Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL [2021] FCAFC 48

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **MCKERRACHER, BURLEY AND O’CALLAGHAN JJ** |
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| Date of judgment: | 1 April 2021 |
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| Catchwords: | **MIGRATION** – refusal by delegate of protection visa on character grounds – where the Administrative Appeals Tribunal set aside the delegate’s decision and substituted its own decision granting the respondent a visa – where Tribunal’s decision was based on a statutory construction of the ***Migration Act*** *1958* (Cth) subsequently held to be erroneous – where the primary judge held that the Tribunal’s decision was affected by jurisdictional error but refused to grant relief to the Minister on discretionary grounds – whether the primary judge’s discretion miscarried – whether the Minister relevantly acted in “bad faith” by continuing to detain the respondent after the grant of a visa by the Tribunal – whether the Minister relevantly acted in “bad faith” by failing to adequately explain the continued detention of the respondent to the Court  **MIGRATION** – review by the Tribunal of a decision of a delegate of the Minister under s 501 of the *Migration Act* pursuant to s 500(1)(b) of the *Migration Act* – where s 501 of the *Migration Act* provides only for the refusal or cancellation of a visa on character grounds – whether the Tribunal on review is empowered to grant a visa pursuant to s 65 of the *Migration Act* – consideration of the content and scope of s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth)  **ADMINISTRATIVE LAW** – nature of administrative decisions – whether a decision-maker commits a jurisdictional error by correctly applying a statutory construction that is subsequently held to be erroneous – where the Tribunal acted on the agreement of the parties without giving any consideration to the exercise of the relevant discretion  **NATURAL JUSTICE** – procedural fairness – where findings of unlawful conduct and criminality are made against the Minister personally – whether the Minister was put on notice and afforded a reasonable opportunity to respond |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) ss 43, 43(1), 43(1)(c)(i), 43(1)(c)(ii), 43(5B)  *Federal Court of Australia Act 1976* (Cth) ss 27, 37M  *Judiciary Act 1903* (Cth) s 39B  *Migration Act 1958* (Cth) ss 5(1), 40, 47, 65, 65(1), 65(1)(b), 65A(3), 65B, 66, 189, 196, 196(1)(c), 496, 500(1)(b), 501, 501(1), 501(6), 501G, Pts 5, 7, 7AA, 9  *Migration Regulations 1994* (Cth) Sch 2, cl 790.227 |
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| Cases cited: | *AFX17 v Minister for Home Affairs (No 4)* [2020] FCA 926  *Australian Securities & Investments Commission v Donald* [2003] FCAFC 318; (2003) 136 FCR 7  *BAL19 v Minister for Home Affairs* [2019] FCA 2189; (2019) 168 ALD 276  *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295  *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; (2019) 266 CLR 250  *House v The King* [1936] HCA 40; (1936) 55 CLR 499  *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319  *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A*  [2020] FCAFC 121  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394  *Minister for Industrial Relations (Vic) v Esso Australia Pty Ltd* [2019] FCAFC 26;(2019) 268 FCR 520  *Moore v Minister for Immigration and Citizenship* [2007] FCAFC 134; (2007) 161 FCR 236  *Peacock v Repatriation Commission* [2007] FCAFC 156; (2007) 161 FCR 256  *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389  *R v Ross-Jones; Ex Parte Green* [1984] HCA 82;(1984) 156 CLR 185  *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82  *Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128;(2013) 139 ALD 1  *Shi v Migration Agents Registration Authority* [2008] HCA 31;(2008) 235 CLR 286  *Social Security, Secretary, Department of v Hodgson* (1992) 37 FCR 32  *SZQBN v Minister for Immigration and Citizenship* [2013] FCAFC 94; (2013) 213 FCR 297 |
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| Division: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 90 |
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| Date of hearing: | 11 February 2021 |
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| Counsel for the Appellant: | Mr G Kennett SC, with Mr B Kaplan |
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| Solicitor for the Appellant: | Sparke Helmore |
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| Counsel for the First Respondent: | Mr C Horan QC, with Ms LM Lo Piccolo |
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| Solicitor for the First Respondent: | Northam Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent submits to any order of the Court, save as to the question of costs |

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| **Table of Corrections:** |  |
| 16 April 2021 | References to Mr Dejean in paragraphs 5, 41 (including the heading above para 41) and 43 have been amended to Ms Dejean |

ORDERS

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|  | | NSD 1160 of 2020 |
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| BETWEEN: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  Appellant | |
| AND: | PDWL  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | MCKERRACHER, BURLEY AND O’CALLAGHAN JJ |
| DATE OF ORDER: | 1 april 2021 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Court made 23 September 2020 be set aside, and, in lieu thereof:
   1. certiorari issue to quash the decision of Administration Appeals Tribunal dated 11 March 2020;
   2. mandamus issue to the Administrative Appeals Tribunal (differently constituted) to hear and determine the first respondent’s application for review of a decision made by a delegate of the appellant under s 501(1) of the *Migration Act 1958* (Cth) according to law; and
   3. there be no order as to costs of the appeal.
3. Should any party wish to apply for costs at first instance, submissions in writing, not exceeding three pages, should be filed within 10 days. Unless otherwise ordered, that determination will be on the papers.

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

REASONS FOR JUDGMENT

THE COURT:

1. The appellant, the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs appeals from orders made by a judge of this Court dismissing the Minister’s application for judicial review of a decision by the second respondent, the Administrative Appeals **Tribunal**. The Tribunal granted **the** first **respondent**, a Safe Haven Enterprise (class XE) visa (**SHEV**). Although the primary judge concluded that the Tribunal’s decision was affected by jurisdictional error, (albeit that the decision was correct as the law was then known to be), his Honour in exercise of his discretion declined to grant the relief sought by the Minister. The primary judge raised very firm criticism of the conduct of the Minister as the basis for refusing the relief sought.
2. Some of the criticism directed by his Honour to the Minister, albeit in reality to the Minister’s Department, rather than the Minister personally, was warranted as we note at [35] below. However we have concluded, and with great respect to the primary judge, that the suggestion that the Minister may have acted criminally could only be understood as a personal criticism of the Minister raised without according procedural fairness to this particular Minister to respond to that criticism. Had the opportunity to consider such conclusions been given to the Minister, new evidence advanced on this appeal would have made it clear that this particular Minister had no relevant knowledge at all of the circumstances which gave rise to both the justified and unjustified criticism. It also appears likely that the learned primary judge confused the Minister with the **Minister for Home Affairs**.
3. As his Honour’s refusal to grant the relief sought was based upon the exercise of a discretion which included the unjustified criticism, the discretion, with respect, miscarried. A notice of contention relied on by the respondent that challenges the primary judge’s substantive findings as to the jurisdictional error committed by the Tribunal has been rejected. In exercising the discretion in place of the primary judge, we have resolved to remit the matter to the Tribunal for determination according to law. In reaching this conclusion, we have reconsidered whether the conduct of the Minister (acting through his Department) disentitles him to relief in the nature of *certiorari* and *mandamus* directed to the Tribunal. It will become apparent from the reasons that follow that we consider the conduct of the Minister (through the relevant Departmental personnel) to have been left wanting in serious respects during the continued detention of the respondent following the purported grant of a visa to him by the Tribunal. However, our conclusion is that such conduct did not reach the standard of “bad faith” such that relief should be denied on discretionary grounds, in particular with regard to the principle that *certiorari* should issue “almost as of right” so as to vindicate the public interest in executive power being exercised according to law.

# GROUNDS OF APPEAL

1. The issues raised on the grounds of appeal are, first, whether the primary judge denied the Minister procedural fairness in making particular findings as to his conduct in these proceedings without first giving the Minister a reasonable opportunity to make submissions and adduce evidence going to those matters. The second questions is whether, in making those findings, the primary judge acted without evidence and mistook the facts. The third question is whether the primary judge erred in exercising his discretion to refuse to grant *certiorari* and *mandamus* directed to the Tribunal on the basis that the Minister had engaged in “bad faith” because:
2. Officers of the Commonwealth failed to release the respondentfrom immigration detention following the Tribunal’s decision; and
3. the contents of an affidavit filed in response to order 1 of the orders of a judge of this Court made on 12 March 2020 failed adequately to comply with that order.

# FRESH EVIDENCE

1. In support of grounds 1 and 2 of the appeal, the Minister sought leave pursuant to s 27 of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth) to rely upon an affidavit of Ms Agbinya, solicitor and officer of the **Department** of Home Affairs, sworn on 21 October 2020 (**October Agbinya affidavit**), together with an affidavit affirmed by Ms Dejean, a solicitor employed by the Australian Government Solicitor (**AGS**) on 21 October 2020. Leave was granted for reasons discussed below. Leave was also granted to the respondent to adduce fresh evidence.

# PROCEDURAL BACKGROUND

1. The respondent is a citizen of Afghanistan who made an application for a SHEV on 2 June 2016. On 9 December 2019, a **delegate** of the Minister decided, pursuant to s 501(1) of the *Migration* ***Act*** *1958* (Cth), to refuse to grant a SHEV to the respondent on character grounds. The respondent was notified of that decision on 18 December 2019. A week later the respondent sought review of the delegate’s decision in the Tribunal pursuant to s 500(1)(b) of the Act. In the days intervening, judgment was delivered by another judge of this Court in ***BAL19*** *v Minister for Home Affairs* [2019] FCA 2189; (2019) 168 ALD 276. Relevantly to this appeal, in *BAL19*, the Court held (at [88]) that s 501 of the Act was not available to the Minister as a basis to refuse the grant of a protection visa. The Tribunal heard the application on 24 and 25 February 2020. At 2.30 pm on 11 March 2020, the Tribunal set aside the delegate’s decision and substituted for it a decision that the respondent be granted a SHEV. Later that day, the Minister commenced urgent judicial review proceedings in this Court in relation to the Tribunal’s decision.
2. The Tribunal at the time of its decision was right to think that it was bound by *BAL19* and to conclude that s 501 of the Act was not available to the Minister as a basis to refuse the grant of a protection visa.
3. At 4.30 pm on 12 March 2020, the Minister’s urgent application was listed for hearing before Perry J, as the duty judge. It became apparent at that hearing that the respondent was still in detention in Western Australia, notwithstanding the orders made by the Tribunal on 11 March 2020. Her Honour made an order requiring the Minister to file and serve, by 5.00 pm on 16 March 2020:

an affidavit made by an appropriate officer from the … Department explaining whether the [respondent] was still in immigration detention and, if so, an officer with actual knowledge should also explain why he still is in immigration detention.

1. In purported compliance with that order, Ms Agbinya swore an affidavit on 16 March 2020 (the **March Agbinya affidavit**) confirmingthat the respondent was still in detention, but refusing to explain why he was as the reason was the subject of legal professional privilege. It is by no means a direct criticism of Ms Agbinya, who as the evidence now reveals, took advice from experienced counsel in relation to the content of this affidavit and acted in accordance with that advice. That said, however, the affidavit clearly failed to comply with the order of the Court in most serious circumstances where, on the face of the matters, the liberty of a subject was denied without proper reason.
2. In the meantime, the respondent, also on 16 March 2020, filed an interlocutory application seeking a writ of *habeas corpus*. That application was returned before Wigney J on 17 March 2020 at 2.15 pm. His Honour ordered that the respondent be released from immigration detention forthwith and was highly critical of the conduct of the Minister: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394, particularly at [57]-[58] (**Wigney J’s reasons**). Insofar as the criticism could be understood as a criticism of the Department, that criticism was entirely warranted insofar as the respondent was still detained without proper explanation as to why this was so.
3. On 29 May 2020, the Minister sought leave to amend his originating application to add a new ground, namely, that the Tribunal fell into jurisdictional error in finding that it had no power under s 501 of the Act to refuse the grant of a SHEV to the respondent. Ground 2, which had been the basis of the original application, asserted that the Tribunal fell into jurisdictional error insofar as it considered that it had the power to grant to the respondent a SHEV. An amended originating application was filed some time later on 20 July 2020.
4. In the meantime, on 23 and 24 June 2020, two Full Courts of this Court (differently constituted) each delivered judgments, first in ***KDSP*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108 and, secondly, in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***BFW20*** *by his Litigation Representative BFW20A*  [2020] FCAFC 121. In each case, it was held that *BAL19* had been wrongly decided and that s 501 did provide a basis to refuse the grant of a protection visa.
5. The current proceedings came on before the primary judge on 27 August 2020, with his Honour delivering judgment on 23 September 2020.

# THE PRIMARY JUDGMENT

1. The primary judge held that the Tribunal fell into jurisdictional error insofar as it:
2. failed to give any consideration as to whether the grant of a SHEV could be refused under s 501(1) (thereby failing to exercise the jurisdiction vested in it by s 500(1)(b)); and
3. acted upon an erroneous construction of s 501(1) in the light of the decisions in *KDSP* and *BFW20*;

(see his Honour’s reasons for both findings at  [14], [19], [21]-[22], [29]-[33] and [71]-[72]).

1. The primary judge also held that while it was not necessary to determine the issue conclusively, the Minister’s argument that the Tribunal had no power to grant to the respondent a visa was “not without some merit”, had “considerable force” and “would most likely prevail”: see his Honour’s reasons (at [35], [43], [45], [47]-[52] and [73]).
2. The third feature of the primary judge’s reasons on which this appeal focuses is that notwithstanding the Tribunal’s jurisdictional errors, the grant of *certiorari* and *mandamus* should be withheld on discretionary grounds because each of the following matters evinced bad faith or a “lack of integrity in the decision-making processes of the Minister”:
3. the Minister ignored the Tribunal’s decision and kept the respondent in immigration detention;
4. the Minister could have made, but did not make, an application to the Tribunal pursuant to s 43(5B) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) seeking an order that its decision come into operation on a later date; and
5. the Minister wilfully defied or disregarded order 1 of Perry J’s orders made on 12 March 2020;

(see his Honour’s reasons at [60]-[63] and [74]).

1. In the course of reaching these conclusions, the primary judge made the following findings:
2. the Minister had “unilaterally place[d] himself above the law” (at [68] and [74]);
3. the Minister did not release the respondent from immigration detention because he “[did] not like” the Tribunal’s decision (at [68]);
4. the Minister had “acted unlawfully” (at [74]);
5. the Minister’s “actions [had] unlawfully deprived a person of his liberty” (at [74]);
6. the Minister had acted “intentionally and without lawful authority” and his conduct “[exposed] him to both civil and potentially criminal sanctions” (at [74]);
7. “In the absence of explanation, the Minister [had] engaged in conduct which can only be described as criminal” (at [74]); and
8. such conduct by “this particular” Minister was not unprecedented, citing ***AFX17*** *v Minister for Home Affairs (No 4)* [2020] FCA 926 (at [8]-[9]).

(Together, the **Unlawfulness Findings**).

1. With respect to the last observation at (g), the evidence reveals, and it was not disputed, that the Minister for the purposes of this appeal is the appellant Minister (for Immigration, Citizenship, Migrant Services and Multicultural Affairs), whereas the Minister for the purposes of *AFX17* was the Minister for Home Affairs. Thus, to the extent *AFX17* was relied upon to support the observation that the conduct by “this particular Minister was not unprecedented”, such reliance was factually erroneous. Additionally, the proposition at (g) was not put to counsel for the Minister in the course of argument below.
2. It should be noted however that it is not at all clear how or why this Minister (as opposed to the Minister for Home Affairs) became the named respondent in the proceedings before the Tribunal and the primary judge. It does not appear to have resulted from any election by the respondent at any stage. Senior Counsel for the Minister observed during the hearing that despite the relevant instrument of delegation having actually been authorised by the Minister for Home Affairs, the appellant Minister appears to have become the named respondent at some point during the proceedings before the Tribunal.

# FRESH EVIDENCE

1. The Minister sought to adduce fresh evidence on the appeal in light of the Unlawfulness Findings. While that application was opposed, the Court was satisfied that each party should have the opportunity to adduce fresh evidence.
2. Section 27 of the *Federal Court Act* confers a discretion to receive fresh evidence on appeal. There are no fixed rules governing the exercise of such discretion, but it will generally be exercised favourably to the party seeking to adduce it if, first, it could not have been adduced below by the exercise of reasonable diligence and, secondly, had it been adduced, the evidence would be likely to have produced a different result: *Moore v Minister for Immigration and Citizenship* [2007] FCAFC 134; (2007) 161 FCR 236 per Gyles, Graham and Tracey JJ (at [4]-[7]) and *Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128;(2013) 139 ALD 1 per Jagot, Barker and Perry JJ (at [7]). While this is not a case where the evidence was unavailable, it is a case where no need to adduce such evidence was apparent as the Unlawfulness Findings (at [17] above) had not, with great respect, been foreshadowed sufficiently to put the Minister on notice of them. The second circumstance above is also satisfied.

## Ms Agbinya

1. In the October Agbinya affidavit, substantial correspondence was annexed. Ms Agbinya is currently the Acting Assistant Secretary of the Migration and Citizenship Litigation Branch in the Legal Group of the Department. She has a substantive role as a Principal Legal Officer in the Tribunal and Removals Injunction Section in the Migration and Citizenship Litigation Branch (**AAT Section**), a role which she has held since March 2018. The AAT Section is responsible for managing merits and judicial review applications in relation to character cancellations and refusals, citizenship, removals, freedom of information, and Migration Agents Registration Authority decisions.
2. Ms Agbinya explained that she swore the March Agbinya affidavit in response to the orders of Perry J following the Minister’s 11 March 2020 application for judicial review. She confirmed in the March Agbinya affidavit that the respondent was still detained in the **Yongah Hill** Immigration Detention in Western Australia:

[h]owever, to provide an explanation of the reason why the [respondent] remains in immigration detention would reveal legal advice that is subject to legal professional privilege.

She said further that she did not have instructions to waive the Minister’s privilege. The Minister referred to by Ms Agbinya in this instance was the Minister for Home Affairs.

1. By the time of swearing the October Agbinya affidavit, Ms Agbinya had received email instructions from an advisor to the Minister for Home Affairs stating that the privilege over the legal advice could be waived to set out her involvement in the proceedings between 10 and 17 March 2020. It is noted that the instructions came from the Minister for Home Affairs, not the appellant Minister. That will be explained, though it suffices to observe that the Department of Home Affairs (referred to in these reasons as the “Department”) serves multiple Commonwealth Ministers, including the Minister for Home Affairs and the appellant Minister.
2. On 10 March 2020 at 2.13 pm, Ms Agbinya received an email from Ms Griffin, a solicitor employed by the AGS with conduct of the matter, confirming that the respondent’s application for review in the Tribunal had been listed for decision on 11 March 2020 at 2.30 PM (ADST). She was informed by Ms Griffin that there was a possibility that the Tribunal would make a decision to grant the respondent’s SHEV or direct the Minister to grant a SHEV. She confirmed that the respondent was currently held in detention at Yongah Hill, Western Australia. Ms Agbinya passed on that information to personnel within the Department, who advised who would take responsibility in the matter and confirmed that the decision was “*BAL19* affected”. Ms Agbinya advised the Department that she was concerned the Tribunal seemed to think that it was able to grant a visa and that if an order of that kind were made, it may be necessary to seek a stay and/or ask the Tribunal to amend its orders. She enquired as to whether a stay should be sought.
3. Ms Griffin of the AGS briefed counsel to prepare a draft Federal Court application in anticipation of the possibility of the Tribunal granting the respondent a visa. At 6.07 pm that evening, Ms Agbinya was copied into an email which requested the respondent’s release from detention should that be required the next day.
4. The next day, 11 March 2020, at 2.39 pm, Ms Griffin sent an email to various personnel in the Department including Ms Agbinya advising that the Tribunal had set aside the decision under review and had substituted its own decision that the respondent be granted a SHEV. It was emphasised that the outcome was not a remittal but a substituted decision that should be complied with promptly. At 3.12 pm, Ms Griffin sent a follow-up email circulating the Tribunal’s written reasons. In the intervening period of about 30 minutes before the written reasons were received, a series of communications ensued in the Department including an initial communication to personnel at Yongah Hill instructing them to release the respondent immediately. This was followed up at 3.23 pm with a further communication instructing personnel at Yongah Hill not to take any further action, after the Department had resolved to consider the Tribunal’s decision and await the advice of counsel before proceeding to release the respondent.
5. Throughout the afternoon of 11 March 2020, discussions with counsel ensued and instructions were given to seek an urgent hearing before the duty judge, Perry J, at 4.15 pm that afternoon. That listing fell through, apparently because the Minister’s application was not filed promptly enough and an interpreter for the respondent could not be organised at such short notice. Her Honour proceeded to relist the matter at 4.30 pm the following day, 12 March 2020. In a telephone conference between Ms Griffin, Ms Agbinya, counsel and other Department personnel, it was resolved that counsel would provide a written advice the following day which would include consideration of whether a stay would be available in light of the fact that it seemed the respondent could no longer be lawfully detained pursuant to s 189 of the Act.
6. Significantly, the respondent says, in seeking the urgent hearing before Perry J, an originating application for review of a migration decision and a supporting affidavit affirmed by Ms Griffin were filed just after 4.00 pm on 11 March 2020. In her affidavit, Ms Griffin deposed, in support of expedition of the Minister’s application, that:

The effect of the [Tribunal’s] decision is that the [respondent] has been granted the Visa and he is the process [sic] of being released from Yongah Hill Immigration Detention Centre in Western Australia at the time this affidavit is being affirmed.

1. There was a great deal of activity in the Department at this point, trying to ascertain the position the Department should take.
2. There were also communications with an advisor to the Minister for Home Affairs on the topic and the concern that the Tribunal had granted the respondent a visa.
3. The following day, 12 March 2020, counsel advised, at 11.28 am, that she considered that the Tribunal’s decision would be considered a nullity for the purposes of contempt and unlawful detention or false imprisonment, and that the continued detention of the respondent was not likely to have any further consequences if the Court accepted the Tribunal’s decision was beyond jurisdiction.
4. Counsel was advising on a complex matter with a degree of urgency. Counsel advised later in the day that she did not think the Minister could obtain a stay of the Tribunal’s decision, but that the Tribunal’s decision was clearly wrong. Counsel also advised later in the day that the respondent could “probably” be detained but it was not without risk, and that if the respondent stayed in detention, evidence would have to be put on as to why he was still being detained. Counsel advised that in light of her advice the deponent to the affidavit could say that the respondent was “unlawful” in that he did not have a valid visa, but it was not necessary to disclose the advice as to why, as to do so would waive privilege. There were numerous other exchanges and advices. Intense communications within the Department at various levels, and between legal advisors, continued until Ms Agbinya swore the March Agbinya affidavit.
5. The Department was then informed that the respondent’s legal advisor was proceeding with applications for his release.
6. A fair conclusion to be drawn from all of this activity was that those responsible for decision-making concerning both the release of the respondent and explaining to the Court why he was not released, were acting conscientiously on legal advice received. It could not be concluded that actions of any of those personnel were contumelious in relation to either the continued detention question or in giving the explanation by affidavit as to why the respondent had not been released. Nonetheless, there is no doubt that the primary judge and others were correct in strongly criticising the non-release of the respondent and, in effect, the concealment of the true reasons for the failure to release him. The affidavit did not even explain that the Minister considered the respondent did not hold a visa, or state why. Although this course was adopted on advice of counsel, such conduct fell well short of the standard that is to be expected of a model litigant such as a Minister of the Commonwealth acting through his or her Department, or indeed any litigant, and particularly so where the Court was seeking information on the purported unlawful detention of a subject.
7. The very detailed October Agbinya affidavit does however reveal that at no time was the appellant Minister consulted in relation to these issues. The Minister for Home Affairs’ office however was informed on 17 March 2020 that an affidavit was filed advising the basis for the respondent’s ongoing detention, that the basis was the subject of legal advice which was privileged, and that counsel advised it was open to the Department to keep the respondent in detention, noting that it carried a risk of an unlawful detention claim, but that Ms Agbinya was optimistic as to the Minister’s appeal prospects. The affidavit also indicates that the Minister for Home Affairs’ office had been consulted by the Department about the potential release of the respondent via his ministerial intervention, but that he advised that he did not want a submission to be advanced to him to that end.
8. At about 7.15 pm on 17 March 2020, Wigney J ordered the respondent’s release from immigration detention, following which the respondent was released immediately (from the Court, having been brought there pursuant to directions made by Wigney J). The report as to that outcome was then sent to the Department and copied to various people including, for the first time, two advisors to the appellant Minister.
9. That communication at 8.47 pm on 17 March 2020 was the only form of engagement with the appellant Minister or his office at all in relation to these proceedings because, as explained in the October Agbinya affidavit, the Department’s internal arrangements for ministerial responsibilities for “character matters under s 501 of the Act” rested with the Minister for Home Affairs, rather than with the appellant Minister.
10. Ms Agbinya, having examined the Department’s records could not find any evidence of the appellant Minister’s office being briefed in relation to this matter prior to the evening of 17 March 2020. This communication to the appellant Minister’s office post-dated the events that were the subject of the Unlawfulness Findings.
11. Although the respondent opposed the Minister’s application to adduce fresh evidence, the respondent himself sought, in the alternative, to supplement that evidence with various other documents which he contended completed the record of the Department’s conduct between 10 and 17 March 2020. That evidence was also received, but while there was a significant additional body of legal exchanges and transcript, it does not, in our assessment, change the effect of the summary given in the October Agbinya affidavit.

## Ms Dejean

1. Ms Dejean’s affidavit, also adduced by the Minister, was directed to the procedural issues raised in the appeal, including the fact that the primary judge’s Unlawfulness Findings were not raised by the primary judge with the Minister’s senior counsel at the hearing on 27 August 2020 or otherwise.
2. The affidavit also makes the point that the respondent’s submissions before the primary judge did not raise the prospect of the primary judge making the Unlawfulness Findings about the Minister at [68] and [74] of his Honour’s reasons.
3. Thirdly, Ms Dejean confirmed that the primary judge’s Unlawfulness Findings have been widely reported in the media and may have a significant effect on the Minister’s reputation. Eleven examples of that reporting were referred to. That evidence was not contested.
4. The affidavit confirms the accepted fact that the Minister is not the same minister as in *AFX17*.

# GROUNDS 1 AND 2 OF THE APPEAL

1. The Minister argued these grounds together. There is no dispute that the primary judge was obliged to afford the parties natural justice, specifically an opportunity to be heard, to advance his or her own case, and to answer by evidence and argument the case put against him or her: *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 per French CJ (at [54]).
2. The Minister relies on the fact that at no stage prior to the delivery of judgment did the primary judge put the Minister on notice that he was proposing to make the Unlawfulness Findings as reasons for refusing to grant the relief sought by the Minister and invite the Minister to make submissions supported by evidence as to why those findings should not be made. The primary judge did invite submissions from the Minister as to why relief should not be withheld on discretionary grounds because the Minister had “yet again” ignored orders of the Court that it required an affidavit to be filed explaining why the respondent remained in immigration detention despite the Tribunal’s decision. The primary judge said at the hearing that he was “worried about discretion”. The Minister contends that the primary judge’s exchanges with senior counsel, to which we were taken in the transcript were not sufficiently specific as to indicate to the Minister that his Honour was proposing to make the Unlawfulness Findings against the Minister.
3. Dealing with ground 2, the Minister says that the reality is that the Unlawfulness Findings made by the primary judge were not supported by the evidence before his Honour. Further, had the primary judge indicated to the Minister that he was contemplating making such findings as reasons for withholding relief, the Minister could have adduced evidence in similar form to the October Agbinya affidavit and made submissions as to why none of those findings was correct. The Minister contends, and it must be accepted, that the October Agbinya affidavit establishes that:
4. the Minister (or his office) played no role in the continued detention of the respondent following the Tribunal’s decision;
5. the Minister did not continue to detain the respondent merely because he “did not like” the Tribunal’s decision, thereby placing himself “above the law”;
6. having initially given instructions to those officers responsible for detaining the respondent to release him from detention, officers in the Department sought, and acted upon, the considered advice of counsel which suggested that, although not without risk, it was open to officers to continue to detain the respondent on the ground that the Tribunal’s decision was a nullity (in which case the continued detention of the respondent was not likely to have further consequences if it were held that the Tribunal fell into jurisdictional error);
7. while the respondent was detained, steps were taken to try to regularise his status, including by approaching the Minister for Home Affairs (through his advisors), in relation to whether the Minister would be prepared to exercise his non-compellable powers under the Act; and
8. in swearing the March Agbinya affidavit, filed in response to order 1 of Perry J’s orders, Ms Agbinya acted on the advice of experienced counsel that the provision of a more complete explanation than that which was given for the continued detention of the respondent would have resulted in the waiver of client legal privilege.
9. It follows, the Minister says, that the primary judge erred in making the Unlawfulness Findings which clearly influenced the exercise of discretion because, were those findings not made, it would be likely that the relief sought by the Minister below would have been granted. The Minister relies on the well-established principles expressed in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 (at 504-505) and contends that his Honour mistook the facts, allowed extraneous or irrelevant matters to guide or affect him and failed to take relevant matters into account. The Minister also contends that if it is found on appeal that the primary judge denied the Minister natural justice, the overarching purpose of the civil practice and procedure provisions in s 37M of the *Federal Court Act* calls for a fresh determination in this appeal as to whether relief should be withheld on discretionary grounds in light of the content of the October Agbinya affidavit.
10. The respondent, however, argues that the primary judge gave the Minister a reasonable opportunity to make submissions on the relevant matters and the Minister made a forensic decision not to adduce any evidence on those matters. He says that even if the exercise of discretion by the primary judge was affected by appellable error, this Court should itself re-exercise the discretion so as to refuse to grant relief to the Minister. The respondent stresses, and we accept, that the March Agbinya affidavit did not comply with order 1 of Perry J’s orders and the concerns expressed by Wigney J and the primary judge were warranted. The respondent stresses that he satisfied all of the criteria for the grant of a protection visa and was not considered to be a danger to the Australian community. The order made by Wigney J on 17 March 2020 that he be released from detention forthwith was based on a finding that the current detention was then unlawful and it necessarily followed that the detention had been unlawful since the grant of the SHEV by the Tribunal on 11 March 2020 irrespective of whether or not that decision might have been affected by jurisdictional error as the law has subsequently become known. The respondent submits, and we accept, that his detention under s 189 and s 196 of the Act could only be justified if and when the Tribunal’s decision were set aside. These factors alone, the respondent says, justify the exercise of the discretion adversely to the Minister by the primary judge and by this Court. Indeed, the primary judge’s decision adopted and was largely based on findings that had previously been made by Wigney J. Each judge accepted that the Tribunal’s decision operated with effect from 11 March 2020 in consequence of which the Minister had no option but to comply with the decision and release the respondent. The respondent also contends that the failure to comply with the orders of Perry J also warranted exercising the discretion adversely to the Minister.
11. The respondent also makes the point that the primary judge’s findings were directed to the conduct of the Minister as a party to the proceedings encompassing the conduct of Departmental officers who acted on his behalf. Both the continued detention of the respondent and the filing of an affidavit by an “appropriate officer” pursuant to the order of Perry J involved conduct engaged in on behalf of the Minister, both as a Minister responsible for the administration of the Act and as a litigant before the Court. We can accept the correctness of these observations in relation to the Departmental decision to continue to detain the respondent and to not comply with the orders of Perry J. However, we cannot accept the contention in relation to the Unlawfulness Findings which include some findings which are necessarily and undoubtedly of a personal nature. The references to criminality clearly falls into that category.
12. In relation to ground 1, we accept the important submission for the respondent that the content of the rules of procedural fairness is not “immutably fixed” and fairness is ultimately a practical concept. The background matters emphasised by the respondent are that:
13. on 11 March 2020, the Minister had filed an affidavit stating that the effect of the Tribunal’s decision was that the respondent had been granted the visa and that he was in the process of being released from detention;
14. the following day, Perry J expressed concern that the respondent had not been released and made an order requiring the Minister to file an affidavit explaining whether the respondent was still in detention and, if so, “an officer with actual knowledge should also explain why he is still in immigration detention”;
15. on 17 March 2020 (five days later), Wigney J heard and determined the respondent’s interlocutory application seeking orders in the nature of *habeas corpus* and the Minister’s interlocutory application for expedition. On this occasion, his Honour relevantly found as follows:
    1. section 196(1)(c) required the respondent to be released because he had been granted a visa. The basis on which he had been detained was never properly explained by the Minister and that it became readily apparent that the respondent was not released simply because the Minister did not like the Tribunal’s decision (Wigney J’s reasons at [30]-[31]);
    2. the March Agbinya affidavit provided no explanation whatsoever for why the respondent remained in immigration detention and it was difficult, if not almost impossible, to imagine how the Minister or anyone else could have sensibly formed the view that the affidavit complied with the order of Perry J (Wigney J’s reasons at [45] and [57]-[58]);
    3. the conduct of the Minister “on just about any view”, had been “disgraceful” (Wigney J’s reasons at [57]); and
    4. the respondent was currently unlawfully detained and was legally entitled to his immediate release from detention (Wigney J’s reasons at [87]).
16. The respondent stresses that the Minister did not seek leave to appeal Wigney J’s decision and did not directly take issue with any of these findings. The Minister was clearly on notice, the respondent says, that the primary judge was considering making adverse findings which may deprive the Minister of a discretionary remedy. He was aware that his past conduct, as identified in Wigney J’s judgment, remained a live issue in the proceeding. This was emphasised by:
17. written submissions of the respondent directly raising the exercise of the discretion to refuse relief based on bad faith and the Minister’s “disgraceful” conduct as found by Wigney J; and
18. the Minister’s written submissions of 21 August 2020 directly responding to these submissions, contending that the Minister’s conduct that was “strongly criticised” by Wigney J had no bearing on whether the proceeding was brought in good faith.
19. Matters in the hearing before the primary judge to which the respondent points are:
20. senior counsel for the respondent submitted that the discretion to refuse relief should be exercised on the basis of “unclean hands” by the Minister, both in the refusal to release from detention and the failure to file a complying affidavit;
21. senior counsel for the Minister responded to those submissions, addressing “the matter of unclean hands” and the findings of Wigney J;
22. the primary judge identified the issue on several occasions, including by putting directly to senior counsel for the Minister that there was:

something to be said for the view that in this very case, the Minister was yet again just ignoring orders of this court, and that – I think, the views that I previously expressed have been fairly publicly canvassed, but there is something to be said for the view that a party who just defiantly disregards what this court has said should be done may not be entitled to discretionary relief … [so] why shouldn’t I refuse to grant you relief where this Minister has yet again said … ‘I’m not going to do what I’ve been told to do’.

His Honour indicated that he was “worried about discretion” and invited the Minister to address the issue in post-hearing submissions; and

1. in particular, the submissions of senior counsel for the Minister directly addressed the “two aspects of the Minister’s conduct that were strongly criticised by Wigney J”, namely, the continued detention and the failure to comply with the orders of Perry J.
2. Following the hearing, each of the parties made detailed post-hearing submissions on the discretion to refuse relief.
3. The respondent says that a fair reading is that the primary judge’s discretion was ultimately founded on the findings already made by Wigney J and not directly challenged by the Minister. In these circumstances, it is contended the Minister was not denied a fair hearing in relation to whether the adverse findings about his conduct warranted the exercise of discretion to refuse relief.
4. There is no doubt that the Minister was on notice that the primary judge (in our view, correctly) considered the continued unexplained detention and non-compliance with Perry J’s affidavit order as being a very serious matter.
5. However, the difficulty with the respondent’s submission is that the primary judge’s Unlawfulness Findings, particularly those of a personal nature, went well beyond those that were made by Wigney J. Certainly, there was no reference in any of the exchanges with counsel for either party to the possibility of a finding as to criminal conduct. The findings of Wigney J had been that:
6. the conduct of the Minister was “on just about any view, … disgraceful” (Wigney J’s reasons at [57]);
7. the Minister “*appears* to have willingly and flagrantly failed to comply with the orders made by Perry J on 12 March 2020…” (Wigney J’s reasons at [57]); and
8. “it may perhaps be inferred that the only explanation that the Minister had for the continuing detention of [the respondent] was that he, or someone in his Department, thought that the Tribunal’s decision was wrong…” (Wigney J’s reasons at [58]).
9. The primary judge went considerably further, finding the Minster had engaged in “criminal” conduct; “*intentionally* and without lawful authority” deprived the respondent of his liberty; “*intentionally* engaged in unlawful conduct”; “placed himself above the law”; and had himself engaged in the same conduct previously. We respectfully consider that the Minister was entitled to be put on notice that his Honour was proposing to make findings in the nature of the Unlawfulness Findings so that he could respond to them. Raising the exercise of the discretion to refuse relief based on “bad faith” was not sufficient to draw all these matters to the attention of the Minister.
10. The fact that the Minister did not seek leave to appeal from Wigney J’s orders is not a factor of significance. The judgment of Wigney J was not based on the validity of the Tribunal’s decision, but on the basis that the Tribunal had in fact made a decision that the respondent be granted a SHEV. The ultimate relief sought by the Minister was that the Tribunal’s decision be set aside, the merits of which were only dealt with by the primary judge. In those circumstances, it was not necessary for the Minister to appeal from Wigney J’s orders.
11. The relevant Unlawfulness Findings not being put with sufficient clarity to the Minister to enable him to respond to them, ground 1 is made out.
12. As to ground 2, the respondent submits that the primary judge’s reference to unprecedented conduct “by this particular Minister” should be understood as referring to the Minister as the person ultimately responsible for the conduct of the Department and as a Minister responsible for the administration of the relevant provisions of the Act. As indicated however, the Unlawfulness Findings as they were put by the primary judge were of a directly personal nature such that the broader reading that encapsulates general ministerial responsibility contended for by the respondent is not open. Ground 2 must also be upheld.

# GROUND 3 – EXERCISE OF DISCRETION

1. The grant of the constitutional writs and relief pursuant to s 39B of the *Judiciary Act 1903* (Cth) is a matter of discretion as the primary judge observed. The discretion to refuse relief is not to be exercised lightly as the primary judge also appeared to acknowledge: see, for example, *Re Refugee Review Tribunal; Ex parte* ***Aala*** [2000] HCA 57; (2000) 204 CLR 82 (at [54]-[56]).
2. *Certiorari* vindicates the public interest in executive power being exercised according to law. *Mandamus*, being a demand by a particular applicant for the power to be exercised, may have a private aspect to it: ***SZQBN*** *v Minister for Immigration and Citizenship* [2013] FCAFC 94; (2013) 213 FCR 297 per Jacobson, Edmonds and Stone JJ (at [43]-[49]).
3. One of the established grounds for refusing the grant of judicial review remedies is “bad faith” on the part of the applicant, “either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made”: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte* ***Ozone Theatres*** *(Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389 per Latham CJ, Rich, McTiernan and Webb JJ (at 400). The Minister contends that “bad faith” in the relevant sense ordinarily requires significant dishonesty to subvert the proper processes of, and secure an advantageous outcome in, the relevant transaction or court proceeding; moral obloquy; or fraud.
4. In addition to the underlying factual error as to the identity of the Minister, the Minister argues that the primary judge erred in the exercise of discretion to withhold relief, as the Minister did not act in bad faith either in the relevant transaction, being the review conducted by the Tribunal, or towards the Court. The Minister says that, first, he did not detain the respondent. The obligation to detain an unlawful non-citizen in s 189 and s 196 of the Act is cast upon an “officer” as defined in s 5(1). More importantly, the Minister did not involve himself in any decision as to whether the respondent should continue to be detained. The evidence would suggest this particular Minister knew nothing about the matter. Secondly, the Minister argues that he would not have unlawfully exposed himself to proceedings for contempt even if he did detain the respondent because if the Tribunal’s decision was affected by jurisdictional error, as the primary judge held, then, for the purposes of the Act and the AAT Act, that decision was “no decision at all”, “invalid” or “void”. The relevance of this argument to the Minister’s ability to continue to detain the respondent was rejected by Wigney J (see his Honour’s reasons at [80]-[86]).
5. The Minister also argues that the detention of the respondent sat outside of the decision-making process under review, being the proceeding in the Tribunal, and the judicial review application before the primary judge. Accordingly, even if the considered advice of counsel was incorrect, that would not render the Minister’s conduct as being “bad faith” relevant to the exercise of the discretion. The Minister also argues for the same reasons that the Tribunal’s decision merely purported to alter the respondent’s legal status (by the grant of a visa) and did not require those detaining him to do anything, such that no question of contempt arises.
6. The Minister argues that the upshot of the Tribunal acting beyond jurisdiction was that the respondent did not at any time hold a visa that was in effect and thus was able or required to be lawfully detained. The primary judge’s findings that the Minister acted unlawfully and in contempt of the Tribunal proceeded, it is said, from a flawed premise that the Tribunal’s decision established authoritatively the respondent’s entitlement to a SHEV. Those findings, which fed into the exercise of discretion, were based on a clear error of principle, the Minister argues.
7. The Minister also argued in written submissions, but did not orally press the argument which had it been advanced, would have been rejected, that the Minister (as litigant), having filed an affidavit in accordance with order 1 of the orders of Perry J, complied with those orders. For reasons already expressed in these reasons and in the reasons of Wigney J and the primary judge, any contention to that effect must be firmly rejected. Nonetheless, the fresh evidence does establish that there was not deliberate defiance of Perry J’s orders. Those who prepared the March Agbinya affidavit acted on the considered advice of counsel, who opined that to claim privilege would not amount to a breach of Perry J’s order.
8. The Minister also says that the suggested failure on his part to seek a stay order under s 43(5B) of the AAT Act goes nowhere because if the Tribunal’s decision is, as the primary judge held, affected by jurisdictional error, there was in law no decision, the operative date of which could be delayed. It is unnecessary to consider this submission.
9. The respondent argues to the contrary. He says the primary judge did not err in the exercise of discretion to withhold relief in the circumstances. His Honour correctly articulated the applicable legal principles and took into account all relevant circumstances on the material before the Court, and did not have regard to any irrelevant considerations. The conclusion “was not so unreasonable or plainly unjust” that error should be inferred. The respondent argues that a finding of bad faith or dishonesty was not required in order to enliven the discretion to refuse relief. In particular, the respondent argues that one of the circumstances in which relief may be refused is if the applicant’s conduct “has been disgraceful and he has in fact suffered no injustice”: *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 per Lord Denning (at 320). The respondent argues that the distinction sought to be made between the Minister personally and his “officers” in the context of the continued detention decision is untenable. The respondent argues that the detention was on behalf of the Commonwealth and the Minister is responsible for the administration of the Act.
10. Further, it is said, the contention that there could be no liability for contempt is misguided as the unlawfulness of the respondent’s ongoing detention did not turn on the absence of a “reasonable suspicion” of any officers under s 189 of the Act, but rather on the failure to give effect to the grant of the visa under s 196(1)(c). The respondent stresses that Wigney J made a finding in the proceedings below, which is not outside the decision-making process as the Minister asserts, that the respondent was being unlawfully detained and that his continued detention was unlawful even if the Tribunal’s decision was ultimately held to be invalid or void (Wigney J’s reasons at [80]-[86]). That finding was not appealed. The respondent also stresses that the order of Perry J did not purport to override legal professional privilege as might be implicit in the Minister’s submission, nor deny the Minister’s right to assert it. As both Wigney J and the primary judge held, the existence of legal professional privilege did not prevent the Minister from complying with the order by filing an affidavit which set out an explanation of why the respondent remained in detention. If the explanation was that the Minister or officers of the Department considered that the respondent was an unlawful non-citizen, that could have been stated without disclosing any legal advice on which that view might have been based. It might be also pointed out that dispensation might have been sought from going into any legal professional privilege. There would have been a number of ways of approaching it, rather than simply declining to explain the reason why the respondent remained in detention.
11. The fundamental difficulty is that the “disgraceful conduct” leading to the Unlawfulness Findings did not involve the Minister at all in any personal sense. Whilst it is clear in a proper case that a court on judicial review may withhold the grant of *certiorari* on grounds of bad faith or “unclean hands”, the different nature of that remedy (compared with *mandamus*) is of significance. Like prohibition, *certiorari* has a public content in the sense that it is “concerned with the exercise by … an official of administrative powers in want of, or in excess of, jurisdiction”: *SZQBN* per Jacobson, Edmonds and Logan JJ (at [48]). It will issue “almost as of right”: *Aala* perGaudron and Gummow JJ (at [51]) and Kirby J (at [149]), with their Honours citing *R v Ross-Jones; Ex Part Green* [1984] HCA 82;(1984) 156 CLR 185 per Gibbs CJ (at 194). *Certiorari* should not ordinarily be withheld where the result would be to confer a benefit to a non-citizen in contravention of the Act. This might be compared with the relief in *mandamus* which is a remedy which attempts to vindicate a private right which the Court might be more inclined to withhold based on the conduct of the individual concerned.
12. There is no doubt that the Unlawfulness Findings, which were not open, led the exercise of discretion to miscarry. There is no good reason that this Court should not, acting on the principles just stated, resolve to exercise the discretion in place of the primary judge so as to grant the relief sought by the Minister which simply requires the Tribunal to exercise its jurisdiction according to law. While the relevant conduct left much to be desired and gave rise to the purported unlawful detention of an individual, the evidence contained in the October Agbinya affidavit as described above reveals that such conduct did not amount to “bad faith” on the part of the Minister or the Department. Subject to the notice of contention, the appeal should be allowed.

# THE RESPONDENT’S NOTICE OF CONTENTION

1. Ground 1 of the notice of contention asserts that the decision in *BAL19* was correctly decided and that *KDSP* and *BFW20* were wrongly decided. The respondent also says that the Tribunal did not exceed jurisdiction by applying the prevailing law in *BAL19* in accordance with the agreed position between the parties, for the reasons set out in submissions before the primary judge. In particular, the respondent argues that the decision in *Minister for Industrial Relations (Vic) v* ***Esso*** *Australia Pty Ltd* [2019] FCAFC 26;(2019) 268 FCR 520 (at [45]-[47], [58]-[59] and [104]-[107]) establishes that, although with the benefit of the decisions in *KDSP* and *BFW20*, it can now be said that the Tribunal’s application of *BAL19* in accordance with the agreement of the parties was erroneous, such error could not be jurisdictional because the Tribunal correctly applied the law as it then stood. The respondent says the parties had jointly submitted to the Tribunal that it should set aside the delegate’s decision on the basis of *BAL19*. If the Tribunal had then remitted the matter for reconsideration, as the Minster sought, that is if an order had been made under s 43(1)(c)(ii) rather than s 43(1)(c)(i), it could not be suggested that the Tribunal’s decision would be a nullity, along with any subsequent decision of the Minister following remittal.
2. It does not appear that the parties actually “jointly submitted”, as the respondent suggests, that the Tribunal should set aside the delegate’s decision. The solicitor for the Minister accepted that the Tribunal was bound by *BAL19*, but maintained the position that it was wrongly decided. For reasons given by the primary judge (at [24]-[31]), the Full Court’s judgment in *Esso* does not support the contention advanced for the respondent. If the reasoning in *Esso* is applied to the circumstances of the present, following the Full Court judgments in *KDSP* and *BFW20*, the Tribunal fell into jurisdictional error by proceeding on the basis that the power in s 501(1) was not available to be exercised and that it was required to set aside the delegate’s decision. For the Tribunal to proceed on an erroneous understanding of such a fundamental aspect of its task as conferred by the Act cannot be said to be within jurisdiction.
3. In those circumstances, this aspect of ground 1 of the notice of contention cannot succeed.
4. In the alternative, the respondent also submits as part of ground 1 that the primary judge’s reasons should be affirmed on the basis that the decisions in *KDSP* and *BFW20* are wrong because the decision in *BAL19* was correct. This, senior counsel for the respondent acknowledged, was an ambitious submission, given that eight judges of the Court in *KDSP* and *BFW20* have all confirmed that *BAL19* was wrongly decided. Special leave to appeal in *KDSP* was recently refused by the High Court. Ground 1 must be rejected.
5. Success on Ground 2 of the notice of contention, as we understand it, could not assist the respondent in light of our rejection of ground 1. As such, we will deal with this ground only briefly.
6. Ground 2 of the notice of contention asserts that s 43 of the AAT Act did confer power on the Tribunal to grant the respondent a visa in substitution for the decision of the delegate. It is necessary to set out the relevant parts of s 43 of the AAT Act and ss 65 and 501 of the Act as follows:

**AAT Act**

**43 Tribunal’s decision on review**

…

*Tribunal’s decision on review*

(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

(a) affirming the decision under review;

(b) varying the decision under review; or

(c) setting aside the decision under review and:

(i) making a decision in substitution for the decision so set aside; or

(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

**Migration Act**

**65 Decision to grant or refuse to grant visa**

(1) Subject to sections 84 and 86, after considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

Note 1: Section 84 allows the Minister to suspend the processing of applications for visas of a kind specified in a determination made under that section. Section 86 prevents the Minister from granting a visa of a kind specified in a determination under section 85 if the number of such visas granted in a specified financial year has reached a specified maximum number.

Note 2: See also section 195A, under which the Minister has a non‑compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister’s power under that section.

Note 3: Decisions to refuse to grant protection visas to fast track review applicants must generally be referred to the Immigration Assessment Authority: see Part 7AA.

…

**501 Refusal or cancellation of visa on character grounds**

*Decision of Minister or delegate—natural justice applies*

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

…

1. The respondent puts his argument this way:
2. there is no separate challenge by the Minister to the Tribunal’s decision that, if it did have power to do so, the preferable course was to grant the visa. It is a pure question of law, about whether s 43(1) of the AAT Act is broad enough to confer power to substitute a decision to grant a visa under a different provision of the legislation, namely, s 65 of the Act:
3. It can be accepted that the Tribunal’s jurisdiction in the present case was that conferred by s 500(1)(b) of the Act to review the decision of the delegate of the Minister to refuse to grant the visa under s 501(1), but that does not answer the question as to what the Tribunal’s powers were on such a review;
4. section 43(1) provides that the Tribunal may exercise all the powers and discretions conferred by any relevant enactment on the person who made the decision, provided that those powers and discretions are exercised for the purpose of reviewing a decision;
5. conferral of power should not be narrowly construed. The Tribunal stands in the shoes of the primary decision-maker, in this case the delegate of the Minister, and can exercise all of the powers and discretions conferred by the Act and potentially, by other Acts, on the Minister for the purposes of reviewing that decision;
6. the question is not whether it should exercise those powers, but whether it has those powers: *Social Security, Secretary, Department of v Hodgson* (1992) 37 FCR 32 (at 39-40); and *Australian Securities & Investments Commission v Donald* [2003] FCAFC 318; (2003) 136 FCR 7 per Kenny J (at [21] and [24]-[36]) and Downes J (at [56]-[60]);
7. the relevant decision-making process in dealing with a protection visa application encompasses the powers conferred by s 501 and extends to the entire decision-making process, from the duty to consider the application in s 47 right through to the power to grant or refuse to grant a visa under s 65 of the Act;
8. although there is no need to show a direct interrelationship or dependence of the provisions, it is clear when one looks at s 65 and s 66 that they are interrelated and interlocking with the powers under s 501 of the Act. The Minister’s duty under s 47 to consider a valid application for a visa culminates in a decision to grant or refuse a visa, a binary decision-making function. Section 65, which deals with the culmination of that function, expressly incorporates as one of the specified matters that need to be addressed in making the decision to grant or refuse, whether or not the grant of the visa is prevented by s 501, the special power to refuse or cancel;
9. so if a decision is made, as here, to refuse to grant a visa on character grounds under s 501, that will attract s 65A(3) and lead to a decision under s 65B of the Act to refuse to grant the visa;
10. there is also a separate notification and reasons provision in s 501G such that s 65 and s 66 are framed to accommodate decisions under s 501 of the Act. As to that interrelationship, in the recent Full Court decision in *KDSP*, Bromberg J took the view that a decision to exercise the power conferred by s 501 results in a decision under s 65;
11. it follows that the consequence of this is that the powers and discretions or duties conferred by s 65 and s 501 are sufficiently related that the powers in s 65 to grant a visa can be exercised by the Tribunal for the purposes of reviewing a decision to refuse to grant a visa under s 501. There is no need for dependence between those provisions, it is sufficient that the test is one of relevance, and there’s no reason for a narrow construction of the Tribunal’s powers under s 43 in their application to the Tribunal;
12. finally, nothing in the High Court’s decision in *Shi v Migration Agents Registration Authority* [2008] HCA 31;(2008) 235 CLR 286 requires any different approach; and
13. the question becomes whether the Tribunal could have considered the exercise of the power to grant a visa under s 65 if all other visa criteria had been met.
14. This approach is, with respect, an artificial and strained construct. The simple reality is that the Tribunal based its decision on a view of the law which was correct at the time, but is now shown to have been incorrect. It is an artificial reconstruction of the events to suggest that it had another source of power which it might have utilised to reach the same decision.
15. Were it necessary to reach a concluded view, we would respectfully reject these arguments. The Tribunal fell into jurisdictional error by purporting to grant a SHEV to the respondent primarily because its review function was limited to deciding whether or not to refuse the grant of a SHEV under s 501(1) of the Act, that being the power conferred on the decision-maker whose decision the Tribunal reviewed under s 500(1)(b). That latter provision did not confer any power on the Tribunal to review a decision made by the Minister (or a delegate) under s 65(1)(b) of the Act, or to make a primary decision under that provision. No decision-maker ever reached any state of satisfaction in relation to the criteria for the purposes of the exercise of a power under s 65, nor did the Tribunal itself consider any of the other visa criteria. Assuming the Tribunal was entitled to take on the role of a decision-maker under s 65(1) of the Act, the fact that the parties presented an agreed position to the Tribunal did not obviate the need for it to reach a state of satisfaction as to whether at the time of its decision the respondent satisfied all of the criteria for the grant of a SHEV. A concession does not permit the Tribunal “to avoid its duty as an administrative decision-maker to make the correct or preferable decision … on all relevant aspects of the matter before it”: *Peacock v Repatriation Commission* [2007] FCAFC 156; (2007) 161 FCR 256 per Downes, Lander and Buchanan JJ (at [23]).
16. The Tribunal simply assumed that because the Minister or a delegate was satisfied that the respondent met the criteria for the grant of a SHEV, it necessarily followed that he continued to meet these criteria as at the date of the Tribunal’s decision. It may theoretically have assumed (it is not known) that even if it had a power to grant a visa under s 65, it was not required to turn its own mind to that question. It was wrong to make those assumptions. In particular, it did not consider the national interest criterion in cl 790.227 of Sch 2 to the *Migration Regulations 1994* (Cth).
17. The delegate’s decision was a decision expressly stated to have been made under s 501, the Form of Application for Review and the identification of the decision sought to be reviewed and the reasons for the review application were all confined to issues arising under s 501 of the Act.
18. We respectfully adopt the primary judge’s reasoning where his Honour said (at [41]-[44]):

41 …

That subsection, [s 501(1)], confers a discretion to refuse to grant a visa if the Minister is not satisfied that the person passes the character test. The “*character test*” is defined in s 501(6). Review of decisions under s 501 are permitted by s 500(1)(b) which provides as follows:

**500 Review of decisions**

(1) Applications may be made to the Administrative Appeals Tribunal for review of:

…

(b) decisions of a delegate of the Minister under section 501 (subject to subsection (4A)); or

…

Section 501(4A) identifies those decisions which are not reviewable.

42 The correct characterisation of the decision under review assumed significance, so both Senior Counsel submitted, because it played a large part in defining the ambit of the powers of the Tribunal when undertaking its review functions.

43 If the characterisation of the decision under review by the Minister be correct, there is considerable force in the argument that upon an application for review, the only decision which could be made in substitution for that of the delegate was a decision that could be made under s 501. Such an approach to the confined nature of the power vested in the Tribunal by s 501 **would sit comfortably with the structure of the [Act], which provides for separate means of review in respect to separate kinds of decisions**.

44 If the character of the decision under review advanced on behalf of [the respondent] be correct, the Tribunal would have power to make all such decisions as an original decision-maker could make when entertaining an application for a visa.

(Emphasis added.)

1. The better view is that the jurisdiction which is vested in the Tribunal by s 500(1)(b) of the Act is the jurisdiction to review “decisions … under section 501”. It is that provision which “marks the boundaries of the AAT review”: *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; (2019) 266 CLR 250 per Bell, Gageler, Gordon and Edelman JJ (at [51]). When exercising the jurisdiction conferred by s 500(1)(b), the Tribunal was exercising the powers and discretions of the delegate as the original decision-maker, being powers confined by s 501(1). As the primary judge correctly observed, no decision was made by the delegate and no decision was sought to be reviewed by the respondent of any decision made (for example) pursuant to s 65 of the Act. Separate provision for Tribunal review of such decisions, it may be noted, is provided for in Pts 5 and 7 of the Act.
2. It follows that the Tribunal had no power to order the grant of a SHEV to the respondent. The only power that could be exercised by the Tribunal, given the statutory definition of the “character test” (s 501(6)), was the exercise of the discretion conferred by s 501(1) to “refuse to grant a visa…”.

# CONCLUSION

1. For those reasons, the appeal must be allowed, the notice of contention rejected and the exercise of discretion re-exercised. The matter will be remitted to the Tribunal in accordance with the terms of the relief sought by the Minister.
2. It is necessary to reemphasise that the criticisms of the decisions made within the Ministers’ Department (albeit on advice) to detain the respondent and to file an inadequate affidavit, which failed to comply with the orders of a judge of this Court warranted the criticism in firm terms expressed by the primary judge. However, in travelling beyond specific focus on those shortcomings, with great respect, the primary judge fell into error, which should be rectified on appeal.
3. As to costs, the position is not straightforward. We note that the orders sought by the Minister are that each party should pay their own costs of the appeal, but that the respondent pay the costs of the Minister at first instance. The costs order for the appeal is appropriate. There may well be doubt as to whether costs should follow the event at first instance, given the nature of some of the observations made in these reasons. Should any party wish to apply for costs at first instance, submissions in writing, not exceeding three pages, should be filed within 10 days. Unless otherwise ordered, that determination will be on the papers.

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| I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices McKerracher, Burley and O’Callaghan. |

Associate:

Dated: 1 April 2021