



[2021] HCA Trans 197

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry  
Sydney

No S64 of 2021

B e t w e e n -

PDWL

Applicant

and

MINISTER FOR IMMIGRATION,  
CITIZENSHIP, MIGRANT SERVICES  
AND MULTICULTURAL AFFAIRS

First Respondent

ADMINISTRATIVE APPEALS  
TRIBUNAL

Second Respondent

Application for special leave to appeal

KIEFEL CJ  
EDELMAN J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA BY VIDEO CONNECTION TO BRISBANE

ON FRIDAY, 12 NOVEMBER 2021, AT 1.00 PM

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**KIEFEL CJ:** In accordance with the protocol for remote hearings, I will announce the appearances for the parties.

5 **MR D.J. HOOKE, SC** appears with **MR J.D. DONNELLY** and **MR S. ZANOTTI STAGLIORIO** for the applicant. (instructed by Northam Lawyers)

10 **MR G.R. KENNETT, SC** appears with **MR B.D. KAPLAN** for the first respondent. (instructed by Sparke Helmore)

**KIEFEL CJ:** There is a submitting appearance for the second respondent. Yes, Mr Hooke.

15 **MR HOOKE:** May it please the Court. Can I indicate, your Honours, that I have no vision of your Honours, but I am content to - - -

**KIEFEL CJ:** We could stand down for a moment and see if that can be corrected, Mr Hooke. We should at least give that a try.

20 **MR HOOKE:** If your Honour pleases.

**KIEFEL CJ:** Yes. We will adjourn shortly.

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**AT 1.01 PM THE MATTER WAS ADJOURNED**

30 **UPON RESUMING AT 1.02 PM:**

35 **KIEFEL CJ:** Mr Hooke, I understand you are only on audio, but we can actually see you.

**MR HOOKE:** Thank you, your Honour.

40 **KIEFEL CJ:** Yes, Mr Hooke.

**MR HOOKE:** Your Honours, this application requires a short extension of time at the outset.....three or four days.

45 **KIEFEL CJ:** Is that opposed, Mr Kennett? You are on mute, I think, Mr Kennett.

**MR KENNETT:** Is that better, your Honour?

50 **KIEFEL CJ:** Yes, it is, we can hear you now.

**MR KENNETT:** No, the extension is not opposed, your Honour.

**KIEFEL CJ:** Yes, you have that extension, Mr Hooke.

55 **MR HOOKE:** Thank you, your Honour. Your Honours, the application  
presents two, in our submission, important and interesting special leave  
questions. The first is encapsulated in grounds 1 and 2 of the proposed  
appeal and the second under ground 3. The effect of each of those  
60 questions would be that, on the first question, that involving the discretion  
to refuse relief, the applicant would succeed in the proceedings. The second  
special leave question would, on the existing orders of the Full Court from  
remitter, define the scope of the Tribunal's powers to be exercised on that  
remitter. It is important to understand at the outset, your Honours, what  
was not in issue.

65 **EDELMAN J:** Mr Hooke, the two questions are not entirely independent,  
though, are they? I mean, if you are wrong in relation to the second  
question, then it is effectively a circumstance where you seek the exercise  
of a discretion not to grant certiorari in circumstances where, on any view,  
70 the Tribunal would not have power to make the orders that the Tribunal did  
in any circumstance, given the nature of the application.

**MR HOOKE:** Your Honour, that is so, and as is the converse, of course,  
and that is that if we are correct about the second, then that would  
75 strengthen the case, we would submit, on the exercise of discretion because  
that would inform, of course, the nature and quality of the error that the  
Tribunal had committed. So, yes, there is an interconnection, but it is one  
that cuts both ways, as it were, rather than one that is simply adverse to us.

80 **EDELMAN J:** I do not want to take you out of turn, but at the moment I  
cannot see how it is that you could be correct on the second ground, in  
circumstances where it was only an application under section 501 that was  
brought, and not an application for review of any decision under section 65.

85 **MR HOOKE:** Your Honour, it is a somewhat involved question of  
statutory construction, of course. The way that we put ground 3 – and I will  
proceed straight to that ground, if it is convenient to the Court. What we  
submit about ground 3 is first of all that the Minister's position in the  
Federal Court in respect of the scope of power was different to the  
90 submission that was made to the Tribunal. That submission was recorded  
by the Tribunal at application book – it is in paragraph 30 of the Tribunal's  
reasons at application book 14 - which was that it was open to the Tribunal:

to conduct my own re-assessment if I were minded to do so.

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The Tribunal expressed the view that the appropriateness of embarking on such an open-ended exercise was not attractive where there were matters of primary fact that fell to be determined, but that was not the case. But the important thing was the Minister's submission on that issue. What we say is that the power to grant or refuse a visa is one that is exercised under section 65. If your Honours turn up section 65, which can be conveniently found at application book 160, your Honours see that:

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Subject to sections 84 and 86 . . . the Minister:

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(a) if satisfied that:

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

110

Yes:

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

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In this case yes, and:

(iii) the grant of the visa is not prevented by –

various provisions, including, three lines from the bottom of that subparagraph, section 501 – the Minister:

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is to grant the visa; or

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

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In our submission, the power to grant or refuse the visa is one under section 65, informed though by the facultative provision in section 501, here relevantly subsection (1), which your Honours will find at application book 169. Although expressed in terms of the Minister being permitted to refuse to grant a visa if the person does not satisfy the Minister that they passed the character test, in our submission, when one reads the provisions together – as, in our submission, principle requires – section 501 is feeding into or informing the exercise of power under section 65.

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So that, when a matter comes before the Tribunal under section 500, in our submission, in truth, what is being considered is a decision – in this case under 501(1) – as to whether the person passes the character test, and that then feeds back into section 65(1)(a)(iii) - - -

140 **EDELMAN J:** But, Mr Hooke, they are separate decisions, are they not?  
A decision under section 501(1) may be made by a different delegate from a  
decision under section 65, and in fact, a delegate under section 65 may not  
even have authority to make a decision under section 501.

145 **MR HOOKE:** Your Honour, that may be so, but the ultimate decision is,  
of course, that of the Minister. We would say that section 34AB of the  
*Acts Interpretation Act* means that, for administrative law purposes, when  
one comes to consider the ultimate decision, one is considering it as a  
decision of the Minister, not as some bifurcated set of decisions, as it were.

150 **EDELMAN J:** Does that mean then, if one looks at the top of page 7 of  
the Tribunal's decision, where the Tribunal records that:

155 A delegate of the Respondent (who exercised delegated authority  
under section 501 of the *Migration Act* only) –

that that sentence should be read as though the exercise of authority was  
also under section 65?

160 **MR HOOKE:** Yes, your Honour, we would submit so. Of course, under  
section 34AB of the Interpretation Act, it is a decision of the Minister and  
the Minister is, of course, the receptacle of the whole suite of powers in  
relation to the granting or refusal of a visa. As the Tribunal member  
observed, it was clearly a question of administrative convenience within the  
165 Department that there might, or might not, in a particular case, be separate  
delegations to separate people. It does not change the ultimate question for  
decision which was whether or not the applicant should be successful in his  
application for the grant of a protection visa and that, of course, was the  
ultimate question.

170 So, we would submit in relation to the third ground that, properly  
understood, 501(1) is facultative, not a substantive standalone power and  
that what it does it inform the exercise of power under section 65. Or, we  
say, that if it is properly understood as a standalone power, the Tribunal,  
175 when reviewing a decision under 501(1) to refuse a visa, has the suite of  
powers available to the Minister in considering the application and that  
includes the power to grant a visa under section 65.

180 We say that that is the effect of section 43(1) of the Tribunals Act –  
which your Honours will find at application book 122. Your Honours see  
that subsection (1) provides that:

185 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 –

190 That, of course, by section 34AB, is the Minister. So, that, your Honour, is  
the way that we put ground 3 in a nutshell. We say that it is an important  
question and one that goes to the powers that are exercised by the Tribunal  
on a daily basis.

195 Could I then turn to the first and second grounds - the first special  
leave question. I was taking your Honours to what was not in issue before  
the Tribunal, and the Tribunal member recorded, in paragraph 5, that it was  
not disputed that at that time the:

Applicant satisfies the criteria specified in section 36 of the  
*Migration Act* for the grant of a protection visa.

200 That:

the Applicant was not considered to be a danger to the Australian  
community -

205 That was at paragraph 8, and that the applicant had satisfied the criteria  
under the regulations for the grant of a protection visa at paragraph 28,  
those matters being that it:

210 has signed a values statement (PIC 4019), has passed a health  
examination (cl 709.222 and 790.223), and has received a security  
clearance (PIC 4003A).

215 Of course, the Minister had submitted that it was open to the Tribunal to  
conduct its own reassessment of the application, not confined to  
section 501. Against that background the primary judge determined that the  
Tribunal had erred in following Justice Rares in *BAL19*, but that relief  
should be refused on account of the Minister's misconduct.

220 The primary judge made a number of findings in relation to conduct  
which, in our submission, properly should be understood as being referable  
to the officers acting on the Minister's behalf, and for whom he was  
responsible as a Minister administering the *Migration Act*. Although the  
Minister for the first time offered some explanation for the matters of  
225 conduct that had been criticised by Justice Perry, Justice Wigney, the  
primary judge and ultimately by the Full Court in the Full Court, and that  
Court revisited the circumstances on the basis of that additional evidence,  
there were nonetheless substantial findings highly critical of the Minister's  
conduct through his Department and officers.

230           We have summarised those findings in paragraphs 2 and 3 of the  
reply at application book 185 and 186, and I draw attention to what we have  
said there in writing. In particular we draw attention to the characterisation  
of those findings of the Full Court, which we say, as we said in-chief:

235           undermined or defied the authority of the court . . .

          involved an unlawful exercise of executive power . . .

and was in:

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          breach of the model litigant obligations - - -

**KIEFEL CJ:** Mr Hooke, could I clarify two matters with you?

245           **MR HOOKE:** Yes, your Honour.

**KIEFEL CJ:** When you say, “an officer for whom the Minister was  
responsible”, you are not saying officers in the department which the  
Minister administers?

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**MR HOOKE:** No, we do not use it as a term of art, your Honour. We  
would say - - -

**KIEFEL CJ:** Officer of the Commonwealth, is it?

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**MR HOOKE:** Officer of the Commonwealth exercising functions under  
the Act administered by the Minister.

260           **KIEFEL CJ:** All right. So not a delegate and not someone for whom the  
Minister is directly responsible.

**MR HOOKE:** Well, he is directly responsible in the sense that that person  
is exercising functions under the Act for which the Minister is responsible,  
that is, responsible for administering.

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**KIEFEL CJ:** The difficulty pointed to by the Full Court was that the  
primary judge’s findings do not actually involve the Minister personally,  
not only for the reason that these persons were not his officers, but also  
because they do not include statutory functions of the ministers, and, in  
some respects, they involve the wrong minister.

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**MR HOOKE:** Yes, well, the question of how this Minister came to be the  
respondent was something that was a bit confused and, indeed, I do not  
think the Minister quite knows, but the fact is that this is a minister

275 administering the *Migration Act*. Your Honour, it is something of an  
unbecoming submission, with respect, to contend that principles of  
responsible government do not come home to roost with the responsible  
Minister, where that Minister is, by reason of their position, administering  
the Act to the appropriate party. Otherwise, of course, one would have - - -

280 **KIEFEL CJ:** It is also a fairly serious thing to impugn the conduct of the  
Minister, unless you are very clear about the Minister's connection with it,  
the Minister's knowledge and the Minister's responsibility.

285 **MR HOOKE:** Quite so, your Honour. That is a difficulty that arose  
initially out of the Minister's silence and the Department's silence on the  
issues. We come back, of course, to the proposition that the only proper  
party to proceedings such as these is the Minister. One could not bring  
proceedings against the individual officers, if one were able to identify  
290 them, and seek to impugn the Minister's - or the conduct of the  
Commonwealth through that mechanism.

The Minister is the embodiment of the Commonwealth for the  
purpose of these proceedings and for the purpose of seeking the relief that  
295 he did in the Federal Court. So, in our submission, the disorienting conduct  
is properly visited upon the Minister as the manifestation of the  
Commonwealth.

Your Honours, I am conscious of the time. There seems now to be  
300 an acceptance on the part of the Minister that the submission put by the  
applicant in the Full Court and recorded at paragraph 70 of the Full Court's  
reasons – that is, that bad faith was not required in order to engage the  
discretion to refuse relief is a correct statement of principle and that appears  
at paragraph 18 of the response at application book 146.

305 That concession embodies precisely the submission that was put to  
the Full Court but not dealt with and that is the subject of ground 1.  
Your Honours, in relation to the nature of the discretion itself, we say that  
the fact that the constitutional writs are attended by discretion is plain.  
310 Your Honour, may I have a moment to complete the submission?

**KIEFEL CJ:** Yes, Mr Hooke.

315 **MR HOOKE:** Thank you, your Honour. Whilst the fact of the discretion  
is plain, the scope of it is not and in the context of the disorienting conduct  
being that of the Executive, in our submission the public interest in curbing  
the exercise of executive powers upon which the Minister and the  
Full Court rely is met by the very same public interest in ensuring that those  
possessed of such powers hear the Minister and those officers of the  
320 Commonwealth discharging functions under the Act - to adapt the words of

Justice Gaudron in *Enfield City Corporation*, “to exercise them only in accordance with the laws which govern their exercise”.

325 In our submission, the scope and content of the discretion to refuse relief is an important question in all judicial review contexts, not only under this Act and federally generally but in State contexts as well. In our submission both special leave questions are suitable for a grant of leave. May it please the Court.

330 **KIEFEL CJ:** Thank you, Mr Hooke. The Court will adjourn to consider the course that it will take.

335 **AT 1.25 PM SHORT ADJOURNMENT**

340 **UPON RESUMING AT 1.29 PM:**

**KIEFEL CJ:** We need not trouble you, Mr Kennett.

345 In our view, there is no reason to doubt the correctness of the decision of the Full Court. Special leave is refused with costs.

The Court will now adjourn.

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**AT 1.29 PM THE MATTER WAS CONCLUDED**