

# Alan Tudge's criminal act just one more example of Morrison government's hubris

The acting immigration minister should be sacked for 'disgraceful' and 'unlawful' behaviour — but he won't be, of course.

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The full extent of the “conservative” Morrison government's respect for the rule of law and its honouring of the fundamental human right to freedom from arbitrary detention is now laid out for open view.

PDWL is an Afghan refugee who applied for a protection visa in 2016. In December 2019 the immigration minister, David Coleman, refused him on the ground that he had a criminal conviction. Shortly after this Coleman went on leave which is still, mysteriously, going. The acting minister since has been Alan Tudge.

On March 11 this year, the Administrative Appeals Tribunal (AAT) upheld PDWL's appeal and ordered that he be given a protection visa and immediately released from immigration detention. He was not released but, on the same day, Tudge filed Federal Court proceedings challenging the AAT decision.

The new case came before Justice Melissa Perry in the Federal Court on March 12. She asked why PDWL was still in detention and ordered Tudge to explain by affidavit — sworn by an immigration officer with actual knowledge — the reasons by March 16.

PDWL remained in detention.

On March 16 his lawyers filed an application for his release, which was heard by Justice Michael Wigney on March 17. Wigney ordered PDWL be released immediately, noting that to him it had become “readily apparent ... that PDWL was not released from immigration detention simply because the minister did not like the tribunal’s decision”.

On March 16 the department had filed an affidavit by an in-house lawyer in the Department of Home Affairs, who swore that she knew why PDWL had not been released but she could not reveal the reasons because of legal professional privilege.

Wigney called bullshit on this sophistry, rightly, concluding that “the conduct of the minister in this case, on just about any view, has been disgraceful ... [He] appears to have willingly and flagrantly failed to comply with the orders made by Perry J.” With that bollocking Tudge’s department finally released PDWL from detention — after a week during which he had clearly been held illegally and in disregard of orders from the AAT and two Federal Court judges.

Fast-forward to September and the determination by yet another Federal Court judge, Justice Geoffrey Flick, of the minister’s ultimate appeal against the AAT’s protection visa decision. Flick ruled that the AAT had got the law wrong and the minister should succeed.

However — and it’s a big however — as Flick explained, the grant of orders on judicial review is discretionary. It is extremely rare for a court to refuse to do so because the applicant has behaved disgracefully, but that is exactly what Tudge had done in this case and, consequently, he should be denied the court’s help.

Flick did not hold back, and paragraph 74 of his judgment deserves (almost) full republication:

**“The minister cannot place himself above the law and, at the same time, necessarily expect that this court will grant discretionary relief.**

**The minister has acted unlawfully. His actions have unlawfully deprived a person of his liberty. His conduct exposes him to both civil and potentially criminal sanctions, not limited to a proceeding for contempt.**

**In the absence of explanation, the minister has engaged in conduct which can only be described as criminal. He has intentionally and without lawful authority been responsible for depriving a person of his liberty.**

**Whether or not further proceedings are to be instituted is not a matter of present concern. The duty judge in the present proceeding was quite correct to describe the minister’s conduct as “disgraceful”. Such conduct by this particular minister is, regrettably, not unprecedented.**

**Any deference to decisions made by ministers by reason of their accountability to parliament and ultimately the electorate assumes but little relevance in the**

**present case. Ministerial “*responsibility*”, with respect, cannot embrace unlawful conduct intentionally engaged in by a minister who seeks to place himself above the law. Although unlawful conduct on the part of a litigant does not necessarily dictate the refusal of relief, on the facts of the present case the minister’s conduct warrants the refusal of relief.”**

The underlying fact here is that the Immigration Department believed the AAT’s decision to be wrong (as indeed it was) and that it would be overturned on appeal. It then assumed for itself a power that nobody has: to ignore a court’s or tribunal’s decision with which it did not agree.

The AAT’s ruling had the full force of law behind it. Tudge had no choice, in accordance with the rule of law, but to comply with it. Its terms required immediate compliance. He ignored it.

It’s fair to conclude as Flick strongly hinted that Tudge has committed several contempts of court; that he will be liable to a civil claim for damages for wrongful imprisonment by PDWL; that he has committed a crime (something along the lines of kidnapping and assault). It feels weird to read and say such words about a serving minister of the Commonwealth government — surreal.

The Morrison government has become accustomed to ruling by arrogant lawlessness. This incident exemplifies its absolute disregard for the rules that maintain our democracy and the freedoms we blithely expect. It’s hardly, sadly, exceptional.

Tudge should, of course, resign or be sacked for this disgrace. Neither of those things, of course, will happen.