FEDERAL COURT OF AUSTRALIA

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL [2020] FCA 394

File number:	NSD 269 of 2020
Judge:	**WIGNEY J**
Date of judgment:	17 March 2020
Catchwords:	**MIGRATION** – detention – power to detain – where first respondent refused a safe haven enterprise visa – where Administrative Appeals Tribunal granted a visa – where first respondent continued to be detained – application for a writ in the nature of habeas corpus – whether detention unlawful – interlocutory relief granted
Legislation:	*Acts Interpretation Act 1901* (Cth) ss 24AB, 34AB *Administrative Appeals Tribunal Act 1975* (Cth) ss 43, 43(1), 43(1)(c)(ii), 43(5A), 43(5B), 43(6), 44 *Federal Court of Australia Act 1976* (Cth) s 23 *Federal Court Rules 2011* (Cth) rr 5.04(1), 5.04(3) *Judiciary Act 1903* (Cth) ss 39B, 39B(1), 39B(1A)(c) *Migration Act 1958* (Cth) ss 13, 14, 36, 36(1C), 43(5A), 43(6), 65, 189, 189(1), 196, 196(1), 196(1)(c), 476A, 476A(1), 500(1)(b), 500(4), 501, 501(1), 501(6), 501(6)(d)(i)
Cases cited:	*Al-Kateb v Godwin* (2004) 219 CLR 562 *Alsalih v Manager Baxter Immigration Detention Facility* (2004) 136 FCR 291; FCA 352 *BAL19 v Minister for Home Affairs* [2019] FCA 2189 *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Commissioner of Taxation* (2005) 148 FCR 427; FCAFC 244 *Matete v Minister for Immigration and Citizenship* [2009] FCA 187 *Minister for Home Affairs v CSH18* [2019] FCAFC 80 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54; [2003] FCAFC 70 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2019] FCA 2033

	Re Control Investments Pty Ltd & Ors and Australian Broadcasting Tribunal (No 2) (1981) 3 ALD 88 *Ruddock v Vadarlis* (2001) 110 FCR 491; [2001] FCA 1329 *Sargeson v Chief of Army* [2005] FCA 1670 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 *Tang v Minister for Immigration and Citizenship* (2013) 217 FCR 55; [2013] FCAFC 139
Date of hearing:	17 March 2020
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	90
Counsel for the Applicant:	R Francois
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the First Respondent:	Dr J Donnelly with Mr K Tang
Solicitor for the First Respondent:	Northam Lawyers
Counsel for the Second Respondent:	The second respondent did not file a submitting notice

ORDERS

NSD 269 of 2020

BETWEEN:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** Applicant
AND:	**PDWL** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

JUDGE:	**WIGNEY J**
DATE OF ORDER:	**17 MARCH 2020**

THE COURT ORDERS THAT:

1. The first respondent be released from detention forthwith.
2. The applicant's application be allocated to a docket judge and listed for case management hearing at the earliest opportunity and subsequently heard with the degree of expedition that the docket judge considers to be warranted.
3. The applicant pay the first respondent's cost of the interlocutory application as agreed or assessed.

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

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from transcript)

WIGNEY J:

1 The first respondent in these proceedings, who has been assigned the pseudonym **PDWL**, has applied for relief in the nature of a writ of habeas corpus directed to the **Minister** for Immigration, Citizenship, Migration Services and Multicultural Affairs requiring the Minister to release him from immigration detention forthwith. The Minister has also applied for an interlocutory order that his application for review of a decision of the Administrative Appeals **Tribunal** to grant PDWL a protection visa be expedited. The applications have come on for hearing before me, as duty judge, as a matter of urgency and with limited notice. As the matter concerns the liberty of PDWL, it is necessary for it to be decided without further delay.

RELEVANT BACKGROUND

2 The sequence of events that have given rise to these applications may be described in brief terms.

PDWL applies for a protection visa

3 PDWL is a citizen of Afghanistan of Hazara ethnicity. He arrived in Australia in 2012. In 2016, PDWL applied for a protection visa under s 36 of the ***Migration Act*** *1958* (Cth), specifically a Safe Haven Enterprise (Class XE) visa.

PDWL's visa application is refused

4 On 9 December 2019, a delegate of the Minister refused PDWL's visa application. The basis of that refusal was said to be that PDWL had not satisfied the delegate that he passed the "character test" and that the delegate had decided to exercise the discretion under subs 501(1) of the Migration Act to refuse PDWL's visa application on that basis.

5 Subsection 501(1) of the Migration Act provides as follows:

> **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).

6 The "character test" is defined in subs 501(6) of the Migration Act. It is unnecessary, for present purposes, to consider that definition.

7 It is worth noting that the discretion in subs 501(1) of the Migration Act is conferred on the Minister. Thus it is clear, if it were not otherwise, that the delegate was exercising the discretion to refuse PDWL's visa application as the Minister's delegate. It follows that a decision under subs 501(1) of the Migration Act which is made by a delegate of the Minister is deemed to have been made by the Minister: see s 34AB of the ***Acts Interpretation Act*** *1901* (Cth); *Minister for Home Affairs v CSH18* [2019] FCAFC 80 at [79]. There is no evidence to suggest that the delegate's delegation was limited to exercising the Minister's discretion under subs 501(1) of the Migration Act and did not otherwise extend to deciding whether or not to grant a visa to PDWL.

8 The delegate gave fairly detailed reasons for the decision to refuse PDWL's visa application. It is unnecessary to consider those reasons in any detail, other than to note that the delegate's reasons focussed almost entirely on whether PDWL passed the character test and the exercise of the discretion to refuse his visa application on the basis that he did not.

PDWL applies for a review in the Tribunal

9 On 25 December 2019, PDWL electronically filed an application in the Tribunal for a review of the decision to refuse his visa application. The Tribunal had jurisdiction to entertain that application by reason of subs 500(1)(b) of the Migration Act, which provides as follows:

> **500 Review of decision**
>
> (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
>
> …

10 Subsection 500(4) of the Migration Act excludes certain decisions from review under s 500. The delegate's decision, in PDWL's case, was not one of those excluded decisions.

The Tribunal sets aside the refusal and grants PDWL a visa

11 PDWL's review application came on for hearing before the Tribunal sometime in early 2020. Between the date of the delegate's decision and the hearing in the Tribunal, Rares J handed

down a judgment which had potential implications for decisions to refuse visas under subs 501(1) of the Migration Act. In that decision, ***BAL19*** *v Minister for Home Affairs* [2019] FCA 2189, Rares J held, amongst other things, that the terms of subs 36(1C) of the Migration Act precluded the Minister from using subs 501(1) or its analogues as a basis to refuse to grant a protection visa (at [88]).

12 It was agreed by the Minister before the Tribunal that the decision in *BAL19* required the Tribunal to set aside the delegate's decision. There was, however, a significant dispute in the Tribunal as to what decision the Tribunal could and should make under s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) in addition to setting aside the delegate's decision. Subsection 43(1) of the AAT Act provides as follows:

> **43 Tribunal's decision on review**
>
> (1A) …
>
> *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.

13 Two other relevant aspects of the operation of s 43 of the AAT Act should be noted.

14 First, unless the Tribunal specifies otherwise, a decision made by it comes into operation forthwith upon the giving of the decision: subss 43(5A) and (5B) of the AAT Act.

15 Second, a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications for review or appeals, in accordance with s 44), be deemed to be a decision of that person: subs 43(6) of the AAT Act.

16 The Minister contended that the Tribunal could, and should, set aside the decision and remit it for reconsideration by a delegate of the Minister pursuant to subs 43(1)(c)(ii) of the AAT Act. He argued that the Tribunal did not have the power under s 43 of the AAT Act to make a decision granting PDWL's visa application because the review application before the Tribunal

was only in respect of the delegate's decision under s 501 of the Migration Act. PDWL submitted, however, that the Tribunal could, and should, not only set aside the delegate's decision, but also make a decision to grant his visa application in substitution for the delegate's decision. The Tribunal heard extensive argument on that issue.

17 On 11 March 2020, the Tribunal published its Decision and **Reasons** for Decision. The Tribunal set aside the delegate's decision and substituted a decision that PDWL be granted a safe haven enterprise visa. In reaching that decision, the Tribunal rejected the Minister's submission that s 43 of the AAT Act was not "wide enough" to empower it to substitute a decision that the visa be granted to PDWL. The Tribunal recorded the Minister's submission in that regard as follows (Reasons at [17]-[18]):

> [The Minister] drew a distinction between the powers of the "section-65 delegate" and those of the "section-501 delegate", who were different people. [The Minister] submitted that the section-501 delegate does not have delegated authority to grant the visa under section 65 but only delegated authority to refuse one under section 501.
>
> It followed in [the Minister's] submission that, standing in the shoes of the section-501 delegate and exercising all the powers and discretions conferred by the *Migration Act* on the delegate who made the decision under review, I did not have authority to grant the visa under section 65, but was limited to the powers the section-501 delegate had under his or her instrument of delegation.

18 The Tribunal's reasons for rejecting that submission were as follows (Reasons at [19]):

> I do not think that section 43(1) should be interpreted in this narrow way. The reference in section 43 (1) to "all the powers and discretions conferred by any relevant enactment on the person who made the decision" should not be taken to be one to only those powers and discretions that have been conferred on a delegate (where a delegate makes a decision). [The Minister] conceded quite properly that if in this case, for example, the section-501 delegate had the powers of the section-65 delegate as well, it would follow on [the Minister's] argument that the Tribunal would have power to grant a visa. In my opinion, the conferral of power on this Tribunal in section 43(1) was not intended to be affected by the chance division of delegated authority in the Minister's department. Rather, in my opinion, the reference to "all the powers and discretions conferred on the person who made the decision" should be taken to be a reference to the powers and discretions that are conferred on the person who is nominated in the Act as the decision-maker (whether or not that person has delegated his or her authority to make the decision). Although a delegate may be said in law to act in his own name, and not as an agent, it is nevertheless the case that a delegate acts by virtue of a derived, and not an original, authority. In this case, it is accurate to say the Minister is responsible in law for the decision taken by his or her delegate under the instrument of delegation the Minister has executed. There is no reason to view the reference in s 43(1) to "all the powers and discretions of the person who made the decision" as excluding the powers and discretions of the delegator. [The Minister's] submission also implies that s 43(1) will operate differently when a decision is taken on behalf of the nominated decision-maker rather than under a delegation. In such a case, the act is taken in law to be the act of the nominated decision-maker.

(Footnotes omitted.)

19 The Tribunal also rejected the Minister's submission that, because the matter came before the Tribunal on a review of a decision under s 501, the Tribunal "did not have any authority to exercise any powers outside section 501". In response to that argument, the Tribunal referred to two decisions: first, the decision of the President of the Tribunal in *Re Control Investments Pty Ltd & Ors and Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88; and second, a decision of the Full Court in *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Commissioner of Taxation* (2005) 148 FCR 427; FCAFC 244.

20 The Tribunal, having referred to those authorities, reasoned as follows (Reasons at [24]):

> I think these two authorities make it clear that the Tribunal's jurisdiction extends in this case to a decision that the protection visa be granted provided that it is taken for the purpose of reviewing the decision under review. In this regard, it is important to bear in mind that what was refused under section 501 was an application for a specific visa. There is, in my opinion, no limitation on the Tribunal's jurisdiction preventing it from deciding to grant the requested visa if that decision is taken for the purpose of reviewing the refusal of the visa by the delegate. I make the obvious point that whether the jurisdiction exists in law is not the same question as whether the jurisdiction should be exercised in any given case.

21 Finally, the Minister had submitted that the Tribunal's power to substitute a new decision did not "extend in law to a decision that a visa be granted". That submission was apparently based on what was said to be the Tribunal's "universal practice" in the Migration and Refugee Division of the Tribunal. The Tribunal held that, even if that practice did exist, it did not provide any reason for limiting the Tribunal's powers under s 43 of the AAT Act.

22 It should be emphasised at this point that it is clear from the Tribunal's reasons that the Minister had conceded in the Tribunal that, putting the impugned s 501 decision to one side, PDWL otherwise satisfied all the criteria in s 36 of the Migration Act for the grant of a protection visa. The only thing standing in the way of a grant of the visa to PDWL was the finding that he did not satisfy the "character test" in subs 501(6) of the Migration Act. Once it was accepted, on the basis of the decision in *BAL19*, that subs 501(1) provided no basis to refuse a protection visa, it followed that it was open to the Tribunal to decide to grant a protection visa to PDWL. The Tribunal noted in that regard (Reasons at [34]):

> However that may be, the matter has now come before the Tribunal on a review. [The Minister] conceded properly that all valid criteria in section 36 and the Regulations were satisfied, although [the Minister's] formal position was that *BAL19* was wrongly decided. I note that section 65 of the [Migration] Act provides that the Minister "is to grant the visa" if satisfied of the requisite matters.

23 The Tribunal concluded as follows (Reasons at [35]):

> Since [PDWL] satisfies all criteria for the grant of a visa (with the exception of one criterion that has been found to be invalid in *BAL19*), I see no reason why I should not decide that [PDWL's] application for a visa should be granted. It is in my opinion the preferable course to take in the exercise of my jurisdiction. I note that I am obliged under section 2A of the *AAT Act* to pursue the objective of providing a mechanism that is, amongst other things, "fair, just, economical, informal, and quick". In the circumstances of this case, where the [Minister] fully accepts that there is no impediment to the grant of a visa (except for the question of character which has been determined by the Federal Court to be legally irrelevant), I have decided I should finalise this matter by substituting a decision that [PDWL] be granted a safe haven enterprise visa under s 36. In this regard, I would note that [PDWL] indicated at the hearing that he has been in detention for some considerable time and is understandably anxious to be reunited with his wife and children. In the circumstances, the grant of the visa should be made promptly.

24 The Tribunal accordingly decided to set aside the decision under review and substitute a decision that PDWL be granted a safe haven enterprise visa.

25 It should finally be noted that, by reason of subss 43(5A) and (6) of the Migration Act and s 24AB of the Acts Interpretation Act, the Tribunal's decision to grant a protection visa came into operation forthwith and was deemed to be a decision of the Minister.

PDWL remains in immigration detention

26 It is important to emphasise that at the time the Tribunal was considering his review application, PDWL was in immigration detention. That was because, by reason of the delegate's decision to refuse his visa application, he was an unlawful non-citizen. Section 14 of the Migration Act helpfully defines an "unlawful non-citizen" as a non-citizen in the migration zone who is not a lawful non-citizen. A lawful non-citizen, on the other hand, is defined in s 13 of the Migration Act as "a non-citizen in a migration zone who holds a visa that is in effect".

27 The effect of subss 189(1) and 196(1)(c) of the Migration Act is that an unlawful non-citizen must be detained and kept in immigration detention until, relevantly, he or she is granted a visa.

28 Subsection 189(1) of the Migration Act provides as follows:

> **189 Detention of unlawful non-citizens**
>
> (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

29 Subsection 196(1) of the Migration Act provides as follows:

> **196 Duration of detention**

> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
>
> (a) he or she is removed from Australia under section 198 or 199; or
>
> (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
>
> (b) he or she is deported under section 200; or
>
> (c) he or she is granted a visa.

30 PDWL was not released from immigration detention on 11 March 2020 when the Tribunal, acting pursuant to s 43 of the AAT Act and exercising the Minister's powers conferred under the Migration Act, granted PDWL a visa. That was despite the clear terms of subs 196(1)(c) of the Migration Act which, in effect, required he be released because he had been granted a visa. He was no longer an unlawful non-citizen because he had been granted a visa.

31 The basis upon which PDWL was kept in immigration detention was never properly explained by the Minister. It ultimately became readily apparent, however, that PDWL was not released from immigration detention simply because the Minister did not like the Tribunal's decision.

THE MINISTER'S REVIEW APPLICATION

32 On 11 March 2020, the Minister filed an application in this Court for judicial review of the Tribunal's decision. The relief sought by the Minister included the issue of a writ of certiorari to quash the Tribunal's decision and the issue of a writ of mandamus directed to the Tribunal requiring it to hear and determine PDWL's application for review of the decision made by a delegate of the Minister under subs 501(1) of the Migration Act according to law.

33 The sole ground of that application is that the Tribunal erred in its decision by purporting to grant PDWL a Safe Haven Enterprise (Class XE) visa when it had no jurisdiction to do so. The Tribunal was said to have had no jurisdiction to grant the visa to PDWL because its jurisdiction to review the delegate's decision was, on a proper construction of s 501 of the Migration Act and s 43 of the AAT Act, confined to the decision that had been made by the delegate under subs 501(1). The Minister contended that the Tribunal's decision did not extend to granting a visa under s 65 of the Migration Act.

34 The Minister also sought interlocutory relief. That relief was that the hearing of his application for judicial review of the Tribunal's decision be expedited. The Minister also sought an order that the application for interlocutory relief be heard *instanter*. It should be noted, in this context, that the interlocutory relief sought by the Minister did not extend to or include an order

that the Tribunal's decision be stayed or that the Court immediately hear his application that the Tribunal's decision be quashed. The Minister simply sought that the hearing of his substantive application be expedited.

35 The Minister's interlocutory application for expedition came on for hearing before Perry J sitting as duty judge on 12 March 2020. Her Honour did not make an order expediting the Minister's application. Instead, her Honour made the following orders:

1. On or before **5pm** on **Monday 16 March 2020** the applicant is to file and serve an affidavit by an appropriate officer from the applicant's Department explaining whether the first respondent is still in immigration detention and, if so, an officer with actual knowledge should also explain why he is still in immigration detention.
2. The matter be listed for a case management hearing at **9am** on **Tuesday 17 March 2020**.

36 Two matters should be noted at this point.

37 First, PDWL remained in immigration detention on 12 March 2020. It is abundantly clear that Perry J wanted to know why that was so.

38 Second, an affidavit sworn by the Minister's solicitor which accompanied the Minister's application included the following statement about PDWL's detention (at paragraph 8.1):

> The effect of the AAT's decision is that the First Respondent [PDWL] has been granted the Visa and he is in the process of being released from Yongah Hill Immigration Detention Centre in Western Australia at the time this affidavit is being affirmed.

39 The clear impression conveyed by that statement was that the Minister appreciated that, as a result of the Tribunal's decision, it was necessary to release PDWL from immigration detention and that his release was being attended to. It would appear, however, that that was either a false impression, or that the Minister changed his mind at some stage after the affidavit was sworn, or perhaps, at the risk of sounding flippant or facetious, the process of releasing PDWL from immigration detention was taking an inexplicably long time. That is because PDWL was still in immigration detention when the matter next came before the Court five days later on 17 March 2020.

PDWL'S HABEAS CORPUS APPLICATION

40 On 16 March 2020, PDWL, who by now had the good fortune of having obtained pro bono legal assistance, filed an interlocutory application seeking the following relief:

1. There issue a writ of habeas corpus directed to the applicant, requiring it to release the first respondent from immigration detention forthwith.

2. In the alternative to order 1, an order in the nature of a writ of habeas corpus directed to the applicant, requiring it to release the first respondent from immigration detention forthwith.

3. In the alternative to orders 1-2, there issue a writ of mandamus directed to the applicant, requiring it to release the first respondent from immigration detention forthwith.

4. The applicant pay the first respondent's costs of this interlocutory application as agreed or assessed.

41 A request was made for PDWL's application to be listed at the same time as the Minister's application for expedition.

42 Late on the afternoon of 16 March 2020, the Minister filed an affidavit in purported compliance with the order made by Perry J. That affidavit was sworn by Ms Marian Otigwoheh **Agbinya**, who said that she was a solicitor currently employed as the Acting Assistant Secretary of the Migration and Citizenship Litigation Branch in the Legal Division, Corporate and Enabling Group of the Department of Home Affairs.

43 At paragraph 6 of her affidavit, Ms Agbinya stated as follows:

> As at the time of swearing this affidavit, I am informed and verily believe that the First Respondent [PDWL] is detained at the Yongah Hill Immigration Detention Centre in Western Australia.

44 Somewhat remarkably, given the clear terms of Perry J's order, Ms Agbinya went on to depose, at paragraph 9 of her affidavit, as follows:

> I confirm that I have actual knowledge of why the First Respondent [PDWL] remains in immigration detention. However, to provide an explanation of the reason why the First Respondent remains in immigration detention would reveal legal advice that is subject to legal professional privilege.

45 It is difficult, if not almost impossible, to imagine how the Minister, or anyone else, could have sensibly formed the view that this affidavit complied with Perry J's order. It provided no explanation whatsoever for why PDWL remained in immigration detention. More will be said about that in due course.

46 PDWL's interlocutory application for a writ in the nature of habeas corpus was in due course listed for hearing before me, sitting as duty judge, along with the Minister's interlocutory

application for expedition. As it was apparent that PDWL was still in immigration detention in a detention centre near Perth, I ordered that the two applications be listed before me at 2.15 pm on 17 March 2020 and that PDWL be conveyed to a courtroom in the Western Australian Registry of the Court for the hearing of the applications.

THE MINISTER'S APPLICATION FOR EXPEDITION

47 The Minister's application for expedition can be dealt with shortly.

48 The only evidence tendered by the Minister in support of his application for expedition was the delegate's decision and the Tribunal's Reasons. The only real basis of the application was, in substance, that the Minister contended that the Tribunal's decision was plainly wrong and that his argument that the Tribunal acted beyond jurisdiction was overwhelmingly strong.

49 It was also submitted that there was a risk that other Tribunal members might follow the Tribunal's decision in this matter and that that could have "quite significant" practical consequences. There was, however, no evidence which provided any support for the Minister's submission in that regard. There was, for example, no evidence that any other review applications which raised similar issues to this matter had been decided by the Tribunal, or were currently before the Tribunal, or were likely to come before the Tribunal in the near future. The Minister's claim that there were potentially significant practical consequences if his review application was not expedited was therefore at best hypothetical or speculative.

50 As for the Minister's contention that the Tribunal's decision was plainly wrong, it is neither necessary nor desirable to refer, at length, to the Minister's arguments in support of the proposition that the Tribunal's decision was beyond power or jurisdiction. In simple terms, the Minister argued that the Tribunal's jurisdiction was limited to reviewing the delegate's decision under subs 501(1) of the Migration Act. It did not extend to the Minister's decision to refuse to grant the visa. The Minister submitted that the task of the Tribunal in reviewing the delegate's decision was to be identified by considering together the operation of both the general provision in s 43 of the AAT Act and the specific provision in s 501 of the Migration Act. The Minister relied, in that context, on what was said by the majority of the High Court, albeit in a different context, in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [25] (per Kirby J) and [93] (per Hayne and Heydon JJ).

51 The Minister also relied on the decision of Rares J in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2019] FCA 2033, though somewhat

ironically it was noted that the Minister had appealed that judgment. In any event, in that case the Minister's delegate had decided that the applicant did not pass the character test in subs 501(6) of the Migration Act because her circumstances fell within subs 501(6)(d)(i). On review, the Tribunal found that its review jurisdiction was limited to considering that issue and no more and that the Minister could not broaden the review to include whether the applicant failed the character test by reason of one of the other subparagraphs of subs 501(6). Rares J upheld that finding, reasoning (at [68]) that because "the criterion in s 501(6)(d)(i) was the ground of [the delegate's] decision in the exercise of the power under s 501(1), that ground confined the issues on the review".

52 Finally, the Minister relied on the fact that PDWL's application to the Tribunal stated that the delegate's decision which was the subject of the review application was "his/her discretion to not refuse the visa application under s 501" of the Migration Act.

53 It may be accepted, for the purposes of the Minister's application for expedition, that the Minister has a reasonably arguable case that in granting the visa to PDWL, the Tribunal exceeded its jurisdiction. The Minister's arguments are not, however, so overwhelmingly clear or strong as to suggest that the Tribunal's decision be quashed or set aside without further ado. Nor, indeed, are they so clear or strong as to alone warrant an order for expedition.

54 The Minister's arguments are supported, to an extent, by the observations made in both *Shi* and *CPJ16*, though both those cases involved quite different questions of construction and quite different facts and circumstances. Those cases are by no means determinative of the critical issue in this case. The terms of PDWL's application to the Tribunal is of little moment. The Minister must also overcome the fact that the decision under review was the decision made by the Minister, by his delegate, to refuse PDWL's application for a protection visa and that, in that context, subs 43(1) of the AAT Act provides that in 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". There could be little doubt that the Migration Act conferred on the Minister a power and discretion to grant a visa to PDWL. Why then, was the Tribunal not empowered, by reason of subs 43(1), to grant a visa to PDWL?

55 The Minister's contention that he has overwhelming strong grounds for arguing that the Tribunal acted beyond jurisdiction provides no sound reason for granting his application for expedition. While he may have reasonably arguable grounds, they are not overwhelmingly strong. Nor does his speculative assertion, unsupported by evidence, that the Tribunal's

decision may have significant practical consequences if followed by other Tribunal members. No other reasons or arguments for expedition were advanced. In all the circumstances, the Minister has failed to demonstrate any sound basis for the expedition of his review application. That alone would provide a sufficient justification for the dismissal of the Minister's interlocutory application for expedition.

56 There is, however, another powerful reason for dismissing the Minister's application for expedition. The power to order expedition proceedings in this Court is discretionary: r 5.04(1) and item 2 of r 5.04(3) of the *Federal Court Rules 2011* (Cth). The conduct of the parties may, depending on the circumstances, be a relevant consideration in the exercise of that discretion. It is in the circumstances of this case.

57 The conduct of the Minister in this case, on just about any view, has been disgraceful. Putting aside the fact that PDWL remains in detention, despite having been granted a visa on 11 March 2020, that is, six days prior to the hearing of these applications, the Minister appears to have willingly and flagrantly failed to comply with the orders made by Perry J on 12 March 2020. That order required the Minister to file an affidavit by an appropriate officer in his Department with actual knowledge of why PDWL was still in immigration detention. The affidavit filed in purported compliance with that order contained no such explanation. Rather, it sought to conceal any explanation behind the cloak of legal professional privilege.

58 Putting aside the Minister's undoubted ability to waive any privilege if he wished to do so, I have little doubt that an explanation could have been given for the continuing detention of PDWL which did not involve the disclosure of any privileged information. The reasons for the continuing detention could have been explained by an officer who was not a solicitor and the explanation could undoubtedly have been given without exposing any legal advice that may have supported that explanation. It may perhaps be inferred that the only explanation that the Minister had for the continuing detention of PDWL was that he, or someone in his Department, thought that the Tribunal's decision was wrong. It would appear, however, that either no officer in the Minister's Department was prepared to depose to that fact, or the Minister was simply prepared to ignore the clear terms of Perry J's order.

59 The Minister's failure to comply with the order made by Perry J on 12 March 2020 provides another reason to refuse his application for expedition.

PDWL'S APPLICATION FOR HABEAS CORPUS

60 Despite not complying with the terms of Perry J's order and not providing an explanation for PDWL's continuing detention, the Minister opposed PDWL's habeas corpus application. He did so on two grounds: first, that the Court had no jurisdiction to entertain the action; and second, that PDWL's continued detention was lawfully justified under subs 189(1) of the Migration Act.

Jurisdiction to order PDWL's release from detention

61 The Minister sought to argue that the Court had no jurisdiction to entertain PDWL's application by reason of s 476A of the Migration Act. Subsection 476A(1) of the Migration Act provides as follows:

> **476A Limited jurisdiction of the Federal Court**
>
> (1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:
>
> (a) the Federal Circuit Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Circuit Court of Australia Act 1999*; or
>
> (b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or
>
> (c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA; or
>
> (d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.
>
> Note: An appeal in relation to any of the following migration decisions cannot be made to the Federal Court under section 44 of the *Administrative Appeals Tribunal Act 1975*:
>
> (a) a privative clause decision;
>
> (b) a purported privative clause decision;
>
> (c) an AAT Act migration decision.
>
> In addition, reference of a question of law arising in relation to a review of any of the proceedings mentioned in paragraph (a), (b) or (c) cannot be made by the Tribunal to the Federal Court under section 45 of the *Administrative Appeals Tribunal Act 1975*.
>
> The only migration decisions in relation to which an appeal under

> section 44 of that Act, or a referral under section 45 of that Act, can be made to the Federal Court are non-privative clause decisions.

62 The Minister sought to characterise PDWL's application for a writ in the nature of habeas corpus as an application "in relation to a migration decision". That was said to be because some hypothetical officer somewhere in the Commonwealth must have made a decision to detain the first respondent under subs 189(1) of the Migration Act. The Minister did not adduce any evidence that any officer had in fact turned his or her mind to subs 189(1) of the Act at any time after the Tribunal's decision, or that any officer had in fact made a decision under subs 189(1) of the Act. One wonders why, if there was in fact such an officer, he or she did not swear an affidavit in compliance with the orders made by Perry J on 12 March 2020.

63 In any event, the Minister's characterisation of PDWL's application for habeas corpus as being a review of a hypothetical decision by the hypothetical officer to detain PDWL under subs 189(1) of the Migration Act has no merit and is rejected. The fact that PDWL has been detained does not mean that a decision was made, or must have been made, by an officer to detain him under subs 189(1) of the Migration Act. No decision under the Migration Act is required as a precondition to the power and duty to detain an unlawful non-citizen: *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Al Masri*** (2003) 126 FCR 54; [2003] FCAFC 70 at [31]. Moreover, once a person is detained in immigration detention, the "sphere of operation of s 189 is complete" and the person's continuing detention is provided for in s 196: *Al Masri* at [30]. It follows that PDWL's claim that he is unlawfully detained now and should be released has nothing whatsoever to do with any decision by an officer under s 189 of the Migration Act. If anything, it concerns whether his continuing detention is authorised by subs 196(1) of the Migration Act.

64 PDWL's application is properly characterised as an application for relief against an officer or officers of the Commonwealth for unlawful detention. That relief could be seen as being relief in the nature of a mandatory injunction compelling the officer or officers to release PDWL from detention. Such an action would be within the Court's jurisdiction conferred by subs 39B(1) of the ***Judiciary Act*** *1903* (Cth). It might equally be said that the Court has jurisdiction to entertain PDWL's application under subs 39B(1A)(c) of the Judiciary Act. That is because the only suggested basis for the continuing detention of PDWL was under subs 189(1) or some other provision of the Migration Act.

65 Even if, as the Minister contended, PDWL's application could properly be characterised as an application for review of an officer's decision to detain him under subs 189(1) of the Migration

Act, there is no substance in the Minister's submission that s 476A of the Migration Act deprives the Court of its jurisdiction, under s 39B of the Judiciary Act or otherwise, to entertain his application. That is because an application to review a decision to detain a person under subs 189(1) of the Migration Act is not an "application in relation to a migration decision" for the purposes of s 476A of the Migration Act.

66 The Minister relied, in support of his contention that s 476A of the Migration Act effectively ousted the Court's jurisdiction to entertain PDWL's application, on the decision of the Full Court in ***Tang*** *v Minister for Immigration and Citizenship* (2013) 217 FCR 55; [2013] FCAFC 139. He submitted that *Tang* established that the Court's jurisdiction under s 476A "is a very narrow jurisdiction".

67 The decision in *Tang* provides no support for the Minister's argument in relation to the operation of s 476A in the circumstances of this case. The question in *Tang* was whether a decision of the Federal Circuit Court of Australia to refuse to grant an applicant an extension of time to seek judicial review of a decision of the then Migration Review Tribunal was a "migration decision" for the purposes of s 476A of the Migration Act. The Full Court held that it was not. The main reason given for so concluding was that the expression "in relation to a migration decision" was confined to "applications for direct judicial review of migration decisions and does not extend to ancillary judicial review proceedings", including proceedings where judicial review is sought of orders made by the Federal Circuit Court in respect of an underlying migration decision (at [9]).

68 Importantly, however, the Full Court also made the following observation (at [7]):

> The expression 'in relation to a migration decision' appears throughout Division 2 of Part 8. In particular, ss 477 and 477A require proceedings 'in relation to a migration decision' in the original jurisdiction of the Federal Circuit Court and in this Court's circumscribed original jurisdiction to be commenced within 35 days of the migration decision. *These time limits make little sense if proceedings 'in relation to a migration decision' were to include collateral challenges to the underlying migration decision such as might occur in a case alleging false imprisonment*.
>
> (Emphasis added.)

69 Thus, the Full Court considered that an action for false imprisonment would not be an action "in relation to a migration decision" even if it involved a collateral challenge to a migration decision. The application by PDWL is an action for a remedy for unlawful detention. Even if it could be said to relate in some way to a hypothetical decision by an officer to detain PDWL under subs 189(1) of the Migration Act, the most that could be said is that it involves a collateral

challenge to that decision. That is because, as established by *Al Masri*, PDWL's continuing detention could only be authorised by s 196(1), not s 189(1) of the Migration Act. The observations in *Tang* would suggest that PDWL's application is not an application "in relation to" any decision that may have been made under subs 189(1) if it only involves a collateral challenge to that decision.

70 Putting the Minister's contentions concerning the operation of s 476A of the Migration Act to one side, it has long been accepted that the Court has jurisdiction to entertain applications for relief in the nature of habeas corpus, or at least jurisdiction to hear applications for injunctions to test the lawfulness of a person's detention under the Migration Act.

71 In ***Ruddock*** *v Vadarlis* (2001) 110 FCR 491; [2001] FCA 1329, Black CJ (at [71]) described habeas corpus as "a remedy directed to the relief of a person's detention without lawful authority, at a particular place and time". Black CJ also observed (at [66]) that neither party contested the proposition that this Court has jurisdiction to make an order "in the nature of habeas corpus". Although Beaumont J found (at [101]) that the Court was not invested with the power to issue such a writ, his Honour found (at [106]) that the Court could entertain a claim for an order "in the nature of" a writ of habeas corpus, the power to so order being found in s 23 of the *Federal Court of Australia Act 1976* (Cth) (***Federal Court Act***). French J (at [208]) described habeas corpus as being "concerned with restraints on liberty imposed by a public officer or authority" and (at [164]) affirmed that, although the particular act of the Commonwealth in question in that case was not amenable to habeas corpus, there was no suggestion that the Court lacked jurisdiction to entertain an application for the writ of habeas corpus. His Honour considered that the Court's jurisdiction to entertain such an application was to be found in s 39B of the Judiciary Act and that the power to make appropriate orders in respect of such an application was in s 23 of the Federal Court Act.

72 In this context, Gleeson CJ's obiter observations in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [24]-[28] should also be noted. Although his Honour was in dissent in that judgment, the question of whether this Court had jurisdiction to issue a writ of habeas corpus was not argued before the High Court. His Honour was the only member of the court to address that issue. His Honour referred (at [24]) to the apparent division of opinion in *Ruddock* as to whether this Court had the power to issue a writ of habeas corpus, or to make an order in the nature of habeas corpus, under s 23 of the Federal Court Act read with s 39B of the Judiciary Act. His Honour then noted that "[e]ven if the power is best described as a power to make an order in the nature

of habeas corpus, that is what was sought". His Honour did not express any doubt about this Court's jurisdiction to exercise that power. His Honour also observed (at [25]) that the "remedy of habeas corpus, or an order in the nature of habeas corpus, is a basic protection of liberty, and its scope is broad and flexible".

73 In *Al Masri*, the Full Court dismissed an appeal from a judgment and order of a judge of this Court that a person be immediately released from immigration detention in circumstances where that detention was no longer authorised or justified by subs 196(1) of the Migration Act. There does not appear to have been any doubt or dispute about the Court's jurisdiction to entertain such an action. The Full Court did, however, (at [170]) reject the contention that an application for relief in the nature of habeas corpus was fundamentally misconceived in the particular circumstances of that case and endorsed the proposition that a writ of habeas corpus provided an "immediate remedy".

74 In ***Alsalih*** *v Manager Baxter Immigration Detention Facility* (2004) 136 FCR 291; FCA 352, Selway J considered (at [24]-[39]) the authorities in relation to the Court's jurisdiction to issue a writ of habeas corpus or to make orders "in the nature of habeas corpus". His Honour (at [41]) expressed agreement with what Beaumont J said on that topic in *Ruddock* and doubted that the Court had jurisdiction to grant a writ of habeas corpus. Selway J ultimately resolved the issue on the basis that the Court plainly had jurisdiction to entertain injunctive proceedings to determine the lawfulness of detention under the Migration Act, as well as jurisdiction to order release if the detention was found to be unlawful (at [40]). His Honour observed (at [43]) that the "practical effect" of such injunctive relief "would be the same as if the detention were found to be unlawful upon a writ of habeas corpus".

75 The conclusion arrived at by Selway J in *Alsalih* was cited with approval by Jacobson J in *Sargeson v Chief of Army* [2005] FCA 1670. His Honour stated in that regard (at [38]) that "if the Commonwealth has no lawful authority to detain a person, so that if the court is satisfied that the detention is unlawful, the court can order the officer of the Commonwealth to release that person".

76 The jurisprudence in relation to the Court's jurisdiction to issue a writ of habeas corpus, or make an order in the nature of habeas corpus, was helpfully summarised by Stone J in *Matete v Minister for Immigration and Citizenship* [2009] FCA 187 at [10]:

> It is not uncommon for this Court to be asked to grant a writ of *habeas corpus* or more commonly, as in this case, an order "in the nature of habeas corpus". There has been

> considerable discussion in previous cases concerning the Court's jurisdiction to grant such relief and the jurisprudential basis for any such jurisdiction: see generally *Ruddock v Vardarlis* [2001] FCA 1329; (2001) 110 FCR 491; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70; (2003) 126 FCR 54; *Alsalih v Manager, Baxter Immigration Detention Facility* [2004] FCA 352; [2004] 136 FCR 291 and *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 at [24]- [28] per Gleeson CJ (dissenting). It unnecessary for me to discuss the issue except to say that, in so far as the remedy of habeas corpus is directed to relief from unlawful imprisonment, this Court has jurisdiction in relation to an officer of the Commonwealth both to determine if detention is lawful and to order a person's release when it is not lawful; *Judiciary Act 1903* (Cth) s 39B; *Federal Court of Australia Act 1976* (Cth) s 22; *Alsalih* at [41]-[42], *Sargeson v Chief of Army* [2005] FCA 1670; (2005) 225 ALR 249 at [37]- [39]. The critical issue is, however, that the detention be unlawful. …

77 The Minister's contention that the Court does not have jurisdiction to entertain PDWL's application has no merit and is rejected. That is so whether it be considered to be an application for a writ of habeas corpus, an action in the nature of habeas corpus, an action for injunctive relief against an officer of the Commonwealth, or an action in respect of a matter arising under the Migration Act. Either way, the Court has jurisdiction to entertain such an application under s 39B of the Judiciary Act and power to make an order releasing a person from detention under s 23 of the Federal Court Act. The Court's jurisdiction to entertain such an action is not affected in any way by s 476A of the Migration Act because it is not an action in relation to a migration decision.

Is the current detention of PDWL unlawful?

78 The question then is whether the current detention of PDWL is unlawful.

79 The case advanced by PDWL in relation to that issue was straightforward. The Tribunal granted him a visa. He is therefore no longer an unlawful non-citizen and his detention is not authorised under s 196 of the Migration Act. The Minister was ordered to file an affidavit explaining why PDWL was still in immigration detention. He did not do so.

80 The Minister's case in response can also be shortly stated. The Minister submitted that PDWL is lawfully detained because it would be open to an officer to detain PDWL under subs 189(1) of the Migration Act. That was said to be because that hypothetical officer could reasonably form the suspicion that PDWL was an unlawful non-citizen, even though the Tribunal had granted him a visa, because the officer could reasonably believe that the Tribunal's decision was a nullity.

81 That contention can be and is rejected for a number of reasons.

82 First, the Tribunal's decision is not a nullity until the Court sets it aside and declares that it is a nullity. It may, of course, be readily accepted that if that occurs, the decision is then treated as having been a nullity at all times; that is, it is treated as if the decision was never made: cf. *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 612-613, 618, 643-647. That may no doubt have other implications. But it does not mean that the Tribunal's decision can reasonably be considered to be a nullity by some hypothetical officer of the Minister's Department simply because he or she thinks that the Court might eventually, or even will eventually, declare it to be so.

83 The decision has not yet been set aside or declared by the Court to be a nullity. While the Minister may have reasonable arguments as to why the Court should, at some stage in the future, declare it to be a nullity, that has not yet occurred. The Minister, or officers in his Department, cannot simply ignore, or decide to give no effect to, a decision of the Tribunal simply because they do like it or believe it is wrong.

84 Second, the effect of the Tribunal's decision is that, unless and until the Court sets the Tribunal's decision aside, or declares it to be a nullity, PDWL can no longer be detained. Subsection 196(1)(c) of the Migration Act effectively so provides: *Al Masri* at [34].

85 Third, the Minister's contention that PDWL's continuing detention is somehow authorised by subs 189(1) of the Migration Act misconceives the operation of that section. As was noted earlier, the Full Court in *Al Masri* concluded (at [30]) that "the sphere of operation of s 189 is complete once a person is detained in immigration detention and … thereafter continuing detention is provided for by s 196". The continuing detention of PDWL therefore cannot be justified by reference to some hypothetical decision under subs 189(1) of the Migration Act. If s 196 "[does] not operate to render lawful the continued detention of an unlawful non-citizen" that consequence cannot "be avoided by a succession of repeated actions to detain under s 189": *Al Masri* at [30].

86 Fourth, while it may be accepted that the Minister has a reasonably arguable case that the Tribunal's decision was beyond jurisdiction and should be set aside, that itself does not justify PDWL's continued detention. Indeed, even if the Minister's arguments were considered to be extremely strong, which I do not necessarily accept to be the case, PDWL's detention would still not be authorised by subs 189(1) as contended by the Minister. Nor would it be justified under subs 196(1) of the Migration Act. Detention under either of those sections would only be justified if and when the decision is struck down at some stage in the future.

CONCLUSION AND DISPOSITION

87 The Minister did not seek to justify PDWL's continuing detention on any basis other than that a decision had been made under subs 189(1) of the Migration Act. For the reasons just given, subs 189(1) of the Migration Act can provide no justification for the continuing detention of PDWL. It follows that he is currently being unlawfully detained. That state of affairs should be immediately remedied. The appropriate remedy is an order that he be immediately released. I do not consider that it is necessary or useful to express that order in terms of the issue of a writ of habeas corpus, or an order in the nature of habeas corpus. As PDWL has been brought before the Court, it is unnecessary to direct that the Minister or any particular officer who is responsible for his detention release PDWL from detention. It is sufficient that I simply order his release forthwith.

88 As for the Minister's application for expedition, for the reasons given earlier that application should be dismissed. The matter should, however, be docketed to a judge of this Court as soon as possible. The docket judge can then determine the degree of expedition that is warranted.

89 I propose to make the following orders:

1. First, that PDWL be released from detention forthwith.
2. Second, that the Minister's originating application for review of the Tribunal's decision be allocated to a docket judge and listed for case management hearing at the earliest opportunity and subsequently heard with the degree of expedition that the docket judge considers to be warranted.
3. Third, that the Minister pay PDWL's costs of the interlocutory application as agreed or assessed.

90 I should finally express the Court's gratitude to pro bono counsel and solicitors who appeared for PDWL on these applications.

I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 17 March 2020