

# *Before the High Court*

## *Ruddock and Others v Taylor*

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On 8 October 2004 the High Court granted leave to appeal from a decision of the New South Wales Court of Appeal, *Ruddock and Others v Taylor* (hereafter *Taylor*).<sup>1</sup> The case involves an action in trespass for false imprisonment arising from cancellation of Mr Taylor's visas on two separate occasions, pursuant to s501 of the *Migration Act* 1958 (Cth) (hereafter *Migration Act*), and subsequent immigration detentions, for the purpose of removal from Australia. The second cancellation gave rise to the litigation reported in *Re Patterson; Ex parte Taylor* (hereafter *Re Patterson*)<sup>2</sup> in which, inter alia, a majority of the High Court decided that the exercise of power pursuant to s501 was not a valid exercise of power in relation to Mr Taylor, as although he was a 'non-citizen', he was not an 'alien' within the meaning of s51(xix) of the Constitution. The Court of Appeal found that the 'ministers' who cancelled the visas had acted unlawfully and were liable for false imprisonment. The appeal is brought by Mr Philip Ruddock, the then Minister for Immigration and Multicultural Affairs (hereafter the Minister for Immigration), Senator Kay Patterson and the Commonwealth.<sup>3</sup> The issue that the High Court is asked to consider in this case is whether the circumstances of the detentions give rise to liability in tort for false imprisonment.

The Minister for Immigration argues that the principles of liability in trespass should be modified when his liability is in issue. The case thus raises important issues about the basis of the Minister's liability for intentional torts in the context of immigration detention. The Minister also argues that it is immune from liability under the statutory framework of the *Migration Act*. In particular the Minister attempts to avoid liability on the basis that the acts of cancellation and the detentions were separate. The Minister argues that he is not responsible for the acts of the officers who effected the detentions. This case thus raises the issue of whether a remedy in tort can be given for unlawful exercises of power under s501, and whether non-citizens have the same rights as others in our legal system.

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1 (2003) 58 NSWLR 269.

2 (2001) 207 CLR 391.

3 I shall refer to the appellants collectively as the Minister for Immigration, or the Minister, and to the actions of both Mr Ruddock and Senator Patterson as the 'ministerial acts'. References to the Minister and the Department will be to the Minister for Immigration and Department of Immigration, irrespective of the current title of the Department.

## 1. *The Context of the Decision*

The *Migration Act* establishes a system of entry into, and remainder in, Australia by visas. The object of the Act is stated in s4(1) as being ‘...to regulate, in the national interest, the coming into and presence in Australia of non-citizens’. Mr Taylor is a non-citizen, that is, a person who is not an Australian citizen,<sup>4</sup> and as I will explain below in the discussion of the High Court decision in *Re Patterson*,<sup>5</sup> his prospective removal was purportedly in the ‘national interest’.

Very briefly, for the purpose of a discussion of the relevant powers, the detention provisions were applicable to him if he was an ‘unlawful non-citizen’<sup>6</sup> and he fitted that category if s501 applied to him, and his visas were validly cancelled.<sup>7</sup> In that situation the immigration detention provisions in ss189 and 196 of the *Migration Act* were activated. I deal first with the nature of the powers exercised under s501 and then with the immigration detention regime.

### A. *Removal of ‘Undesirable’ Non-citizens*

Section 501 contains the so called ‘character’ provisions which enable the Minister for Immigration to refuse or to cancel a visa for a person who does not satisfy the character test as defined in ss(6). Its importance to the central scheme of the *Migration Act* is clear. Section 65 confers an overriding discretion and responsibility upon the Minister in relation to the visa scheme. It provides that the Minister must be ‘satisfied’ that the ‘common entry’ criteria are met before granting a visa. These include the ‘health’ and ‘good character’ requirements. Importantly, s65(1)(iii) specifically refers to the need for the Minister to be ‘satisfied’ that the grant of the visa is not prevented by s501.

There is evidence that s501 is being used as a form of ‘disguised’ deportation to bypass the specific power in s201 of the *Migration Act*<sup>8</sup> — the Criminal Deportation Power (hereafter the CDP) — which authorises the deportation of ‘non-citizens’<sup>9</sup> who have been in Australia for less than 10 years who are convicted of a crime and sentenced to a term of imprisonment of one year or more. The consequence of cancellation of a visa of a person who is a ‘non-citizen’ under s501 is that the non-citizen becomes liable to be removed from Australia under s198 of the Act. The current s501 arises from amendments made to the *Migration*

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4 *Migration Act* 1958 (Cth) s5.

5 *Re Patterson*, above n2.

6 *Migration Act* 1958 (Cth) s14 defines an ‘unlawful non-citizen’ as a person who is not a ‘lawful non-citizen’. The *Migration Act* 1958 (Cth) s13 defines a ‘lawful non-citizen’ as someone who holds a valid visa.

7 *Migration Act* 1958 (Cth) s15.

8 Ray Turner, ‘Ridding the Country of “Bad Aliens” — The Operation of the Character and Conduct Provisions in the Migration Act 1958’ (2002) 6 *Immigration Review* 7.

9 The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) Annual Report for 2001–2002 states that all new cases involving non-citizen criminals were ‘considered for visa cancellation under section 501’. In that period 66 non-citizens were removed following visa cancellation under that power (48 in 2000–2001) and 137 visas were cancelled on character grounds (104 on 2000–2001). No deportation orders were served for 2001–2002 (20 in 2000–2001).

*Act* in 1998 and 2001. The *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act* substantially enhanced the powers of the Minister. This legislation followed a long battle between the Minister and the Administrative Appeals Tribunal (hereafter AAT) (and the courts) over the application and scope of the CDP.<sup>10</sup> The 1998 amendments applied to Mr Taylor.

There are several important differences between the CDP and the s501 powers:

- The CDP in s201 assumes that a person is ‘integrated’ into the community after a period of 10 years. The s501 power is being used in some instances to remove persons who have extensive ties with Australia and who have resided in Australia for more than 10 years. For example in *Shaw v Minister for Immigration* (hereafter *Shaw*),<sup>11</sup> it was held by a narrow majority of the High Court that a man born in Britain who migrated to Australia in 1974 at the age of two years was an ‘alien’ whose permanent entry visa could be cancelled under s501(2) of the *Migration Act*.
- Decisions under ss201 and 501 are reviewable by the AAT. However the s501 power is subject to personal intervention by the Minister (ss 501A, B, C). The exercise of such discretion is unreviewable and not subject to rules of procedural fairness.
- There are significant differences between the content of the policy directions that govern the exercise of these discretions. For example, the CDP identifies a range of personal considerations relating to family unity whereas the s501 Policy Direction 21 is primarily focused upon consideration of the ‘protection of the Australian community’.<sup>12</sup>

The application of s501 to Mr Taylor’s situation raises the following human rights and legal concerns:

- Whether s501 is being used to remove a person who has substantial ties with Australia, thereby interfering with a right in respect of family life.
- Whether s501 is effectively discriminating against a non-citizen by imposing an extra penalty in the case of a convicted criminal.

As Spigelman CJ pointed out in the New South Wales Court of Appeal, Mr Taylor ‘had served the sentences imposed upon him for the crimes he had committed before he was subjected to immigration detention’.<sup>13</sup>

Overall *Taylor* raises the issue of the scope of tort law to protect the personal liberty of a non-citizen (who, according to the current interpretation of the High Court in *Shaw’s* case may be a constitutional ‘alien’). In theory his status as an ‘alien’ makes no difference to his rights to private law remedies in ‘municipal law’.

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<sup>10</sup> *Minister for Immigration v Gunner* (1998) 84 FCR 400; *Minister for Immigration v Jia Le Geng* (2001) 65 ALD 1.

<sup>11</sup> (2003) 203 ALR 143.

<sup>12</sup> *Madafferi v Minister for Immigration* (2002) 70 ALD 644.

<sup>13</sup> *Taylor*, above n1 at 272.

As some members of the High Court have been careful to remind us, for example in *Lim v Minister for Immigration* (hereafter *Lim*),<sup>14</sup> the law has two faces.<sup>15</sup> Even ‘aliens’ are entitled to the protection of Australian law whilst actually within the country.

### **B. The Immigration Detention Regime**

The last point brings me to the detention provisions. The current provisions establishing Australia’s immigration detention regime were introduced by the 1992 *Migration Reform Act* which, was a response to the increasing number of ‘boat people’ arriving in Australia in the late 1980s and early 1990s.<sup>16</sup> However, the immigration detention regime has the aim of facilitating the removal of all unlawful non-citizens from Australia.<sup>17</sup> The critical provisions in this case were ss189 and 196 of the *Migration Act*. These provisions are contained in Division 7 of Part 2 of the Act — ‘Detention of unlawful non-citizens’. Section 189 provides that, if an officer ‘knows or reasonably suspects’ that a person in the migration zone is an unlawful non-citizen, ‘the officer must detain the person’.

At the relevant time, s196, dealing with the period of detention, provided:

- (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
  - (a) removed from Australia under section 198 or 199; or
  - (b) deported under section 200; or
  - (c) granted a visa.
- (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

The seminal decision of the High Court in *Lim*<sup>18</sup> established that the ‘aliens’ power in s51(xix) of the Constitution provides the constitutional basis for a regime of non-punitive, administrative, immigration detention. However the High Court also made it clear that express authority is required to detain an ‘alien’,<sup>19</sup> and that the constitutional limits of the power are to be determined by what is ‘reasonably necessary’ for the exercise of executive power. It was decided on the facts of that case (in the refugee\boat people context described above) that it was necessary for

14 (1992) 176 CLR 1 at 29 (Brennan, Deane & Dawson JJ). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 328 (Brennan J), *Secretary, DIMIA v Mastipour* (2004) 207 ALR 83 (hereafter *Mastipour*) at 86 (Lander J).

15 Belinda Wells, ‘Aliens: The Outsiders in the Constitution’ (1996) 19 *UQLJ* 45.

16 Adrienne Millbank, *The Detention of Boat People: Current Issues Brief No 8 2000–01* (Canberra: Department of the Parliamentary Library, 2001): <<http://www.aph.gov.au/library/pubs/cib/200-01/01cob08.htm>> (15 October 2004).

17 *Migration Act* 1958 (Cth) s198.

18 *Lim*, above n14.

19 *Id* at 10 (Mason CJ); at 19 (Brennan, Deane & Dawson JJ); at 55 (Gaudron J); at 63 (McHugh J).

the executive arm of government to have a regime of immigration detention for the purpose of admission and deportation of aliens. To that extent the *Lim* decision is consistent with older authorities, which held that powers of detention and removal are incidental to the two constitutional heads of power which are relevant to migration law.<sup>20</sup>

The High Court in *Lim* made it clear that the limits of the aliens power are based upon the separation of judicial and executive functions. In some recent cases this idea has been used to argue that the limits of the power have been reached. For example, in the Full Court of the Federal Court in *Minister for Immigration v Al Masri* (hereafter *Al Masri*)<sup>21</sup> it was found that s196 of the *Migration Act* contained an ‘ambiguity’ which opened the way for judicial interpretation of the legislation consistent with the rights of an individual. That case was concerned with the limits of the power to detain a Palestinian asylum seeker whose application for a protection visa had been rejected and who had requested that he be returned to the Gaza Strip. In fact his removal was impracticable. In concluding that his continued detention was unlawful, the Federal Court found that there was no clearly manifested legislative intention to curtail the right of personal liberty of a person under the Act where there was no realistic prospect of removal.

Further, the Full Court in *Al Masri* said that the Act should be read subject to an implied limitation, as far as its language permits, in conformity with Australia’s treaty obligations.<sup>22</sup> In this case s196 was read to conform to Australia’s treaty obligations under Art 9 (the right to liberty) of the International Covenant on Civil and Political Rights (ICCPR).<sup>23</sup> Applying this principle the court found that s196 was subject to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention. In this case *Al Masri*’s counsel successfully argued that the statutory provisions read together amounted to a failure of the legislature to make an express provision for Mr *Al Masri*’s situation.

The *Al Masri* decision was overturned recently by a narrow majority of the High Court of 4:3 in *Al-Kateb v Godwin*.<sup>24</sup> In that case McHugh J in the majority found that the words of ss196 and 198 are ‘unambiguous’ and do require the indefinite detention of a stateless person for whom there is no immediate prospect of removal. McHugh J said that the words of s196 are ‘too clear’ to be read as subject to a purposive limitation or an intention not to affect ‘fundamental rights’.<sup>25</sup> McHugh J also considered that the purposive limits of the ‘aliens’ power

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20 *O’Keefe v Calwell* (1949) 77 CLR 261; *Koon Wing Lau v Calwell* (1949) 80 CLR 533. The ‘immigration and emigration’ power contained in s51(xxvii) of the Constitution was used broadly until the date of these decisions.

21 (2003) 197 ALR 241.

22 *Id* at 260 [82].

23 Ratified by Australia on 13 August 1980.

24 (2004) 208 ALR 124 (hereafter *Al-Kateb*).

25 *Id* at 31.

extended to preventing a person from entering the Australian community.<sup>26</sup> By contrast, Gleeson CJ speaking for the minority thought that ‘a principle of legality’ was relevant. By this he meant the presumption against legislative removal of rights relied upon in *Al Masri*.<sup>27</sup> Importantly, he and Gummow J (also in the minority) preferred to apply this presumption rather than (as did the Federal Court in *Al Masri*) the presumption of conformity with international obligations.

The significance of this discussion for present purposes is that the Minister argues that the words of s196 clearly and unambiguously authorised the detentions of Mr Taylor at all times for the purpose of the action in tort, even though subsequently they were held to be unlawful. The Minister’s argument is weakened by the fact that s196 was amended in 2003 to cover the claim in *Taylor*. Subsection (4) of s196 now refers specifically to persons who are ‘detained as a result of the cancellation of his or her visa under s501’ and states that the ‘detention is to continue until a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen’. In the special leave application counsel for the Minister argued that s196 was ‘unambiguous’ even without the amendment. Counsel for Mr Taylor argued to the contrary, that the amendment now declares that a detention in similar circumstances is lawful. In other words, Mr Taylor’s argument would be that s196 was ‘ambiguous’ in its application to him, as it required amending legislation.

The Minister further argues that once a ‘reasonable suspicion’ arises under s189, s196 authorises the detention of an unlawful non-citizen. That is, as counsel for the Minister argued in the special leave application, once s189 is triggered, it imposes a duty to detain under s196. This is another way of arguing that the obligation to detain was unqualified or unambiguous.

## 2. *The High Court Decision in Re Patterson; Ex parte Taylor*<sup>28</sup>

This decision — its basis and reasons — are central to understanding the facts and issues in *Taylor*.<sup>29</sup> It is also essential to evaluating the reasons of the New South Wales Court of Appeal in that case as the Minister argues both that the Court of Appeal misinterpreted or misapplied the decision in *Re Patterson*, and that the High Court decision was itself wrongly decided.<sup>30</sup>

Mr Taylor was born in the United Kingdom and came to Australia as a child with his parents in 1966.<sup>31</sup> He has spent most of his life in a rural town in New South Wales, has never left Australia and has no recollection of life in the United Kingdom. In February 1996 he pleaded guilty to serious offences involving sexual

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26 Hayne, Heydon JJ in the majority agreed with this view as did Gleeson CJ in the minority. Callinan J in the majority expressed reservations, and Gummow and Kirby JJ in the minority strongly rejected this view. Thus there was 4:3 support for this view.

27 *Al-Kateb*, above n24 at 19.

28 *Re Patterson*, above n2.

29 *Taylor*, above n1.

30 High Court, No S421 of 2004, Notice of Appeal 11 December 2003 at [2].

31 The facts are taken from the judgment of McHugh J above n2 at 421 [92].

assaults upon children. He was sentenced to a minimum term of three and a half years with an additional term of two and a half years of parole. In prison he received favourable reports and undertook sex offender diversion courses. He was released from prison in August 1999 and returned to the rural town, which according to the facts as stated by McHugh J in his judgment in *Re Patterson* ‘does not object to his presence in that locality’.<sup>32</sup>

As Mr Taylor had not taken out citizenship under the *Australian Citizenship Act* 1948 (Cth) he was deemed to have held two types of visas: an absorbed person visa<sup>33</sup> and a transitional (permanent) visa.<sup>34</sup> From the age of eighteen he has been on the electoral rolls for the Federal and State parliaments.

The first of the two cancellations took effect on 4 November 1999. Immigration officials and police officers arrested and detained Mr Taylor acting under warrants issued as a result of a decision (dated 4 September 1999) by the then Minister for Immigration, the Honourable Phillip Ruddock, to cancel his visas, acting under s501(2) of the *Migration Act*. At that time (and currently) that provision stated:

Decision of the Minister or delegate — natural justice applies

...

- (2) The Minister may cancel a visa that has been granted to a person if:
- (a) the Minister *reasonably suspects* that the person does not pass the character test; and
  - (b) the person does not satisfy the Minister that the person passes the character test. (Emphasis added.)

On 12 April 2000 Callinan J made orders absolute for certiorari by consent pursuant to s75(v) of the Constitution on the basis of breach of the rules of natural justice.<sup>35</sup> Thus the first period of detention (161 days from 4 November 1999 to 12 April 2000) ended. A consequence of that decision was to restore the old visas.

The second of the two visa cancellations was made purporting to act under s501(3) of the *Migration Act*. The second decision was made by Senator Kay Patterson as parliamentary secretary for the Minister on 30 June 2000. On this occasion Mr Taylor was held in detention from 6 July 2000 until he was released by order of the High Court made on 7 December 2000 (155 days of detention).

Section 501(3) was added to the Act by the 1998 amendment in the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act* referred to above. It provides:

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<sup>32</sup> Id at 422 [93].

<sup>33</sup> *Migration Act* 1958 (Cth) s34.

<sup>34</sup> Granted as a result of the *Migration Reform (Transitional Provisions) Regulations* 1994 (Cth), reg 4.

<sup>35</sup> Described in *Re Patterson*, above n2 at 508 [355] (Callinan J).

## Decision of the Minister — natural justice does not apply

...

- (3) The Minister may:
- (a) refuse to grant a visa to a person; or
  - (b) cancel a visa that has been granted to a person if:
  - (c) the Minister reasonably suspects that the person does not pass the character test; *and*
  - (c) the Minister is satisfied that the refusal or cancellation person is in the national interest. (Emphasis added.)

There are three important differences in the terms of this power in comparison to s501(2). First, the power is only exercisable by the Minister ‘personally’,<sup>36</sup> secondly, the rules of natural justice do not apply,<sup>37</sup> but thirdly and significantly, the exercise of power under s501(3) is conditioned upon the Minister being satisfied that the cancellation ‘is in the national interest’.<sup>38</sup> Like the power in the *Migration Act* s501(2), it is conditioned upon the Minister’s reasonable suspicion<sup>39</sup> that the person does not pass the character test. However, as I explain below, Mr Taylor could never pass the character test.

Section 501C(3) (one of the personal intervention powers) was also relevant. It required the Minister to give Mr Taylor ‘relevant information’ for the decision and to invite him to make representations about the revocation of his visa. Under s501C(4) the Minister then had a discretion to revoke the cancellation if such representations were made, *and* the Minister was satisfied that he passed the character test. Like s501(3), the s501C(4) power is only exercisable by the Minister ‘personally’.<sup>40</sup> The paradox in this case was that Mr Taylor never could satisfy the character test as he had a ‘substantial criminal record’ within the meaning of s501(7) as he had been sentenced to ‘a term of imprisonment of 12 months or more’.<sup>41</sup> Thus s501C(4) had no application to him. This as I will explain was a crucial fact in this case.

It was also crucial that the exercise of power under s501(3) is conditioned upon the Minister being satisfied that the cancellation ‘is in the national interest’. As Kirby J elaborated in his judgment in *Re Patterson*, the Minister in introducing the 1998 ‘national interest’ amendment made it clear that it applied ‘in exceptional or emergency circumstances’ — this was the reason for granting the Minister a personal discretion in relation to this power. Its purpose was to enable persons who are a ‘significant threat to the community’ to be removed.<sup>42</sup>

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<sup>36</sup> *Migration Act* 1958 (Cth) s501(4).

<sup>37</sup> *Id* at s501(5).

<sup>38</sup> *Id* at s501(3)(d).

<sup>39</sup> *Id* at s501(3)(c).

<sup>40</sup> *Id* at s501C(5).

<sup>41</sup> *Id* at s501(7)(c).

<sup>42</sup> *Re Patterson*, above n2 at 500 [326]. Contrast *Madafferi* above n12 at 669 [89] where the Full Court of the Federal Court opined that this was setting the ‘bar’ too high, but that the consideration of ‘national interest’ is an ‘evaluative task’ which must be obtained ‘reasonably’.

In this case Senator Patterson made her decision (the second cancellation decision) on the basis of a departmental minute which gave her misleading advice about the operation of s501(3), and a departmental submission which failed to emphasise the central importance of the ‘national interest’ to the exercise of her powers.<sup>43</sup> As Gaudron J points out in her judgment,<sup>44</sup> the minute mistakenly advised Senator Patterson that if she made a decision under s501(3), then Mr Taylor would have an opportunity to make representations under s501C(4) for revocation of her decision. The departmental submission further compounded the erroneous advice by equating a ‘substantial criminal record’ with the ‘national interest’ in removal of the person. As Gaudron J said,<sup>45</sup> the terms of s501(3) make it clear that the national interest considerations are separate and distinct from the question whether or not a person passes the character test, and require evaluation.

Further, there did not appear to be any evidence suggesting that the cancellation of Mr Taylor’s visa was ‘in the national interest’ in the sense required in s501, or in the Policy Direction. Because of the misleading advice given to Senator Patterson about s501C(4), Mr Taylor was not given an opportunity to make submissions. His visa was simply cancelled under s501(3). Kirby J in his judgment discusses how this exercise of power ‘effectively’ deprived Mr Taylor of the opportunity of presenting the only relevant grounds for revoking the decision, namely:

His very long residence in Australia, his family connections, his maternal dependant, his lack of real connection with his country of birth and his compliance with parole conditions and efforts at rehabilitation.<sup>46</sup>

Spigelman CJ in *Taylor* in the New South Wales Court of Appeal also referred to the fact that the material suggested that he was ‘highly unlikely to re-offend’, or that there was at least only a ‘moderate risk’.<sup>47</sup>

In a unanimous decision, the High Court in *Re Patterson* granted certiorari and prohibition in Mr Taylor’s favour. It is often said that the decision contains no ratio. Spigelman CJ in *Taylor* for example, expresses such a view.<sup>48</sup> In the recent *Shaw* decision,<sup>49</sup> the High Court was prepared to revisit *Re Patterson* on the constitutional issue for that reason. However, the reasoning of the High Court on the exercise of s501 as an administrative power forms part of a ratio and is relevant to the tort liability issue.

As the pleadings set out in Callinan J’s judgment<sup>50</sup> in that case demonstrate, there were three key issues to be considered by the seven judges in the High Court.

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43 See for example, *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24; a Minister cannot hide behind defective advice when there is a personal discretion to be exercised.

44 *Re Patterson*, above n2 at 416–419 [69]–[81].

45 *Id* at 418 [78].

46 *Id* at 503 [333].

47 *Taylor*, above n1 at 280.

48 *Id* at 274.

49 *Shaw*, above n11.

50 *Re Patterson*, above n2 at 509 [358].

There was first the ‘delegation issue’ of whether Senator Patterson could and was validly acting as the Minister ‘personally’ in the exercise of the statutory discretion.<sup>51</sup> All six judges who considered this matter agreed that she could and was.

The next issue or group of issues concerned the exercise of s501 as an administrative power. As pleaded, the issue was whether the Senator had acted unreasonably<sup>52</sup> in failing to take into account the ‘national interest’. Two judges in the High Court, Gaudron and Kirby JJ, decided that there was a jurisdictional error on the basis of failure to properly establish the ‘national interest’ requirement.<sup>53</sup> Gummow and Hayne JJ (with Gleeson CJ, McHugh J and Gaudron J expressly agreeing, that is five of the seven judges) decided that there had been an administrative or jurisdictional error because Senator Patterson was misled about the effect of s501C(3).<sup>54</sup> There is majority support that the reason for the decision in *Re Patterson* was the failure of Senator Patterson to understand the basis of her power or jurisdiction. This is important reasoning as the High Court has recently said that the effect of jurisdictional error is that the decision is regarded in law ‘as no decision at all’.<sup>55</sup> It is the invalid exercise of power in that sense which is, or should be, the focus of the action in tort.

The third issue was the constitutional question of whether Mr Taylor is an ‘alien’. It was decided by a majority of 4:3 that Mr Taylor is not an ‘alien’,<sup>56</sup> although he is a non-citizen. For that reason also s501 was not a valid exercise of power. Arguably this aspect of the reasoning was not necessary to the decision once it had decided the jurisdictional error issue. However, the New South Wales Court of Appeal in *Taylor* relied on the decision for its constitutional basis,<sup>57</sup> although counsel for Mr Taylor suggested otherwise in the special leave application.

### **3. *The Decision of the New South Wales Court of Appeal***

Mr Taylor subsequently commenced proceedings against the Minister and Senator Patterson (who made the decisions to cancel the visas) and the Departmental officers (who effected the detentions), for damages for false imprisonment. At first instance before Murrell DCJ he succeeded and obtained a verdict for \$116,000. The ministers and the Commonwealth appealed against this judgment, and Mr Taylor cross-appealed against the assessment of damages. The Court of Appeal

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51 *Migration Act 1958* (Cth) s501(4).

52 Kirby J alone decided that the decision was unreasonable. *Re Patterson*, above n2 at 505 [339].

53 Callinan J as the seventh justice appeared to agree with Kirby J’s reasoning on the ‘national interest’ issue. (2001) 207 CLR 391 at 519 [381].

54 *Id* at 437 [139].

55 *Minister for Immigration v Bhardwaj* (hereafter *Bhardwaj*) (2002) 209 CLR 597 at 641 [51] (Gaudron & Gummow JJ), 618 [63] (McHugh J) and 646 [152] (Hayne J). See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76]–[78] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ).

56 As noted above, *Shaw’s* case has overturned *Re Patterson* on that ground.

57 *Taylor*, above n1 at 274 (Spigelman CJ), 283 (Meagher J). Ipp J agreed.

unanimously dismissed the appeal and Mr Taylor's cross-appeal. There are however some important differences in the reasoning of the justices as I will explain below.

The tort of false imprisonment has been described as 'any wrongful total restraint on the liberty of the plaintiff which is directly brought about by the defendant'.<sup>58</sup> It is one of the genus of the tort of trespass, and an 'intentional' tort. Its principal concern is to protect against unlawful total restraints on a person's liberty and freedom of movement.<sup>59</sup> The elements of the tort which are in issue on the facts of this case are:

- Whether the element of *directness* is established on the part of the acts of the Minister and Senator Patterson (the 'ministerial acts') (as distinct from the actions of the Departmental officers who effected the detentions);
- Whether the ministerial acts (as distinct from the actions of the Departmental officers who effected the detentions) were *intentional* for these purposes;
- Whether there was an *unlawful* restraint on Mr Taylor's liberty.

Indeed as I will explain, when the liability of a public authority is in question, the latter issue is the primary one. For historically, public authorities have been held liable in trespass as a prima facie invasion of liberty unless they can justify their actions with express (usually statutory) authority.<sup>60</sup>

The actions of the Minister and Senator Patterson on the one hand (the 'ministerial acts') and the Departmental officers were argued separately. The leading judgment in the Court of Appeal was given by Spigelman CJ who dealt only with the liability for the ministerial acts. Spigelman CJ relied first upon the Minister's lack of 'lawful authority' to detain Mr Taylor due to his lack of status as an 'alien'.<sup>61</sup> Spigelman CJ<sup>62</sup> agreed with the trial judge that the effect of the High Court's interpretation of the scope of s501 in *Re Patterson* was that s189 could not 'constitutionally' apply to Mr Taylor. Further on this point of whether there was an *unlawful* restraint on Mr Taylor's liberty, Spigelman CJ referred to *Bhardwaj*<sup>63</sup> as authority for the proposition that the effect of the orders for certiorari made by the High Court in relation to each period of detention was 'to wipe the slate clean'. He said: 'There never was such a decision in law'.<sup>64</sup> Spigelman CJ found that in the statutory context (see above), the element of *directness* for the acts of the Minister and Senator Patterson was established as the detention provisions were self-executing and made 'detention an inevitable

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58 Francis A Trindade, 'The Modern Tort of False Imprisonment' in N Mullany (ed), *Torts in the Nineties* (1997) at 229.

59 *Ibid.*

60 *Entick v Carrington* (1765) 19 State Tr 1030; *Coco v R* (1994) 179 CLR 427. See Susan Kneebone, *Tort Liability of Public Authorities* (1998) at 48–49.

61 *Id* at 271.

62 *Id* at 274.

63 *Bhardwaj*, above n55.

64 *Taylor*, above n1 at 275; *id* at 282 (Meagher JA). Ipp JA agreed with both the reasons of Spigelman CJ & Meagher JA.

consequence' of the cancellations.<sup>65</sup> He rejected the Minister's argument that there was a separation between the ministerial acts in cancelling the visas, and the actions of the departmental officers who effected the detentions. Importantly he rejected the argument that the officers in this case exercised an independent discretion.<sup>66</sup> Finally Spigelman CJ found that the acts of the Minister and Senator Patterson in cancelling the visas were intentional for the purpose of the tort.

Meagher JA substantially agreed with Spigelman CJ's reasons for the 'ministers' liability. Meagher JA rejected the argument that liability was dependent upon establishing 'fault'. He found that the 'ministers' were the 'real and proximate cause'<sup>67</sup> for the detention.

In relation to the Departmental officers, the Minister successfully argued that the officers' actions were lawful, not on the basis that Mr Taylor was a person in fact subject to deportation (as an 'alien'), but on the basis of the words 'reasonably suspects' in s189(1) of the *Migration Act* as they did 'the work of an express protective subsection'.<sup>68</sup> Meagher JA found on the basis of that provision, that the officers were not liable, and thus that the Minister was not vicariously liable for their actions. He found that although the officers acted under mistake of law (as Mr Taylor was not an 'alien') they were exonerated by the words of s189(1). Spigelman CJ did not find it necessary to consider this basis of liability.<sup>69</sup>

The third judgment was given by Ipp J who agreed with the reasons of both Spigelman CJ and Meagher JA. Thus it can be assumed that he agreed with both the (broader) reasons of Spigelman CJ on the point of whether there was an *unlawful* restraint on Mr Taylor's liberty by the Ministers, as well as with Meagher JA's reasons on the liability of the officers. Similar to Meagher JA, Ipp J explained his views on the directness issue in terms of causation theory.

In summary then, the New South Wales Court of Appeal decided that there was an unlawful detention of Mr Taylor by the 'ministers' on two bases. First, relying on the decision in *Re Patterson*, as Mr Taylor was not an 'alien', s501 of the *Migration Act* and thus the detention provisions did not apply to him. Importantly, this reasoning is only relevant to the second decision and the second period of detention. The Court of Appeal did not distinguish the two decisions and two periods of detention in its reasoning on this point. Secondly, the detention was unlawful (in the sense of null and void, although their Honours did not use these words) because both decisions were quashed by the writ of certiorari. This reasoning applies to both decisions and periods of detention. The Court of Appeal also found that the ministerial decisions were the direct cause of the detention. Additionally Meagher JA (with Ipp J possibly agreeing) found that the Minister was not vicariously liable for the actions of the officers on the basis of the protection provided by s189(1) of the *Migration Act*.

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65 *Taylor*, above n1 at 277.

66 *Ibid*.

67 *Id* at 284.

68 *Id* at 285 (Meagher J).

69 *Id* at 275. Ipp JA agreed with both the reasons of Spigelman CJ and Meagher JA.

#### 4. *The Basis of the Appeal*

In addition to arguments based upon the effect and correctness of *Re Patterson*, the Minister questions the basis of his liability in tort.

First, he argues that there was no ‘fault’ in the ministerial action, and that he should not be liable unless there is lack of bona fides or fault. He suggests that on grounds of public policy, and by analogy with other torts, that liability should be fault based. The Minister next argues that in the particular circumstances, the actions were protected by the statutory framework, and in particular by s189. The Minister argues that s189 involves an independent discretion by an officer (for which he is not vicariously liable); that the acts of cancellation and detention are clearly delineated. Thus it follows, so the Minister argues, that the cancellations are not causally relevant to the detentions.

The first argument goes to the basis of liability. The Court of Appeal rejected the argument for fault-based liability. It decided the issue on the basis of whether or not there was an unlawful restraint on Mr Taylor’s liberty. As noted above, the Court of Appeal decided that there was an unlawful detention of Mr Taylor by the ‘ministers’ on two bases. First, because s501 did not apply to Mr Taylor, and secondly, because of the consequences of the remedy of certiorari in relation to the decisions. The Minister concedes that the effect of the remedies was to retrospectively ‘wipe the slate clean’. This is consistent with recent jurisprudence of the High Court which avoids the labels of ‘voidness’ and ‘nullity’ and instead concentrates upon the consequences of the remedy.<sup>70</sup> Thus the central issue is whether the detention of Mr Taylor was ‘unlawful’ for the purpose of liability in trespass.

Mr Taylor’s counsel argues that liability in trespass is strict and that no question of fault arises. The argument that the officers were exercising an independent discretion is rejected. Mr Taylor’s counsel further relies upon the decision in *Cowell v Corrective Services Commission of New South Wales* (hereafter *Cowell*).<sup>71</sup> In that case the court found that statutory protection did not apply to a principal who was directly liable in the circumstances. That is, Mr Taylor’s counsel argues that the immunity of the officers does not affect liability for the ministerial acts (for which the Commonwealth has conceded liability, if any).

The remainder of the Minister’s arguments relate to the elements of the tort of false imprisonment, but hinges on the independent discretion argument. The Minister concedes that the two periods of detention were the likely result of the cancellation of the visa, indeed that they were the ‘natural and probable result’ of those decisions. But the Minister argues that there was no legal causal nexus between the ministerial action and the acts of the Departmental officers in detaining Mr Taylor on the basis that the officers exercised an ‘independent discretion’.

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<sup>70</sup> See for example, *Bhardwaj*, above n55, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. See Mark Aronson, ‘Nullity’ (2004) 40 *ALIAL Forum* 19.

<sup>71</sup> (1988) 13 NSWLR 714.

In the Court of Appeal Spigelman CJ said that the ‘inevitability’ of the detention appeared from the documentation.<sup>72</sup> This documentation, which is also cited in the judgment of Gummow and Hayne JJ in *Re Patterson*<sup>73</sup> unequivocally advises Senator Patterson that Mr Taylor’s detention will be the consequence of the cancellation. The Respondent’s Summary of Argument<sup>74</sup> refers to the evidence on this point. It is explained that the briefing notes for each decision-maker expressly advised that upon cancellation Mr Taylor would be detained and subsequently removed from Australia.

The Minister also argues that the ministerial acts were not ‘intentional’ in the relevant sense. In relation to this point, he argues that the separation between the acts of cancellation and detention points to the lack of intention.<sup>75</sup>

I turn now to evaluate these arguments.

### **5. *What is the Basis of the Commonwealth’s Liability in Trespass?***

This case concerns an action in trespass for damages for false imprisonment for which the principles are well established. However the Minister challenges the principles and argues that the tort of trespass should be assimilated with other torts, in relation to which the High Court has made clear in recent decisions<sup>76</sup> that the statutory context is relevant, together with considerations of public policy. The Minister argues that ‘it cannot have been intended by the legislature that a Minister acting bona fide, cancelling a visa, would be treated as having detained the person’.<sup>77</sup> The Minister argues that a bona fide exercise of power under s501 that ‘is unknowingly flawed by jurisdictional error’<sup>78</sup> should not lead to liability. In my view this argument should be rejected.

In this as in other tort contexts, public authorities are not in a special position.<sup>79</sup> As Spigelman CJ said in *Taylor*<sup>80</sup> the executive arm of government, as must any individual, must establish lawful authority for its actions.<sup>81</sup> Typically, public authorities have been held liable in trespass unless they can justify their actions with express (usually statutory) authority.<sup>82</sup> In these cases it was explained that excess of authority or jurisdiction makes the official action void, and removes the

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<sup>72</sup> *Taylor*, above n1 at 276.

<sup>73</sup> *Re Patterson*, above n2 at 454 [193].

<sup>74</sup> High Court, No S542 of 2003, 11 December 2003 at [13].

<sup>75</sup> Applicants’ Summary of Argument, High Court No S542 of 2003, dated 13 November 2003 at [21].

<sup>76</sup> See for example, *Sullivan v Moody* (2000) 207 CLR 562. That case involved actions in negligence against medical practitioners, social workers and department officers by third parties, in relation to the investigation of allegations of sexual abuse of children.

<sup>77</sup> S542, above n75 at [22].

<sup>78</sup> *Id* at [24].

<sup>79</sup> *Ex parte Evans (no 2)* [2001] 2 AC 19 (hereafter *Ex parte Evans (no 2)*).

<sup>80</sup> *Taylor*, above n1 at 269.

<sup>81</sup> *Id* at 272.

<sup>82</sup> See *Kneebone*, above n60 at 48–49.

protection or defence which such authority or jurisdiction provides. For example, officials executing a warrant under the authority of the Secretary of State were held liable in trespass when the warrant was proved to have been issued without lawful authority.<sup>83</sup> Recently, a conviction based upon evidence obtained by a trespass was held to be unlawful.<sup>84</sup> In this and other trespass actions, the courts apply a general defence of 'statutory authority'. The onus is upon the defendant to establish lawful justification for its acts. The principal concern of the tort of trespass, as stated above, and as recognised by these principles, is to protect against unlawful total restraints on a person's liberty and freedom of movement.<sup>85</sup>

Mr Taylor's counsel (as did Spigelman CJ in *Taylor*) relies upon two decisions from the prison context in support of his argument for retaining these principles, and in support of Mr Taylor's claim. Both decisions concern prisoners in the criminal justice system who made successful claims for false imprisonment arising from a wrongful calculation of the period of detention.<sup>86</sup> The Minister counters with *Percy v Hall*,<sup>87</sup> a decision of the English Court of Appeal.

*Percy v Hall* was concerned with the liability of police constables who had made arrests acting on the basis of certain by-laws which were later declared invalid. The issue in this case was whether the invalidity (if established) affected the liability of the constables in tort for false imprisonment. It was decided that even if the by-laws had been invalid (for uncertainty), which they were not, this did not affect the liability of the constables who had acted in reliance on the by-laws, provided that they could show that they had been acting in the reasonable belief that offences were being committed.

The issues are first, whether the analogy of prisons and criminal justice system is appropriate in the immigration detention context, and secondly, whether there is a valid distinction to be made between the facts of *Taylor* and the 'prison-wrongful calculation of period of detention' cases. That is, should the outcome of *Taylor* depend upon the nature of the jurisdictional error (in relation to which the remedy on the Minister's own admission, 'wipes the slate clean'). Finally, what of the arguments for assimilation with other torts?

As Gleeson CJ appeared to recognise in the special leave application, the prison/criminal justice analogy is a difficult one to apply. As the Chief Justice observed, actions in false imprisonment are not brought each time a conviction is overturned. The statutory context for the cancellation of visas under s501 and the immigration detention regime operates in the 'national interest'. Yet the courts have made it clear that in this context, the Minister for Immigration must act within statutory authority and respect the rights of individuals whatever their status.<sup>88</sup> The seminal decision in *Lim*<sup>89</sup> itself arose in the context of a claim for compensation.

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83 *Entick v Carrington* (1765) 19 State Tr 1030. See also *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 (action in trespass for wrongful demolition of property).

84 *Coco v R* (1994) 179 CLR 427.

85 *Ex parte Evans (no 2)*, above n79.

86 The decisions are *Cowell*, above n71 and *Ex parte Evans (no 2)*, above n79.

87 [1997] QB 924 (Court of Appeal).

88 See for example, *Goldie v Commonwealth* (2002) 188 ALR 708 (hereafter *Goldie*).

In *Minister for Immigration v Tang Jia Xin*<sup>90</sup> the High Court accepted the decision of the trial judge,<sup>91</sup> in a claim for false imprisonment, that there had been an unlawful detention by exceeding the permissible statutory limit.

The errors in *Taylor* raise the lawfulness of the detention rather than a wrongful calculation of a period of detention. The first cancellation decision in *Taylor* involved a breach of the rules of natural justice in applying s501(2) of the *Migration Act*. The second cancellation decision was ‘infected’ by a failure to evaluate the ‘national interest’ in applying s501(3) of the *Migration Act*. In my view the High Court should determine that as a result of these errors, the Minister’s actions in detaining Mr Taylor were ‘unlawful’ for the purpose of liability in trespass. The High Court has recently said that the effect of jurisdictional error is that the decision is regarded in law ‘as no decision at all’.<sup>92</sup> If the High Court is to move away from the position it has taken in other cases, it will need to provide strong justification for doing so.

In *Ex parte Evans (no 2)*<sup>93</sup> a distinction was suggested between the facts of that case and the situation where an initially lawful decision to detain is subsequently declared ultra vires. However a closer examination of the facts suggests that the distinction is not applicable to *Taylor*. In that case a person was sentenced to concurrent terms of imprisonment and the period was calculated by the governor on the basis of the method approved by the then leading judicial authority. Subsequently, in a separate action, the established method of calculation was successfully challenged. The prisoner was immediately released, but on the basis of the new judicial authority, she had been kept in custody for an additional 59 days. She successfully sued the governor for damages for false imprisonment. The principal reason for the decision was that the fresh judicial authority operated retrospectively and removed the lawful justification for the detention. As Lord Hope pointed out in this case, the responsibility for calculating the release date was committed to the governor by statute.<sup>94</sup> In obiter discussion, with reference to *Percy v Hall*, it was recognised that in a situation where the lawfulness of the detention is subsequently declared invalid, an argument might be made that the governor was not responsible,<sup>95</sup> as he was bound to obey a court order to detain. That observation depends on the nature of the governor’s statutory duties and responsibilities, which bear no analogy to the position of the Minister for Immigration exercising personal, unreviewable, discretionary powers under s501 and who bears ultimate responsibility for the exercise of powers under the *Migration Act*.

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89 *Lim*, above n14.

90 (1994) 125 ALR 203.

91 (1993) 116 ALR 329 (Neaves J). The findings of Neaves J on the ‘unlawfulness’ point were subsequently confirmed in a fresh action in the Federal Court (Unreported, Wilcox J, 18 and 19 March 1996, 11 April 1996).

92 *Bhardwaj*, above n55. In *Plaintiff S157/2002 v Commonwealth*, above n55, it was recognised that breach of natural justice is a jurisdictional error.

93 *Ex parte Evans (no 2)*, above n79.

94 *Id* at 34.

95 *Id* at 34 (Lord Hope).

Moreover, the decision in *Percy v Hall* is not consistent with Australian law. For example in *Spautz v Butterworth*<sup>96</sup> where a magistrate issued an arrest warrant for which he had no authority, and which resulted in an imprisonment, the magistrate was held liable in trespass. That case expressly supports the proposition that liability is strict, and that a plaintiff need not show that the defendant acted maliciously and without reasonable and probable cause.

The decision in *Cowell*,<sup>97</sup> which although it concerns the prison context, is a better analogy for *Taylor*. In that case the court found that a principal (the Corrective Services Commission and the Government of New South Wales) was directly or personally liable (rather than vicariously liable) in trespass where there was an 'unlawful act', despite the fact that express statutory protection applied to a subordinate officer.<sup>98</sup> The Commission was responsible for the overall management of prisons in the State of New South Wales. *Taylor* is concerned with ministerial decisions which involve personal discretions, at the highest level of the Department of Immigration, in relation to a system of immigration detention. The errors in that case were jurisdictional errors which according to current Australian jurisprudence, render the original decisions 'as no decision at all'.<sup>99</sup>

Finally, what of the Minister's arguments that a bona fide exercise of power under s501 should not lead to liability? The effect of this argument is to assimilate trespass to other torts. To accept such an argument would negate the importance of the intentional torts for preserving the rights of individuals. Recently for example in the case of *Goldie*,<sup>100</sup> the Full Court of the Federal Court found that the elements of the tort of false imprisonment were made out on the facts (which are discussed below), but not those for misfeasance in a public office or negligence. The Minister's argument may be attempting to draw on the analogy of the principles relating to privative clauses, which protect bona fide exercises of power.<sup>101</sup> But this analogy is inaccurate as the law makes it clear that tort liability is separate from administrative wrong,<sup>102</sup> even though as *Taylor* illustrates, the two contexts are linked. This argument is simply too broad to be sustained. In any event, as recent decisions in the law of negligence illustrate, the statutory context is but part of the factual context.<sup>103</sup> There is no conflict between the Minister's argument at its broadest, namely that liability depends on the statutory context, and the

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96 (1997) 41 NSWLR 1. Discussed by Margaret Fordham, 'False Imprisonment in Good Faith' (2000) *Tort LR* 53 at 66, n53

97 *Cowell*, above n71.

98 The case is fully discussed in Kneebone, above n60 at 321–322.

99 *Bhardwaj*, above n55.

100 *Goldie*, above n88.

101 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 614–617. Alternatively the Minister may be drawing an analogy with the principles re specific statutory protection. See below.

102 Kneebone, above n60 at 3–6.

103 See for example, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 discussed in Susan Kneebone, 'The Liability of Government as an Occupier of Land' (2000) 6 *LGLJ* 17.

established principles in trespass. The onus is upon the Minister to show that the actions were lawful in the statutory context.

The Minister does not rely upon the legality of the ministerial acts to support the detentions. Rather he focuses upon the actions of the officers and the overall scheme of immigration detention. The Minister argues that the acts of cancellation and detention are separate. He argues that once a ‘reasonable suspicion’ arises under s189, then s196 authorises the detention of an unlawful non-citizen. That is, as counsel for the Minister argued in the special leave application, once s189 is triggered, it imposes a duty to detain under s196. This as I will explain in the next section, raises the issue of the relationship between the ‘ministers’ and the officers on the facts of *Taylor*, and whether the former are responsible in tort for the actions of the latter.

In order to succeed on this point, Mr Taylor will need to establish that *Percy v Hall* is not good law in Australia and that the traditional principles as stated above apply. Alternatively, he will need to argue that having regard to the nature of the jurisdictional errors in *Re Patterson*, the cancellation decisions were not reasonable or bona fide in the circumstances. He will need to persuade the High Court that the ‘ministers’ had ultimate responsibility for ensuring that their decisions, which on their admission they knew would result in Mr Taylor’s detention, were lawful. He will have to persuade the court that the decisions were unlawful for jurisdictional errors (rather than the constitutional errors relied upon by the Court of Appeal in *Taylor*).

I turn now to consider the position of the officers and the Minister’s argument that the acts were within statutory authority.

## **6. *Were the Officers Exercising Independent Discretions?: The Effect of s189***

Mr Taylor argues that:

The position in regard to detention of people for deportation is quite different from that of those subject to powers of arrest and detention by police officers. The discretion of a police officer as to whether or not to act on the advice of an informant is not present. There is no process under the [Migration] Act for an individual to be formally charged and no possibility of an application for bail.<sup>104</sup>

The Minister argues to the contrary, that the officers exercised an independent discretion when they acted under s189 of the *Migration Act*. The Minister argues on the basis of the separation of the cancellation and the detention decisions to avoid responsibility for the acts of the officers. This argument calls for some discussion of the so-called ‘independent discretion function’ principle which is a way of denying the existence of a relationship of vicarious liability.<sup>105</sup> For example, it has been applied to the actions of police officers in exercising powers

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<sup>104</sup> Respondent’s Summary of Argument, above n74 at [15].

<sup>105</sup> Kneebone, above n60 at 300–316.

of arrest. As the above quotation suggests, the position of police officers is not necessarily analogous to that of immigration officers. This controversial ‘principle’ expresses a policy about what liability should be sheeted home to public authorities<sup>106</sup> as much as a view about whether the discretion is in fact independent. It has been much criticised and abrogated by statute in some jurisdictions.

Although there are some decisions which suggest that immigration officers may sometimes be exercising independent powers when acting under s189, I argue that those cases involve situations which are distinguishable from the facts of *Taylor*. For example, in *Goldie*<sup>107</sup> the Full Court of the Federal Court found that an officer lacked the ‘reasonable suspicion’ required by s189 in the circumstances of that case. Mr Goldie was taken into immigration detention for a period of three days as the result of a computer error which indicated that he had no current visa. This action followed from the view formed by an officer in charge of the Compliance Section of the Department of Immigration in Perth. The Full Court found an absence of sufficient search or enquiry to make the formation of the suspicion justifiable on objective examination. In this case it was accepted that the officer had to form a reasonable view when acting under s189. The Commonwealth did not deny its responsibility for the acts of its officers, that is, both the officer in charge and the officers who effected the detention.<sup>108</sup>

*Mastipour*<sup>109</sup> is another decision which contains some comments about s189 and the immigration detention context. Mr Mastipour was a putative refugee and detainee at the Baxter Immigration Reception and Processing Centre who claimed damages in negligence against the Secretary of the Department for Immigration, in relation to actions by officers of Australasian Correctional Management (ACM), whilst he was in detention. The Secretary did not deny that a duty of care was owed to the detainee. However, Lander J thought that ‘those who have the responsibility for his detention’ were the persons who owed him a duty.<sup>110</sup> In support of that proposition he cited a case which concerned the liability of a prison authority.<sup>111</sup> By contrast, Selway J thought that having regard to the context of the immigration detention regime, the prison analogy was not necessarily apt.<sup>112</sup> Relevantly, Selway J described the Secretary’s s189 role as ‘a power and a duty to detain’.<sup>113</sup> This comment is consistent with the Secretary being in a position of overall responsibility.

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106 See for example, *NAAV v Minister for Immigration* (2002) 193 ALR 449 at 621 [645]: in relation to s189 the Full Court of the Federal Court said that the detention was ‘a consequence of the provisions of the Act, not an executive decision’.

107 *Goldie*, above n88.

108 The matter was subsequently remitted to French J for assessment of damages: *Goldie v Commonwealth (No 2)* [2004] FCA 156. Damages were assessed at \$22,000. French J took into account the ‘humiliation and indignity’ inflicted on Mr Goldie.

109 *Lim*, above n14.

110 *Id* at 89.

111 *Howard v Jarvis* (1958) 98 CLR 177.

112 *Lim*, above n14 at 86.

113 *Id* at 86.

The effect of s189 was considered in *Ruddock v Vadarlis*<sup>114</sup> in relation to an argument that there was a mandatory duty to detain the ‘rescuees’ from the *MV Tampa* under s189(2) of the *Migration Act*. The Minister in that case successfully argued that the ‘duty’ to detain under s189 was for the purpose of law enforcement only and not for the benefit of individuals. That is, the power was merely ‘facultative’ and could not be relied upon as the source of rights.<sup>115</sup> Thus this short survey suggests that the effect of s189 is relative to the context, and that it is difficult to generalise about its effect.

Mr Taylor’s counsel argues that on the facts of *Taylor*:

When each Minister resolved to cancel the ... visa it was unnecessary for any further document to be produced or signed or any additional decision to be made as to whether or not detention should take place. Communication by the Minister of his or her decision to an officer was sufficient to bring about the detention.<sup>116</sup>

Murrell DCJ at first instance thought that there was ‘no scope for the exercise of a discretion intended to alter the intended outcome of the original and critical administrative decision.’<sup>117</sup> In *Taylor*, Meagher JA said that under s189 the officers had a ‘duty, not merely a power to detain Mr Taylor’.<sup>118</sup> The concept of a duty does not support the conclusion that they were exercising independent discretion. Overall, the facts and legislative context in *Taylor* does not sit well with the concept of an immunity on the basis of an independent discretion. To the contrary, they suggest that the Minister is liable for the acts which led to the detention.<sup>119</sup>

That conclusion however does not dispose of the issue of the relationship between the ministerial acts of cancellation and the actual detentions. In *Taylor*, Meagher JA (with Ipp JA possibly agreeing) construed s189 which refers to the ‘reasonable suspicion’ of the officer as a specific statutory protection clause.<sup>120</sup> He concluded that the officers satisfied the test in *Little v Commonwealth* (hereafter *Little*)<sup>121</sup> on the basis that their mistake of law (that the cancellations were valid) was an honest one, that they did have a ‘reasonable suspicion’ on the facts.

The general approach under Australian law<sup>122</sup> to the application of statutory protection clauses in intentional torts was described by Dixon J in *Little* thus:

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114 (2001) 110 FCR 491.

115 See for example, *Cox v Minister for Immigration* (2004) 143 NTR 10.

116 Respondent’s Summary of Argument, above n74 at [16].

117 *Taylor*, above n1, cited by Spigelman CJ at 276.

118 *Id* at 282.

119 Contrast *Louis v Commonwealth* (1986) 87 FLR 277, where an airline company was held liable in trespass for the forcible deportation of the plaintiff. The Director of Immigration of Hong Kong was able to prove that it was not liable as it had not made the formal direction required by Hong Kong law.

120 *Taylor*, above n1 at 285.

121 (1947) 75 CLR 94.

122 Kneebone, above n60 at Ch 6.

Such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, for then the protection would be unnecessary, but where an *illegality* has been committed by a person *honestly* in the supposed course of the duties or authorities arising from the enactment.<sup>123</sup> (Emphasis added.)

This test requires a defendant to justify positively the act upon which the claim is based (usually an action for false imprisonment or trespass) which is prima facie actionable and therefore requires specific statutory authority. The cases concern the exercise of powers of detention and arrest or similar powers by an authorised individual which interfere directly with a person's liberty. Arguably, these situations are the corollary of the exercise of 'independent discretions' by independent officers, which have no analogy to either the officers' or the 'ministers' actions in *Taylor*.

Meagher JA additionally relied upon the decision in *Percy v Hall*<sup>124</sup> which he regarded as being *in consimili casu*.<sup>125</sup> But that case did not contain specific statutory protection. The argument in that case was based upon general statutory authority and there was no reference to the Australian case law.<sup>126</sup>

If Meagher JA's conclusion about the officers' immunity is correct, the question is whether it affects the ministers' liability. That is, of what relevance is the fact that the officers were immune from liability? The decision in *Cowell*<sup>127</sup> suggests that a 'principal' may be directly liable even if there is specific statutory protection directed at a subordinate. It is difficult to extract general principles from the cases as decisions such as *Edgecock v Minister for Child Welfare*<sup>128</sup> and *De Bruyn v South Australia*<sup>129</sup> illustrate.<sup>130</sup> A conclusion on this point must take into account all the circumstances and policy factors in play. It is difficult to predict what the High Court might decide, but I would argue that the context of immigration detention and s501 powers provides a strong argument that ultimate responsibility resides in the Minister.

The final issue to consider in this section is whether s189 could provide a defence for the ministerial acts. There are two reasons why this argument should be rejected. First, the Minister cannot argue that the acts of cancellation and detention are separate and then rely on s189 to support the 'ministers' decisions. Secondly, the ministers cannot argue that their decisions under s501 were 'reasonable' as they have been found to involve serious jurisdictional errors.

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123 *Little*, above n121 at 108.

124 *Percy v Hall*, above n87.

125 (2003) 58 NSWLR 269 at 285.

126 It seems that the Minister may be attempting to argue that the 'general' 'defence of statutory authority' should be merged with the jurisprudence which has developed re specific statutory protection clauses. That argument and Meagher JA's reasoning at this point should be rejected.

127 *Cowell*, above n71.

128 [1970] 1 NSWLR 751.

129 (1990) 54 SASR 231.

130 *Kneebone*, above n60 at 322–323.

## 7. *The Elements of the Tort: Causation and the Statutory Framework*

The questions of independent discretion, directness and ‘fault’ collapse into the issue of causation. The Minister argues that the independent acts of the officers constitute a *novus actus*. If it is found that the officers were not exercising independent discretions, these difficulties disappear.

I take first the element of directness, which has been considered in the context of police officers making arrests on the basis of wrong information. The issue has arisen as to the informant’s liability. This has been expressed as whether the informant was an instigator, promoter, and active inciter of the action that follows. It is accepted that the interposition of independent discretion on the part of police officers will break the causal nexus.<sup>131</sup> As the facts and arguments rehearsed above suggest, the immigration officers in *Taylor* were not in an analogous position to police officers exercising independent discretions. Spigelman CJ in that case referred to the ‘self-executing nature of the relevant provisions of the *Migration Act* which made ‘detention an inevitable consequence’ of the cancellations.<sup>132</sup> His Honour also said:

When the High Court quashed the cancellation decision on the basis that the power to cancel could not constitutionally apply to [Mr Taylor], it necessarily decided that any other direct consequence of the cancellation could not constitutionally apply to him. In the circumstances of this case, and in the context of the specific statute under consideration, detention was such a direct consequence.<sup>133</sup>

The Minister’s argument that the acts of cancellation under s501 were separate and distinct from the acts of detention under s189 should be rejected, on the basis that the officers were not acting independently in detaining Mr Taylor. The ‘ministers’ were effectively the persons ‘directing’ or ‘instigating’ the detentions as a result of the cancellations.<sup>134</sup> The facts of *Taylor* can be distinguished from, for example, those of *Goldie*<sup>135</sup> where a regional officer independently made the decision to detain Mr Goldie.

The Minister relies upon the decision in *Myer Stores Ltd v Soo* (hereafter *Soo*)<sup>136</sup> in support of its argument that the ministers in *Taylor* were not active in promoting and causing the detention.<sup>137</sup> In *Soo* it was found that an employee of Myer Stores who instigated the false charges against the plaintiff was a joint tortfeasor with the police officers who arrested him. The court relied upon the fact that the employee security guard was active in promoting and causing the detention. It was found as a matter of fact that the employee not only complained

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131 *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597.

132 *Taylor*, above n1 at 277.

133 *Id* at 275.

134 See for example, *Louis*, above n119.

135 *Goldie*, above n88.

136 [1991] 2 VR 597.

137 High Court, S542 of 2003, Applicants’ Summary of Argument at [18].

to the police but formed part of the escort for the plaintiff to the security room.<sup>138</sup> My comment is that this does not seem an appropriate analogy in the context of the regime of immigration detention, where the officers are employees of the Commonwealth answerable to the Minister. Rather the Minister should be directly and vicariously liable for the acts of persons who are carrying out the objects of the *Migration Act*.

The Minister further argues that the ministers did not have the relevant intention to detain. This means that the act must be ‘deliberate or wilful’,<sup>139</sup> rather than involuntary, in the sense that the consequences of the action were intended or substantially certain to result in deprivation of the liberty of the plaintiff.<sup>140</sup> On that point Spigelman CJ in *Taylor* said:

There can be no doubt that each Minister had an intention that [Mr Taylor] be removed from Australia. That was the very point of the decision to cancel the visa  
.....<sup>141</sup>

He referred to the documentation which as noted above supports the view that the ministers did indeed intend Mr Taylor to be detained for the purpose of removal from Australia. On that basis, the onus is upon the Minister to establish absence of intention.<sup>142</sup>

## 8. Conclusions

In my view the decision of the New South Wales Court of Appeal in *Taylor* should be upheld on appeal, on the basis that there were unlawful exercises of power by the ‘ministers’ which led to the plaintiff’s detention. The High Court should rely on *Re Patterson* as establishing that both cancellation decisions involved jurisdictional errors. On that basis, there was no lawful justification for the exercise of the s501 power on either occasion. The High Court should be faithful to its own recent pronouncements about the effect of certiorari and jurisdictional error in the migration law context, and find that the decisions were not legally effective in the circumstances.

The High Court should reject the argument that the officers who carried out the detentions were exercising independent discretions as the clear purpose of the ministerial cancellations was to direct that Mr Taylor be detained and removed from Australia. The officers were bound by those directions.

Neither should it be found that the Minister is protected by the statutory context which involves the exercise of the personal, ‘disguised deportation’ powers in s501. The High Court should accept Mr Taylor’s argument that s196 did not authorise his detention in the circumstances, particularly as the statute now makes unambiguously clear that what was clearly unlawful is now lawful.<sup>143</sup>

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138 *Soo*, above n136 at 617 (O’Byrne J).

139 *Trindade*, above n58 at 235.

140 *Ibid*.

141 *Taylor*, above n1 at 277.

142 *Trindade*, above n58 at 237.

143 Contrast *Al-Kateb*, above n24.

The High Court should be very wary of accepting the Minister's call to unsettle the established principles in this area of law, because of the far-reaching ramifications of such a move. Mr Taylor puts his case on the basis of administrative efficiency versus liberty. This is the gist of the action in trespass for false imprisonment in this context.<sup>144</sup> Arguably it exists to protect persons in the position of Mr Taylor who otherwise may have little protection from the legal system. This argument is even stronger in the s501 context, which attempts to make the Minister's decisions unreviewable. Further, as Kirby J's comments in the special leave application indicate, its decision in *Taylor* will have limited 'floodgates' effect, as a result of the 2003 amendments to the Act. Moreover, the Court of Appeal's assessment of damages at \$116,000 seems modest and reasonable in the circumstances.<sup>145</sup>

One question that remains however is whether a decision in these proceedings in Mr Taylor's favour will be merely pyrrhic, on the basis that it does not determine his status in the citizen-alien dichotomy. However the High Court must uphold the principle that non-citizens, and those who have served their sentences for past crimes, have legal and human rights. This will ensure that any further attempt to remove Mr Taylor under s501 will be considered very carefully by the Minister.<sup>146</sup>

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144 *Ex parte Evans (no 2)*, above n79.

145 I have not delved into this issue but see the discussion of French J in *Goldie*, above n108 and in Fordham, above n96.

146 Whether under s501(2), pursuant to which Mr Taylor must be accorded natural justice, or pursuant to s501(3) (the 'national interest' criteria).