



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY**

**BETWEEN:** **MARTIN JOHN DAVIS**  
Appellant

**AND:** **MINISTER FOR IMMIGRATION, CITIZENSHIP,  
MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**  
First Respondent

**SECRETARY OF DEPARTMENT OF HOME AFFAIRS**  
Second Respondent

**ASSISTANT DIRECTOR, MINISTERIAL INTERVENTION,  
DEPARTMENT OF HOME AFFAIRS**  
Third Respondent

**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

**BETWEEN:** **DCM20**  
Appellant

**SECRETARY OF DEPARTMENT OF HOME AFFAIRS**  
First Respondent

**ASSISTANT DIRECTOR, MINISTERIAL INTERVENTION,  
DEPARTMENT OF HOME AFFAIRS**  
Second Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE FIRST RESPONDENT AND THE  
ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)**

## PART I INTERNET PUBLICATION

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1. This outline of oral submissions is in a form suitable for publication on the internet.

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### Judicial review concerns limitation on power

2. Executive power encompasses: (i) statutory powers or capacities; (ii) prerogative (non-statutory) powers or capacities; or (iii) capacities which are neither statutory nor prerogative capacities (**DCM CS [10]**). The exercise of non-statutory capacities is incapable of unilaterally altering rights, duties or liabilities other than pursuant to the general law, and therefore does not involve an exercise of “power” in the sense relevant to judicial review (**DCM CS [15]-[18]**): *Plaintiff M68* (2016) 257 CLR 42 at [129]-[135] (**JBA 5, Tab 29**); *Griffith University v Tang* (2005) 221 CLR 99 at [78]-[82], [89]-[90] (**JBA 4, Tab 18**); Aronson, “Private Bodies, Public Power and Soft Law’ (2007) 25 *Federal Law Review* 1 at 20; Adam Perry, “The Crown’s Administrative Powers’ (2015) 131 *Law Quarterly Review* 652 at 659, 668 (**JBA 9, Tab 60**).
3. Judicial review is concerned with the “declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power”, and “provides no remedies to protect interests, falling short of enforceable rights” (**DCM CS [26]-[36]**): *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 26, 31, 34-38 (**JBA 3, Tab 10**); *Minister for Immigration v SZSSJ* (2016) 259 CLR 180 at [81] (**JBA 4, Tab 23**); *Graham* (2017) 263 CLR 1 at [42] (**JBA 4, Tab 17**).
4. That judicial review is concerned only with declaring and enforcing the limits of powers unilaterally to alter legal rights is reflected in the principles that determine when the main judicial review remedies will issue (**DCM CS [37]-[39]**): *Hot Holdings* (1996) 185 CLR 149 at 159, 161, 165, 178 (**JBA 4, Tab 20**); *Plaintiff M61* (2010) 243 CLR 319 at [99]-[101] (**JBA 5, Tab 28**); *Ozmanian* (1996) 71 FCR 1 at 31-33 (**JBA 7, Tab 48**).

### Conduct of the officers involved in these appeals could not unilaterally alter rights

5. The legal rights of non-citizens to enter and remain in Australia are determined exclusively by the *Migration Act 1958* (Cth) (**DCM CS [22]**): ss 4, 65 (**JBA 1, Tab 4**).
6. Section 351 is a “dispensing” provision. If the Minister has not made a personal procedural decision to consider whether to make a substantive decision under s 351, anterior departmental processes have no statutory basis (**DCM CS [20]**): *SZSSJ* (2016)

259 CLR 180 at [46], [47], [50], [52]-[55] (**JBA 4, Tab 23**). The Minister had not made a personal procedural decision in the appellants' cases: **DCM20 AS [23]-[24]; Davis AS [25]-[26]**.

7. The officers' conduct in conducting assessments against the Guidelines was incapable of altering the appellants' rights, which are governed by the Act (**DCM CS [19]-[21], [24]-[25]**): *Plaintiff S10/2011* (2012) 246 CLR 636 at [3], [46]-[48], [91] (**JBA 6, Tab 31**); *Raikua* (2007) 158 FCR 510 at [64], [70]-[71] (**JBA 8, Tab 55**); *L v South Australia* (2017) 129 SASR 180 at [6], [13], [97], [103], [135], [152]-[154] (**JBA 7, Tab 43**). *Plaintiff S10* is not distinguishable: **DCM JBFM 71, 76-77**; cf FC [70]-[71], [93]-[95] (Griffiths J) (**CAB 81, 88-89**).
- 10 8. The officers had no duty to bring the appellants' requests to the Minister's attention (**DCM CS [20]**): FC [121]-[122] (Mortimer J), [52] (Besanko J) (**DCM20 CAB 98, 74**); cf FC [253]-[262] (Charlesworth J, Griffiths J agreeing) (**DCM20 CAB 130-132, 87**).
9. The officers' conduct had no effect on the appellants' bridging visas (**DCM CS [22]**): cf FC [10], [44]-[45] (Kenny J) [85] (Griffiths J), [118(b)], [119] (Mortimer J), [288] (Charlesworth J) (**DCM20 CAB 61, 71-72, 86, 96-97, 138**). DCM20 could not satisfy cl 050.212(6) in light of her four requests for intervention: FC [8]-[9] (**DCM20 CAB 24**). With respect to Davis, the officer's conduct had no effect on the duration of his bridging visa: cf FC [45] (Kenny J). In the event that at some future time an application were to be made for a visa under cl 050.212(6), its grant or refusal would involve a reviewable
- 20 statutory decision.

#### **No constraint of reasonableness on the officers' conduct**

10. As the officers' conduct was non-statutory, there is no basis for using the Migration Act to derive a constraint of reasonableness on the officers' conduct (**DCM CS [45]**): cf *Jabbour* (2019) 269 FCR 438 at [81]-[82], [92] (**JBA 7 Tab 42**).
11. Nor can a requirement of reasonableness be derived from the Guidelines (**DCM CS [46]**): cf *Jabbour* (2019) 269 FCR 438 at [89], [91], [102] (**JBA 7 Tab 42**), **DCM20 AS [46], Davis AS [29], [48]**.
- 30 12. No requirement of reasonableness can be implied from the text and structure of s 61 of the Constitution (**DCM CS [44]**). Indeed, structural features of the Constitution vesting responsibility for the administration of departments to Ministers (and for Ministers to be responsible to Parliament for their administration), prevail against the appellants'

argument: *Comcare v Banerji* (2019) 267 CLR 373 (**JBA 3, Tab 15**) at [31], [34], [42], [56]-[77], [143]-[155], [202]-[204]. The court has no role in seeking to ascertain standards bearing on the adequacy of a departmental officer's compliance with ministerial instructions (absent an effect on rights), and then adjudicating on the officer's performance by the grant of declaratory or other relief.

13. Further, unreasonableness grounded abstractly on common law values, unmoored from any other legal sources to inform a "framework of rationality" bearing upon the exercise of particular executive power, is not a secure foundation to found a limit (**DCM CS [43]**): *ABT17* (2020) 269 CLR 439 (**JBA 3, Tab 8**) at [124].

**Alternatively, the officers' conduct was not unreasonable**

- 10 14. The Guidelines invite the application of broad and subjective criteria by the Department. Especially in the absence of a duty of the officers to give comprehensive reasons, that presents a "virtually insuperable hurdle" to demonstrating unreasonableness (**DCM CS [48]**): PJ [43] (**DCM20 CAB 36**).
15. Assuming review for unreasonableness is available, the Full Court was correct in rejecting both challenges, for the reasons given (**DCM CS [49]-[50]**; **Davis CS [14]-[17]**). Re DCM20: FC [358] (**DCM20 CAB 157-158**), FC [363] (**DCM20 CAB 159**). Re Davis: FC [326]-[327] (**DCM20 CAB 149**); FC [111]-[113] (**DCM20 CAB 94**).

**Proposed appeal ground in Davis relating to lawfulness of the guidelines**

- 20 16. The Full Court would have had no jurisdiction to determine this proposed ground. It would have involved a review of one or both of two "purported privative clause decisions": a purported delegation by the Minister of power, contrary to s 351(3); and a purported exercise of power also contrary to s 351(3) (**Davis CS [13]**): Migration Act, ss 5E(1), 476A(1).
17. In any case, it was within the competence of the Minister to issue the Guidelines setting out in advance the circumstances in which he wished to be put in a position to consider whether or not to consider exercising the power conferred by s 351 (**Davis CS [10]-[13]**): *Plaintiff S10* (2012) 246 CLR 636 at [46], [91] (**JBA 6, Tab 31**); *SZSSJ* (2016) 259 CLR 108 at [47], [54] (**JBA 4, Tab 23**).

30 Dated: 19 October 2022

  
Stephen Donaghue

Nick Wood

Megan Caristo