tribunal dealt with the issue of the validity of CBW20’s application for a SHEV at [28]-[77], concluding that the application for the SHEV was valid. Having so concluded, the Tribunal then went on to conduct a merits review of CBW20’s application (at [78]-[144]). For present purposes it is sufficient to focus on [10]-[77] of the Tribunal’s reasons.
3. The Tribunal set out the background to the application for review, referring at [24] to the judgment of the Full Court in *DBB16*. The Tribunal noted that, in light of that decision, CBW20 was not an “unauthorised maritime arrival” within the meaning of the *Migration Act*.
4. The Tribunal referred at [28] to s 91K, which prevented non-citizens who hold a Temporary Safe Haven visa, or have not left Australia since ceasing to hold a Temporary Safe Haven visa, from making a valid application for a visa (other than another Temporary Safe Haven visa). The Tribunal noted at [29] that CBW20 had been granted a Temporary Safe Haven visa for one week in 2014. Later in its reasons, at [39], the Tribunal stated that CBW20 had not departed Australia since the expiration of the Temporary Safe Haven visa. These matters gave rise to an issue as to the validity of CBW20’s application for a SHEV.
5. The Tribunal noted at [30] that it had sought submissions from CBW20 in relation to that issue. At [31(b)], the Tribunal recorded CBW20’s submission that he had never held a *valid* Temporary Safe Haven visa because at the time the Minister exercised his power under s 195A (to grant the Temporary Safe Haven visa) he was under a mistaken belief that CBW20 was an unauthorised maritime arrival.
6. The Tribunal noted at [32] that it had sought submissions from the Secretary of the Department on the application of s 91K in this matter, the validity of the grant of the Temporary Safe Haven visa, and certain other issues (as set out in the Tribunal’s reasons). The Secretary of the Department’s submission in response to that invitation is set out in [35] of the Tribunal’s reasons. The Secretary submitted, among other things, that, although the submission which resulted in the grant of the Temporary Safe Haven visa to CBW20 was based on the mistaken belief that CBW20 was an unauthorised maritime arrival, the validity of that visa grant was unaffected by CBW20 not in fact being an unauthorised maritime arrival. The Secretary submitted that: there is nothing in s 37A of the *Migration Act* which limits the grant of a Temporary Safe Haven visa to a person who is an unauthorised maritime arrival; nor is there anything in the criteria for the grant of a Temporary Safe Haven visa (as set out in the regulations) that requires a person to be an unauthorised maritime arrival to be eligible for the grant of the visa. The Secretary accepted that it was open to the Tribunal to consider whether the grant of the Temporary Safe Haven visa to CBW20 was valid for the limited purpose of assessing the validity of his application for a SHEV. (The Minister adopts the same position in the present proceeding; that is, the Minister accepts that it was open to the Tribunal to determine whether the grant of the Temporary Safe Haven visa was valid so as to determine the validity of the application for a SHEV.)
7. The Tribunal’s consideration of the issue of the validity of CBW20’s application for a SHEV is arranged under three headings, namely the “First Reasoning”, the “Second Reasoning” and the “Third Reasoning”.
8. Under the heading “First Reasoning”, the Tribunal focussed on the Minister’s purported exercise of power under s 46A(2) referred to in [22] above. The Tribunal stated that CBW20 lodged his SHEV application as a result of the Minister exercising his power under s 46A(2) to allow CBW20 to do so. The Tribunal stated that the delegate who made the primary decision that was the subject of the review did not have the power or discretion to invalidate the Minister’s determination under s 46A(2). The Tribunal reasoned at [46] that, given the delegate did not have the power to invalidate the Minister’s exercise of his power under s 46A(2), the Tribunal similarly did not have such power. Accordingly, in the Tribunal’s view, the application for a SHEV was valid.
9. Under the heading “Second Reasoning”, the Tribunal provided alternative reasons for concluding that the SHEV application was valid. The Tribunal stated at [56] that the purpose for issuing the Temporary Safe Haven visa appeared to have been to limit CBW20’s rights to apply for a further visa. The Tribunal referred to the breadth of the Minister’s power under s 195A and set out passages from *Plaintiff M79/2012* and *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 (***Plaintiff S4/2014***). The Tribunal found at [62] that, in the present case, “a critical matter underlying the Minister’s determination that it was in the public interest to exercise the power under s.195A, was that the applicant was [an unauthorised maritime arrival]”. The Tribunal noted that this had proven to be wrong in fact. The Tribunal considered that the exercise of the power “based upon a clear underlying mistake of fact” was contrary to the objects of the provision and invalid (at [62]).
10. The Tribunal stated that, alternatively, the grant of the Temporary Safe Haven visa was invalid in light of *Plaintiff S4/2014*. The Tribunal reasoned at [71]-[72]:

71. Applying the High Court’s judgment in *Plaintiff S4/2014*, s.195A did not empower the Minister to grant a visa which precluded [CBW20] making a valid application for a protection visa, *before* the Minister had decided under s.46A whether to permit him to make a valid application for a protection visa, and the grant of the [Temporary Safe Haven] visa was invalid.

72. As the grant of the [Temporary Safe Haven] visa was invalid s.91K does not apply to [CBW20] and he was not barred from making an application for the SHEV. His SHEV application is therefore valid.

1. Under the heading “Third Reasoning”, the Tribunal noted that there were indications that the Department had considered remedying the unintended consequences of the grant of the Temporary Safe Haven visa to CBW20, including a note in the Department’s electronic records that the Minister notified CBW20 of a “bar lift” under s 91L of the *Migration Act* on 25 March 2020. This resulted in CBW20 being able to lodge another SHEV application in the timeframe permitted by the Minister. In the circumstances, the Tribunal considered that the objects set out in the *Administrative Appeals Tribunal Act 1975* (Cth) were best met by conducting merits review of the application before it, thereby avoiding unnecessary duplication, delays and costs.
2. Accordingly, the Tribunal concluded that it was appropriate to conduct merits review of CBW20’s application.

## The application

1. The present proceeding was commenced by the Minister filing an application in the Federal Circuit Court. The proceeding was subsequently transferred to this Court. As set out in the application, the Minister seeks the following substantive relief:
2. a writ of certiorari directed to the Tribunal quashing its decision dated 8 April 2020; and
3. a writ of mandamus directed to the Tribunal requiring it to determine CBW20’s application for review according to law.
4. The Minister relies on the following grounds:

1. The Administrative Appeals Tribunal (**Tribunal**) exceeded its powers under Part 7 of the *Migration Act 1958* (Cth) (**Act**), and, accordingly, made a jurisdictional error, in concluding that [CBW20’s] application for a protection visa was valid. In particular, the Tribunal fell into jurisdictional error by making the following findings:

(a) the protection visa application remained valid unless and until the determination purportedly made by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**Minister**) under section 46A(2) of the Act to permit [CBW20] to make an application for a protection visa is revoked by the Minister or set aside by a court exercising the judicial power of the Commonwealth;

(b) the exercise by the Minister of his power, under section 195A of the Act, to grant a temporary safe haven visa to [CBW20] was invalid because it was based on an incorrect factual premise (that [CBW20] was an “unauthorised maritime arrival” as defined in section 5AA of the Act) and/or by reason of the judgment of the High Court of Australia in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, when that judgment did not apply to the present case; and

(c) the objective of the Tribunal in section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) was best met by conducting a merits review of the decision of a delegate of the Minister to refuse to grant to [CBW20] a protection visa.

2. The Tribunal should have found that [CBW20’s] application for a protection visa was invalid by reason of sections 46(1)(e)(v) and 91K of the Act because, at the time he purported to make that application, he was a person to whom Subdivision AJ of Division 3 of Part 2 of the Act applied, in that, at that time, he had not left Australia since ceasing to hold a temporary safe haven visa.

1. We were informed at the hearing that CBW20 has now been granted a SHEV. However, it is common ground that the issue raised by the present proceeding is not moot because the issue will affect subsequent applications for visas by CBW20.
2. The Australian Human Rights Commission (the **Commission**) applied for, and was granted, leave to intervene as an amicus curiae. The Commission contends, in summary, that the grant of the Temporary Safe Haven visa was invalid on the basis that the power in s 195A cannot be used to grant a visa, where the consequence of the grant of the visa is to preclude the person from being able to make a valid application for a protection visa, where no such bar previously applied.

## Consideration

1. The issue raised by the application is whether (as the Minister contends) the Tribunal fell into jurisdictional error by failing to conclude that CBW20’s application for a SHEV was invalid. As explained in the Introduction to these reasons, this turns on the validity of the earlier grant of the Temporary Safe Haven visa to CBW20.
2. The following matters are common ground between the parties:
3. CBW20 is not, and never has been, an unauthorised maritime arrival. It follows that, at least prior to the grant of the Temporary Safe Haven visa, CBW20 was not barred from applying for a protection visa (such as a SHEV).
4. When purporting to grant the Temporary Safe Haven visa to CBW20, the Minister proceeded on the basis that CBW20 *was* an unauthorised maritime arrival (which he was not).
5. It was open to the Tribunal to determine whether the grant of the Temporary Safe Haven visa was valid, so as to determine the validity of the application for a SHEV.
6. If the grant of the Temporary Safe Haven visa was *invalid*, then s 91K was not engaged and CBW20’s application for a SHEV was *valid*.
7. Although the Tribunal structured the relevant part of its reasons under three sub-headings – the First Reasoning, the Second Reasoning and the Third Reasoning – in CBW20’s outline of submissions in this proceeding it was submitted that the third section did not in fact provide a separate reason. In oral submissions, senior counsel for the Minister accepted that analysis. Accordingly, the “Third Reasoning” can be put to one side for present purposes.
8. Given that the Tribunal’s “First Reasoning” and “Second Reasoning” provide alternative bases for the Tribunal’s conclusion, senior counsel for the Minister accepted in oral submissions that the Minister needed to show error in *both* parts of the Tribunal’s reasoning in order to succeed in the application.
9. The Minister’s submissions in relation to the Tribunal’s “First Reasoning” can be summarised as follows:
10. The Tribunal appears to have reasoned that, because it did not have the power to invalidate the Minister’s purported determination under s 46A(2), it could not determine whether the SHEV application, which was made consequent upon the Minister’s purported exercise of that power, was invalid. Yet the Tribunal also appears to have reasoned that the SHEV application was made valid by the Minister’s purported determination.
11. However, the determination of the validity of the Minister’s purported determination under s 46A(2) was not a condition on the Tribunal’s power to determine the validity of the SHEV application. And even if it were, the Tribunal could have formed a view about the validity of the purported exercise of power under s 46A(2) to form a view as to whether the SHEV application was valid. The latter question required the Tribunal to consider whether or not the bar in s 91K was engaged. That question, in turn, required the Tribunal to ask itself whether CBW20 had not left Australia since ceasing to hold a Temporary Safe Haven visa (s 91J). Despite being under a duty to determine the validity of the visa application, the Tribunal did not turn its mind to these questions.
12. It also appears that the Tribunal elided the distinction between the validity of the visa application, on the one hand, and the validity of the review application made under s 412 of the *Migration Act*, on the other: see the Tribunal’s reasons at [43], [46].
13. If, as the Minister submits, the bar in s 91K was engaged, CBW20’s SHEV application was invalid by force of s 46(1)(e)(v). Insofar as the Tribunal found otherwise, purported to review the merits of the SHEV application, and remitted the matter to the Minister with a direction that the criterion in s 36(2)(a) had been met, the Tribunal purported to exercise powers that it did not have under s 415.
14. The Minister’s submissions in relation to the Tribunal’s “Second Reasoning” can be summarised as follows:
15. The Tribunal appears to have considered that the grant of the Temporary Safe Haven visa in October 2014 was invalid for two reasons.
16. First, the grant of the Temporary Safe Haven visa “was purportedly done to prevent [CBW20] from applying for a protection visa in Australia”: Tribunal’s reasons, [51]. However, there was nothing in the evidence before the Tribunal, particularly the October 2014 Submission, to support that finding. The evidence was silent as to whether, in granting the Temporary Safe Haven visa to CBW20, the Minister was motivated by the fact that that grant would, at a time when he genuinely believed that CBW20 was an unauthorised maritime arrival, engage the bar in s 91K. In any event, even if one of the purposes of the grant of the Temporary Safe Haven visa was to engage the bar in s 91K, that is not an improper purpose or one which is beyond the power conferred by s 195A: *Plaintiff M79/2012* at [41]-[42], [107], [127]-[135].
17. Secondly, the Tribunal appears to have reasoned that the grant of the Temporary Safe Haven visa was unlawful because the Minister acted on an incorrect factual basis, namely, that CBW20 was an unauthorised maritime arrival because he entered Australia by sea at an excised offshore place: Tribunal’s reasons, [62]. The statement in the October 2014 Submission that CBW20 (amongst others) was an “illegal [sic] maritime arrival” and, therefore, was prevented from making a valid protection visa application, was factually incorrect in the light of *DBB16*. However, that incorrect statement was not, itself, sufficient to vitiate the grant of the Temporary Safe Haven visa to CBW20. A decision made by an administrative decision-maker such as a minister of state is not vitiated by the mere fact that it was made consequent upon the receipt of advice from his or her department that was factually incorrect: see *Arnold v Minister Administering the Water Management Act 2000* [2014] NSWCA 386 (***Arnold***) at [130]; *Oates v Attorney-General* (2001) 181 ALR 559 at [133]; *Zentai v O’Connor (No 3)* (2010) 187 FCR 495 (***Zentai***) at [88], [357]; *Vasiljkovic v O’Connor* (2010) 276 ALR 326 at [95], [110]; *Brock v Minister for Home Affairs* [2010] FCA 1301 at [71]; *O’Donoghue v O’Connor (No 2)* (2011) 283 ALR 682 at [32(b)]; *Hala v Minister for Justice* [2014] FCA 457 at [23]. To vitiate the decision, the incorrect information “must have been supplied … in effect, in bad faith” (*Zentai* at [362]) or “the matter the subject of the advice is a matter which the statute mandates must be taken into account by the relevant decision maker” (*Arnold* at [134]). There was no evidence before the Tribunal to support the former proposition. Nor does the latter apply, as it was not an express or implied condition on the valid grant of a Temporary Safe Haven visa that the grantee be an unauthorised maritime arrival.
18. Further, the present case did not involve the provision to the Minister of a departmental submission that was “seriously misleading as to the facts”: see *Barrett v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 129 (***Barrett***) at 133; see also *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365 at [86], [122].
19. Insofar as the Tribunal relied on *Plaintiff S4/2014*, the present case is distinguishable. There was nothing in the evidence before the Tribunal to suggest that the Minister had decided *to consider* whether to exercise the power in s 46A(2) prior to his decision to grant a Temporary Safe Haven visa to CBW20 under s 195A(2). The Tribunal’s assumption to the contrary (at [71]) was wrong.
20. However, even if the Tribunal’s assumption at [71] were not wrong, it does not matter, for the power in s 46A(2) was never enlivened in the first place: CBW20 was not an unauthorised maritime arrival. It is a condition on the valid exercise of the power in s 46A(2) that the non-citizen in respect of whom the Minister has decided to consider whether to exercise that power be an unauthorised maritime arrival. Here, CBW20 was not, at any time prior to the grant of the Temporary Safe Haven visa, an unauthorised maritime arrival. Consequently, the Minister could not validly have decided to consider exercising the power in s 46A(2), or to exercise that power. Unlike *Plaintiff S4/2014*, it cannot be said that the exercise of power under s 195A(2) was required to be read as not permitting the making of a decision that would foreclose the exercise of power under s 46A(2), for the latter never had any operation.
21. In our view, for the reasons that follow, the Tribunal’s conclusion in the section headed “Second Reasoning” – namely that the grant of the Temporary Safe Haven visa was invalid – was correct.
22. Section 195A (set out at [18] above) applies to a person who is in detention under s 189: s 195A(1). By s 195A(2), the Minister has the power to grant to a person to whom the section applies a visa of a particular class “[i]f the Minister thinks that it is in the public interest to do so”. It has been held that s 195A “stands apart from the regime of tightly controlled official powers, duties and discretions relating to applications for and grants of visas”: *Plaintiff M79/2012* at [33] per French CJ, Crennan and Bell JJ. The only condition expressly stated for the exercise of the power is that the Minister considers that it is in the public interest to do so: *Plaintiff S4/2014* at [36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
23. In the present case, the Minister’s view that it was in the public interest to grant CBW20 a Temporary Safe Haven visa proceeded on the assumption that CBW20 was an unauthorised maritime arrival. While it is common ground that the assumption was erroneous, there is a dispute between the parties as to whether the error was factual or legal. In our view, the error is appropriately described as *legal* because the assumption was predicated on a view that the Western Lagoon at Ashmore Reef had been validly appointed a “proclaimed port” under s 5(5).
24. Further, in deciding to grant a Temporary Safe Haven visa to CBW20, the Minister may be taken to have proceeded on the (incorrect) basis that CBW20 was already subject to a bar on making an application for a visa, namely the bar in s 46A(1), and that the effect of a decision to grant him a Temporary Safe Haven visa would merely be to substitute one bar (that in s 91K) for another. However, the true position was that CBW20 was not an unauthorised maritime arrival and therefore was not subject to the bar in s 46A(1). This, too, involved legal error.
25. It is established that where the exercise of a statutory power is conditioned on the formation of a state of mind, the decision-maker may fall into jurisdictional error where the state of mind is formed on the basis of an error of law. In the context of powers requiring the formation of a state of mind of *suspicion* or *satisfaction*, in *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 (***Graham***), Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ stated at [57]:

The suspicion of the Minister necessary to fulfil the first condition of s 501(3) and the satisfaction of the Minister necessary to fulfil the second condition of s 501(3) and the relevant condition of s 501C(4) **must each be formed by the Minister reasonably and on a correct understanding of the law**. The concept of the national interest, the Minister’s satisfaction as to which is the subject of the second condition of s 501(3), although broad and evaluative, is not unbounded. And the statutory discretion enlivened on fulfilment of those statutory conditions must in each case be exercised by the Minister “according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself” [fn: *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189, citing *Sharp v Wakefield* [1891] AC 173 at 179. See *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158].

(Emphasis added.)

1. In *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 (***Wei***), Gageler and Keane JJ stated at [33]:

The “satisfaction” required to found a valid exercise of the power to cancel a visa conferred by s 116(1)(b) of the *Migration Act* is a state of mind. **It is a state of mind which must be formed reasonably and on a correct understanding of the law** [fn: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[137], citing *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 and *Buck v Bavone* (1976) 135 CLR 110 at 118-119]. Equally, it is a state of mind which must be untainted by a material breach of any other express or implied condition of the valid exercise of that decision-making power. …

(Emphasis added.)

1. The power in s 195A is conditioned on the Minister *thinking* that it is in the public interest to grant the visa. That is a state of mind analogous to the states of mind referred to in *Graham* and *Wei*. Thus it is an implied condition that the state of mind be formed on the basis of a correct understanding of the law.
2. Further, in relation to s 195A itself, in *Plaintiff M61/2010E v Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319, the High Court (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) stated at [78]:

The Minister having decided to consider the exercise of power under either or both of ss 46A and 195A, the steps that are taken to inform that consideration are steps towards the exercise of those statutory powers. That the steps taken to inform the consideration of exercise of power may lead at some point to the result that further consideration of exercise of the power is stopped does not deny that the steps that were taken were taken towards the possible exercise of those powers. Nor does it deny that taking the steps that were taken directly affected the claimant’s liberty. There being no exclusion by plain words of necessary intendment, the statutory conferral of the powers given by ss 46A and 195A, including the power to decide to consider the exercise of power, is to be understood as “conditioned on the observance of the principles of natural justice”. Consideration of the exercise of the power must be procedurally fair to the persons in respect of whom that consideration is being given. **And likewise, the consideration must proceed by reference to correct legal principles, correctly applied.**

(Footnote omitted; emphasis added.)

1. In the present case, the Minister’s view that it was in the public interest to grant the Temporary Safe Haven visa proceeded on the basis of an incorrect understanding of the law (as described at [51]-[52] above). Those legal errors were fundamental to the Minister’s decision. The October 2014 Submission was specifically directed to persons who were believed to be unauthorised maritime arrivals (albeit referred to as Illegal Maritime Arrivals or IMAs). The submission recommended that the Minister exercise the power in s 195A to grant them Temporary Safe Haven visas (and bridging visas) in a context where, it was assumed, they were not entitled to make a valid application for a visa while in detention (see paragraph 14 of the submission). In that (assumed) context, the combined effect of the grant of the Temporary Safe Haven visa and the bridging visa would be that the persons covered by the submission could be released from detention and access Medicare and financial support, while maintaining the (assumed) position that they were subject to a bar on making a valid application for a visa. It is evident, and was conceded by the Minister (T15), that the Minister would not have granted the Temporary Safe Haven visa had he not thought that CBW20 was an unauthorised maritime arrival. The assumption that CBW20 was an unauthorised maritime arrival underpinned the formation of the view regarding the public interest.
2. Further, as noted above, the Minister may be taken to have assumed that CBW20 was already subject to a bar on making a valid application for a visa (namely, the bar in s 46A) and that the effect of a decision to grant a Temporary Safe Haven visa would be to substitute one bar (that in s 91K) for another. However, in truth CBW20 was not subject to any bar, and the effect of the decision was to subject CBW20 to a bar when none previously applied to him.
3. Given the seriousness of the errors of law, and their close connection to the decision to grant the Temporary Safe Haven visa, the errors were jurisdictional. This is not to say that any error of law in relation to an administrative decision will necessarily be jurisdictional: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [80]-[81] per Gaudron J; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [70] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ; see also *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [23] per Kiefel CJ, Gageler and Keane JJ. Whether or not that is the case will depend on matters including the construction of the relevant power and the circumstances of the exercise of the power. Here, the assumed status of CBW20 as an unauthorised maritime arrival, and the assumed consequences of that status, played an important role in the formation of the view that it was in the public interest to grant him a Temporary Safe Haven visa.
4. The present case is not aptly described as a case where the Minister received advice that was factually incorrect: cf the cases referred to in the Minister’s submissions summarised at [48(c)] above. This is a case where, in forming the view that it was in the public interest to grant the visa, the Minister proceeded on the basis that CBW20 was an unauthorised maritime arrival, which involved legal error for the reasons set out above.
5. Accordingly, the Tribunal was correct to conclude (in the section headed “Second Reasoning”) that the grant of the Temporary Safe Haven visa was invalid, and that CBW20’s application for a SHEV was valid. In light of this conclusion, it is unnecessary to consider the Tribunal’s “First Reasoning”.
6. The Minister has not established jurisdictional error by the Tribunal.
7. In light of this, it is unnecessary to consider the Commission’s contentions.

## Conclusion

1. It follows that the application is to be dismissed. In relation to costs, we propose to make the following orders (subject to giving the parties and the intervener a period of time to seek a different order): (a) the Minister pay CBW20’s costs of the proceeding, to be fixed by way of a lump sum; and (b) there be no order as to costs in relation to the costs of the intervener. We will also order that, if any party or the intervener wishes to seek a different costs order, they may file and serve a written submission (of no more than two pages) within seven days; in that event, a responding submission (of no more than two pages) may be filed within a further seven days, and the issue of costs will be determined on the papers.

|  |
| --- |
| I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Perram, Moshinsky and Thawley. |

Associate:

Dated: 4 May 2021