FEDERAL COURT OF AUSTRALIA

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL (costs) [2021] FCAFC 75

Appeal from:	*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 1354
File number:	NSD 1160 of 2020
Judgment of:	**MCKERRACHER, BURLEY AND O'CALLAGHAN JJ**
Date of judgment:	19 May 2021
Catchwords:	**COSTS** – costs of proceedings at first instance – whether the ordinary rule that a successful appellant is entitled to costs at first instance should be disturbed – whether the Minister engaged in disentitling conduct
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 27, 43, 43(2)
Cases cited:	*Arian v Nguyen* [2001] NSWCA 5 *Austen v Ansett Transport Industries (Operations) Pty Ltd* [1993] FCA 403 *Australian Crime Commission v NTD8 (No 2)* [2009] FCAFC 143 *Golski v Kirk* [1987] FCA 200; (1987) 14 FCR 143 *GR Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSWCA 263 *Grass v Minister for Immigration and Border Protection (No 2)* [2015] FCAFC 61 *Minister for Immigration and Border Protection v CQZ15 (No 2)* [2018] FCAFC 19; (2018) 259 FCR 569 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2021] FCAFC 48 *National Mutual Life Association of A/asia Ltd v Windsor* [1991] FCA 64; (1991) 28 FCR 214 *Ngarluma Aboriginal Corporation RNTBC v Ramirez (No 2)* [2018] FCA 2042 *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; (2001) 115

	FCR 229 *Scherer v Counting Instruments Ltd* [1986] 1 WLR 615 *TAI-AO Aluminium (Australia) Pty Ltd v Cordukes* [2004] FCA 1488; (2004) 51 ACSR 465 *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 3)* (1979) 28 ALR 201; (1979) 42 FLR 213 *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 *Viane v Minister for Immigration and Border Protection (No 2)* [2018] FCAFC 175 *Victoria International Container Terminal Ltd v Lunt* [2021] HCA 11; (2021) 95 ALJR 363 *Waterman v Gerling Australia Insurance Company Pty Ltd (No 2)* [2005] NSWSC 1111
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	26
Date of last submissions:	22 April 2021 (Appellant) 11 April 2021 (First Respondent)
Date of hearing:	Determined on the papers
Counsel for the Appellant:	Mr G Kennett SC, with Mr B Kaplan
Counsel for the First Respondent:	Dr J Donnelly
Counsel for the Second Respondent:	The Second Respondent did not file any submissions

ORDERS

NSD 1160 of 2020

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

ORDER MADE BY:	**MCKERRACHER, BURLEY AND O'CALLAGHAN JJ**
DATE OF ORDER:	**19 MAY 2021**

THE COURT ORDERS THAT:

1. There be no order as to costs at first instance.

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

REASONS FOR JUDGMENT

THE COURT:

1 On 1 April 2021, we allowed the appellant's (**Minister**'s) appeal and made orders remitting the matter to the Administrative Appeals **Tribunal** with no order as to the costs of the appeal: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2021] FCAFC 48 (***PDWL (appeal)***). Having observed in *PDWL (appeal)* (at [90]) that the position with respect to costs, particularly at first instance, was not straightforward, the parties were granted leave to apply for their costs at first instance and file short written submissions. The first **respondent** now seeks his costs at first instance from the Minister. After contending at the hearing of the appeal that the respondent should pay the Minister's costs at first instance, the Minister now submits that there should be no order as to costs. For the reasons that follow, the appropriate position is that there be no order as to the costs of the proceedings at first instance. Where appropriate, terms defined in *PDWL (appeal)* are also used in these reasons.

THE RESPONDENT'S ARGUMENTS

2 The respondent advances four arguments in support of his claim for costs at first instance, the foremost of which is that the Minister engaged in disentitling conduct over the course of the proceeding such that a costs order should be made against him despite his success on the merits. Our findings about the conduct of the relevant personnel within the Minister's Department in relation to the continued detention of the respondent (at [35] in *PDWL (appeal)*) are relied upon in this regard, in particular, the portions bolded below:

> 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.**
>
> (Emphasis added.)

3 The respondent emphasises the Minister's failure to adequately comply with the orders of Perry J made on 16 March 2020 in which her Honour ordered the Minister to file an affidavit from an appropriate officer with actual knowledge of the respondent's situation to explain whether the respondent was still in detention and, if so, why. For the reasons given in *PDWL (appeal)* (at [8]-[10], [49]-[50], [56], [68] and [71]) the March Agbinya affidavit did not comply with Perry J's order. The respondent relies on the following statement from Edelman J in *Victoria International Container Terminal Ltd v Lunt* [2021] HCA 11; (2021) 95 ALJR 363 (at [45]), where his Honour appeared to imply that the concealment by a party of relevant matters from a court might be remedied by a costs order against that party:

> The judicial response where it is alleged prior to trial that relevant matters are being concealed cannot be stronger than the judicial response where those matters are discovered after trial. Just as a court which is confronted with obstacles to a fair trial should usually protect its processes by "flexible use of the power to control procedure and by the giving of forthright directions" rather than "refusing to exercise the jurisdiction to hear and determine the issues", so too should a court use its processes to prevent any threat to its integrity such as that which might be suggested by allegations of concealment. But, in this case, once the extent of the role of the CFMMEU had been revealed, there was no threat to the integrity of the court's processes. **Putting to one side any issues concerning costs, no further remedial response, including the extreme measure of a stay of proceedings, was necessary.**
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> (Emphasis added, citations omitted.)

4 In addition to the inadequacy of the March Agbinya affidavit, the respondent contends that the following conduct of personnel in the Department in the hours after the Tribunal granted the respondent a visa on 11 March 2020 should be taken into consideration:

(a) at 2:48 pm, the Department ordered the release of the respondent;

(b) at 3:23 pm, the Department changed its position and rescinded the release order;

(c) despite that change of position at 3:36 pm, an affidavit sworn by Ms Griffin with a "representation" that the respondent "was in the process" of being released was emailed to Perry J's associate;

(d) at 4:00 pm, Ms Griffin advised the Department that "the affidavit [she] made says that [the respondent] was in the process of being released";

(e) despite the above-mentioned change of position and the 4:00 pm conversation, the Department instructed Ms Griffin at 4:21 pm that her "affidavit can remain as is" and that affidavit was read before Perry J at a hearing which commenced at 4:48 pm on the following day, 12 March 2020.

5 The respondent says that, as the new evidence on appeal revealed, the Minister was in a position, at all material times, to adduce evidence as to the true state of affairs concerning the respondent's continued immigration detention and thus assist the Court and the administration of justice – but failed to do so.

6 As to the other submissions advanced by the respondent, first, it is said that the Unlawfulness Findings made by the primary judge in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 1354 (as summarised in *PDWL (appeal)* at [17]) were not advanced by the respondent and it is submitted that the primary judge led himself into error in this regard. While the respondent is correct to say that much of the case on appeal was concerned with findings which were not pressed upon the primary judge by the respondent, for reasons that will be expanded upon below, it is difficult to see how this could justify a costs order against the Minister.

7 Similarly, a submission is advanced that the Minister's application for leave to adduce fresh evidence on appeal (which was granted) amounted to an "indulgence" of the Court and it is usual for the party seeking the indulgence to pay the costs of the application: *Golski v Kirk* [1987] FCA 200; (1987) 14 FCR 143 (at 157). While as a matter of principle the proposition is correct, it is difficult to see what bearing this could have on the question of costs at first instance in circumstances where the costs order for the appeal (that there be no such order) was determined in *PDWL (appeal)* (at [90]).

8 Finally, the respondent submitted (pre-emptively based on the Minister's position at the hearing of the appeal it would seem), that the proceedings involved a clear public interest element such that there are special circumstances to depart from the ordinary rule that costs follow the event: *National Mutual Life Association of A/asia Ltd v Windsor* [1991] FCA 64; (1991) 28 FCR 214 (at 229). In light of the Minister's revised position, it is unnecessary to consider this submission any further. Indeed, the authorities suggest that where special circumstances are present by way of a public interest element, the appropriate disposition is that there be no order as to costs: *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; (2001) 115 FCR 229 per Black CJ and French J; *Australian Crime Commission v NTD8 (No 2)* [2009] FCAFC 143; ***Oshlack*** *v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 per Gaudron, Gummow and Kirby JJ; *Minister for Immigration and Border Protection v CQZ15 (No 2)* [2018] FCAFC 19; (2018) 259 FCR 569 per Kenny, Tracey and Griffiths JJ (at [23]-[24]).

MINISTER'S ARGUMENTS

9 The Minister observes that the respondent was wholly unsuccessful before the Full Court, both in defending the correctness of the decision of the primary judge in relation to the exercise of the discretion to refuse the grant of relief, and in attacking his Honour's reasoning on the flaws in the Tribunal's decision. The Minister says that while this suggests he should succeed in an application for his costs of the proceeding below, no such application is made. However, it is said to call attention to the need for something exceptional to be demonstrated before the respondent can succeed.

10 The Minister submits that he did not engage in "misconduct" or "disentitling conduct" such that he should be ordered to pay the respondent's costs at first instance. Reliance is placed on the examples of such conduct set out by McHugh J in *Oshlack* (at ([69]):

> The traditional exceptions to the usual order as to costs focus on the conduct of the successful party which disentitles it to the beneficial exercise of the discretion. In *Anglo-Cyprian Trade Agencies Ltd* v *Paphos Wine Industries Ltd*, Devlin J formulated the relevant principle as follows:
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> > "No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct."
>
> "Misconduct" in this context means misconduct relating to the litigation, or the circumstances leading up to the litigation. Thus, the court may properly depart from the usual order as to costs when the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; prosecutes the matter solely for the purpose of increasing the costs recoverable; or obtains relief which the unsuccessful party had already offered in settlement of the dispute.
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> (Citations omitted.)

11 In relation to the conduct of the Minister's Department criticised by this Court in *PDWL (appeal)*, concerning principally the continued detention of the respondent and the inadequacy of the March Agbinya affidavit, the Minister submits that these matters are not sufficiently connected with the proceedings appealed from, which concerned the validity of the Tribunal's decision. It is said that no aspect of this conduct falls within the categories described by McHugh J in *Oshlack*.

12 Both the Minister and the respondent rely on [35] in *PDWL (appeal)* which has been set out above. For completeness, the Minister relies on the first half of the paragraph where we said:

> 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. ...

The Minister observes that the criticism levelled against him by both the primary judge and Wigney J in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394 (at [57]) were made without the benefit of the fresh evidence adduced on appeal in the October Agbinya affidavit.

13 For these reasons, the Minister submits that there is no proper basis for any award of costs to be made against him, as the successful party, such that there should be no order as to costs.

PRINCIPLES

14 Section 43 of the *Federal Court of Australia* ***Act*** *1976* (Cth) gives the Court "a broad discretion" as to costs. The Court's discretion to award costs under this section is unfettered except for the fact that it must be exercised judicially: *Oshlack* per McHugh J (at [65]-[67]). A successful party is ordinarily entitled to an award of costs in his or her favour unless good reason is shown to the contrary. That principle is grounded in reasons of fairness and policy and reflects the primary purpose of an award of costs, which is to indemnify (not necessarily fully) the successful party: *Oshlack* per McHugh J (at [67]). While useful guidance can of course come from the authorities, "[j]udicial references to general rules for the award of costs should not be understood as endeavours to alter the discretionary character of such decisions": *GR Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSWCA 263 (at [20]). The Court's task is to exercise the discretion judicially in the particular circumstances of the case before it. As the High Court noted in *Gray v Richards (No 2)* [2014] HCA 47; (2014) 89 ALR 113 (at [2]):

> The disposition of costs is within the general discretion of the Court. Ordinarily, that discretion will be exercised so that costs are awarded to the successful party, but other factors may have a significant claim on the discretion of the Court. The disposition which is ultimately to be made in any case where there are competing considerations will reflect a broad evaluative judgment of what justice requires.
>
> (Citations omitted.)

15 The broad discretion encompasses the jurisdiction for the Court to make no order for costs to a successful party or even costs against a successful party: *Austen v Ansett Transport Industries (Operations) Pty Ltd* [1993] FCA 403 per Burchett J (at [58]); *Trade Practices Commission v* ***Nicholas Enterprises*** *Pty Ltd (No 3)* (1979) 28 ALR 201; (1979) 42 FLR 213 per Fisher J (at 220). However, it is extremely rare for the successful party to be ordered to pay the unsuccessful party's costs. Such an order "can rarely, if ever, be justified": *Scherer v Counting*

Instruments Ltd [1986] 1 WLR 615 per Buckley LJ (at 622); see also *Ngarluma Aboriginal Corporation RNTBC v Ramirez (No 2)* [2018] FCA 2042 per Banks-Smith J (at [6]). There must be "strong justification" for the order and "exceptional circumstances" must be shown: ***Arian v Nguyen*** [2001] NSWCA 5 per Ipp AJA (at [37], with Foster AJA agreeing at [1]) and *Oshlack* per McHugh J (at [70]). Furthermore, the onus lies on the unsuccessful party to demonstrate a basis for departing from the usual rule: *Waterman v Gerling Australia Insurance Company Pty Ltd (No 2)* [2005] NSWSC 1111 (at [10]).

16 Against the backdrop of these principles, it is to be kept in mind that the function of the Court's costs discretion is not a punitive one. Rather, the discourse is located in the domain of compensation and indemnity: ***Grass v Minister*** *for Immigration and Border Protection (No 2)* [2015] FCAFC 61 citing *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 per Mason CJ (at 543). For this reason, the successful party in an appeal will ordinarily be entitled to their costs at first instance: *Viane v Minister for Immigration and Border Protection (No 2)* [2018] FCAFC 175 (at [3]).

CONSIDERATION

17 As the Minister does not seek his costs, the question in issue is whether the Minister has engaged in disentitling conduct sufficient to justify a costs order against him at first instance.

18 While the Minister is correct in his submission that the relevant conduct does not strictly fall within the categories of disentitling conduct described by McHugh J in *Oshlack*, they should not be read as being closed or exhaustive. There is however a question as to whether, and if so, to what extent, any disentitling conduct must be connected to, or the cause of, any delay or added costs in the proceeding.

19 In *Arian v Nguyen*, Ipp AJA (with whom Foster AJA agreed at [1]) considered the question as follows (at [38]):

> It is rare for a successful party who is guilty of misconduct in the litigation to be ordered to pay the unsuccessful opponent's costs where the misconduct does not lengthen the proceedings unnecessarily, cause unnecessary issues to be canvassed or otherwise cause the costs of the litigation to be increased. Indeed, the court's entitlement to depart from the usual order that costs follow the event has sometimes been said, in effect, to be subject to the qualification that the misconduct in question occasioned unnecessary litigation and expense (see ***Huxley v West London Extension Railway Company*** (1899) 14 App Cas 26 at 32-33 per Lord Halsbury LC; ***Ritter v Godfrey*** [1920] 2 KB 47 per Atkin LJ at 60). In other cases, however, this qualification has not been mentioned: see for example ***Donald Campbell & Co v Pollak*** [1927] AC 732 at 811-812; ***Thorne v Doug Wade Consultants Pty Ltd*** [1985] VR 433 at 500;

> ***Jamal v Secretary, Department of Health*** (1988) 14 NSWLR 252 at 271-272; ***Re Elgindata Limited (No 2)*** (supra). On balance, it seems to me that while delay and increased expense brought about by improper conduct in the course of the litigation are highly relevant factors in the discretion to depart from the usual order as to costs, they are not essential to the exercise of that discretion. It would, in any event, be very unusual for misconduct of that kind not to cause unnecessary delay and expense.
>
> (Emphasis in the original).

20 Similarly, in *Grass v Minister*, the Full Court observed (at [3]):

> Although there cannot be an absolute rule about this, it is unlikely that such an order would be made unless the disentitling conduct could in some way be seen to have caused the existence of the litigation or to have prolonged its continuance. …

In that case, the relevant Commonwealth department had deceived the appellant by informing her that she could not be listed for a citizenship ceremony due to a long list, when in fact she was being investigated by the department: *Grass v Minister* (at [7]).

21 The Full Court in *Grass v Minister* went onto make the following findings (at [9]-[10]):

> 9 By the time the proceeding was commenced in this Court to quash that decision the full nature of the Department's deception was known. **Whilst one may readily accept that the Department's deception is a sine qua non of the litigation, we do not accept that it is, relevantly, its cause**. Mrs Grass did not commence the proceeding before Buchanan J because she was suffering under a misconception which had been induced by the Department. By that time the deception had run its course. The reason the proceeding was commenced was because she wished to contest the conclusions of the learned Federal Magistrate that s 26 of the *Australian Citizenship Act 2007* (Cth) did not condition the cancellation power in s 25 and that the setting aside should only be prospective.
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> 10 **In those circumstances, we do not accept that the proceedings in this Court have been either engendered as a result of the misconduct or prolonged by it. This means that the nominated disentitling conduct has not had a prolongation effect**. Assuming, without deciding, that it remains possible to make the order in those circumstances, we would not do so in any event. **Although the events which originally engendered the litigation do not reflect well on the Department, the fact is that its position in this Court has been fully vindicated, without any criticism of the manner in which the litigation in this Court was conducted**.
>
> (Emphasis added.)

22 In this case, the relevant conduct on the part of the Minister, through his Department, occurred well in advance of the proceedings before the primary judge which were concerned with the validity of the Tribunal's decision. The respondent's successful challenge of his continued detention by the Minister was finally determined by Wigney J, with no application for leave to appeal his Honour's decision being made. While it can of course be accepted that the relevant conduct forced the respondent to make his application for *habeas corpus*, the respondent received a costs order in his favour on that application as the successful party.

23 Importantly as well, the judicial review proceedings before the primary judge were brought by the Minister to challenge the validity of the Tribunal's decision. This distinguishes the present case from instances where the instigation of proceedings is in effect caused by the conduct of the ultimately successful defendant: *TAI-AO Aluminium (Australia) Pty Ltd v Cordukes* [2004] FCA 1488; (2004) 51 ACSR 465 per Finkelstein J (at [10]-[11]); *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129, where the reversal of the ordinary rule was confined to the period prior to the defendant's true defence being revealed; and *Nicholas Enterprises* where Fisher J (at 221-222) only ordered the unsuccessful plaintiff to pay one third of the successful defendant's costs in circumstances where an employee of the defendant made untruthful statements prior to the proceedings which rendered the plaintiff's action reasonable.

24 Without in any way qualifying our findings as to the seriousness of the Minister's conduct (through his Department) as expressed in our previous judgment, it cannot be said that the conduct had the effect of prolonging or adding to the cost of the proceedings at first instance. While the present case is somewhat unusual in that the respondent's success at first instance, and the substance of the appeal to this Full Court concerned issues that were not advanced by either party at first instance, it can be reasonably assumed that had the primary judge not made the Unlawfulness Findings, the Minister would have succeeded at first instance on the identification of jurisdictional error in the Tribunal's decision. He would then presumably have received his costs as the successful party. As events unfolded, the appeal has primarily focussed on quite different issues.

25 In our assessment, these matters support the position advanced by the Minister that there be no order as to costs.

CONCLUSION

26 There will be no order as to costs at first instance.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices McKerracher, Burley and O'Callaghan.

Associate:

Dated: 19 May 2021