HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 01 Aug 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M32/2022
File Title:	Davis v. Minister for Immigration, Citizenship, Migrant Servic
Registry:	Melbourne
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondents
Date filed:	01 Aug 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

SUBMISSIONS OF THE FIRST RESPONDENT AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (INTERVENING)

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II ISSUES

2. On 20 May 2019, the third respondent (the **Assistant Director**), being an officer employed in the Department of Home Affairs (the **Department**), assessed a request by the appellant that the Minister for Immigration, Citizenship and Multicultural Affairs (the **Minister**) exercise his personal non-compellable power under s 351(1) of the *Migration Act 1958* (Cth) (the **Act**) by reference to the "Minister's guidelines on ministerial powers (s 351, s 417 and s 501J)" (the **Guidelines**), and concluded that the request would not be referred to the Minister.

3. In the proceedings below, the appellant sought relief on the basis that the Assistant Director's conduct was "unreasonable". The primary judge and the Full Court found that the Assistant Director's assessment was amenable to judicial review on this ground, but that the appellant had not established that the Assistant Director's conduct was "unreasonable".

4. The proceedings raise essentially the same issues as those raised in the *DCM20* appeal (see the Commonwealth parties' submissions in that case) as well as the following additional issues:

   4.1. Should the appellant be permitted to argue that the Full Court erred in failing to find that the Guidelines were inconsistent with s 351 of the Act and unlawful, in so far as they purported to authorise officers of the Department to exercise personal and non-delegable powers conferred on the Minister, or to prevent the exercise of such powers by the Minister, by "screening out" requests made to Minister for intervention under s 351 and preventing the Minister from receiving or being made aware of such requests (see ground 2 of the appellant's notice of appeal)? *Answer: no, because the Full Court refused to grant leave for the appellant to advance this ground for the first time on appeal, and the appellant has not even attempted to identify error in that discretionary decision (see [9] below).*

   4.2. If the answer to question 4.1 is "yes", are the Guidelines unlawful for the reasons the appellant alleges? *Answer: no (see [10]-[13] below).*

4.3. If the answers to questions 4.2 and 4.3 in DCM20 are "yes", has the appellant established that the conduct of the Assistant Director was unreasonable? *Answer: no (see [14]-[17] below).*

PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

5. The Minister has issued notices under s 78B of the *Judiciary Act 1903* (Cth) (CAB 180).

PART IV FACTS

6. The Minister and the Commonwealth Attorney-General (the **Commonwealth parties**) agree with the appellant's summary narrative of facts (AS [6]-[16]).

PART V ARGUMENT

10 **(a) The amenability of the Assistant Director's decision to judicial review**

7. The appellant correctly accepts that the Minister has made no personal procedural decision in relation to him, and that the Assistant Director's conduct therefore had no statutory basis (AS [25]-[26]).

8. The Assistant Director's decision not to refer the appellant's request for intervention to the Minister is not amenable to judicial review on the ground of legal unreasonableness for the reasons the Commonwealth parties give in their submissions in the *DCM20* appeal at [8] to [46].

(b) Ground 2 is misconceived

9. The Full Court refused leave to the appellant to amend his notice of appeal to raise a
20 proposed ground to the effect that the Guidelines constitute an impermissible delegation by the Minister of his power under s 351 of the Act.[1] The appellant has not sought to impugn the refusal of leave, which of course involved a discretionary decision. He has not even attempted to demonstrate, let alone actually demonstrated, that the Court's exercise of discretion miscarried.[2] Instead, his submissions focus solely on the merits of the ground that he was refused leave to advance (cf AS [56]-[61]). No error having been shown in the Full Court's discretionary refusal of leave to raise a new argument on appeal,

---

1 J [3] (Kenny J) (Amended Core Appeal Book (**CAB**) 58), [54] (Besanko J) (CAB 74), [114(b)] (Griffiths J) (CAB 94) and [330]-[332] (Charlesworth J) (CAB 148-149) but see Mortimer J at [123]-[155] (CAB 97-106) who would have granted the appellant leave to raise the proposed ground, which she considered had merit given the personal nature of the power in s 351, but which she nevertheless agreed was precluded by authority at the intermediate appellate Court level.

2 See *House v The King* (1936) 55 CLR 499.

the appellant should not be permitted to reagitate the substance of this proposed ground before this Court.

(c) The Guidelines were not an impermissible sub delegation (Ground 2)

10. In any event, Ground 2 lacks merit. The appellant's submission that the Guidelines "effectively transfers to Departmental officers part of the power conferred by s 351, namely to decide whether to consider the exercise of power or whether to substitute a more favourable decision for the decision of the Tribunal" (AS [59]) is inconsistent with authorities of this Court, which the appellant does not seek to reopen. In *Plaintiff S10*, the plurality accepted that the Minister could lawfully issue guidelines to his or her Department that "determin[e] in advance the circumstance in which he or she wishes to be put in a position to consider exercise of the discretionary powers".[3] Shortly thereafter, in *SZSSJ*, this Court made two crucial and relevant findings. *First*, the issuing of guidelines in *Plaintiff S10* (which were not materially different to the Guidelines in this case) was a step anterior to any decision by the Minister whether to consider the exercise of the power in s 351 of the Act and did not involve a decision by the Minister to decide to consider the exercise of that power.[4] *Second*, absent a personal procedural decision by the Minister to consider whether to exercise the power in s 351(1), "a process undertaken by the Department on the Minister's instructions to assist the Minister to make the procedural decision has no statutory basis" and therefore does not involve an exercise of power under s 351(1).[5] The appellant's submissions are inconsistent with those two findings.

11. Further, the Guidelines are entirely consistent with the Act because, as s 351(7) provides, the Minister does not have a duty to consider whether to exercise the power in s 351(1) in "any … circumstances". Thus, the identification by the Minister of *any* circumstances (including circumstances in which an officer of the Department does or does not make an evaluative judgment of some kind) in which he or she does not wish to consider the exercise of his or her power is consistent with the Act. And no assessment by an officer

---

3 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (***Plaintiff S10***) at [91] (Gummow, Hayne, Crennan and Bell JJ).

4 *Plaintiff S10* (2012) 246 CLR 636 at [46], [52] (French CJ and Kiefel J).

5 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 ***(SZSSJ)*** at [47] and [50]; see also [54]-[55]. The position is no different even if, applying the Guidelines, an officer does not refer a request for intervention to the Minister: see *Plaintiff S10* (2012) 246 CLR 636 at [50] (French CJ and Kiefel J). See also Charlesworth J at J [330]-[332], 148-149 holding that the conclusion of Gummow, Hayne, Crennan and Bell JJ in *Plaintiff S10* (2012) 246 CLR 636 at [91] that it was competent for the Minister to issue the guidelines in that case, "must apply" to the Guidelines.

can possibly be in breach of the requirement that the power of the Minister in s 351(1) be exercised personally, because such assessment by the officer does not involve the exercise (or purported exercise) of power under s 351(1).

12. Nor does the conduct of an officer in not referring a request to a Minister act as a bar to the Minister exercising his or her procedural and substantial powers under s 351 or from otherwise receiving or being made aware of such requests (contra AS [60]). There is nothing in s 351 or the Guidelines that prevents the Minister from exercising his or her powers in relation to a class of persons, or in relation to an individual who has come to his or her attention by means other than a request, notwithstanding a decision by an officer not to refer a request from a person within that class or from that individual.

13. Finally, the Full Court was correct to refuse the appellant leave to introduce the argument because it would have had no jurisdiction to determine the claim for relief with respect to the alleged decisions. The proposed ground necessarily involved the assertion that the Minister had made a "purported privative clause decision" (to delegate his or her power contrary to s 351(3)), and that the Assistant Director had also made a privative clause decision (by purporting to exercise the Minister's power contrary to s 351(3)). However, the Federal Court had no jurisdiction with respect to any such "purported privative clause decisions" (being a species of "migration decision" as defined): see s 476A(1) of the Act.

(d) If amenable to judicial review, the conduct of the Assistant Director was not unreasonable (ground 1)

14. Even if this Court finds that the "decision" of the Assistant Director is reviewable on the ground of unreasonableness, the Full Court did not err in dismissing the appellant's arguments as to the "unreasonableness" of that "decision". In light of the principles set out in the Commonwealth parties' submissions in the *DCM20* appeal at [48], assuming review on the grounds of unreasonableness to be available, no unreasonableness has been demonstrated.

15. Justice Charlesworth (with the concurrence of the other members of the Court)[6] was correct to conclude that (a) notwithstanding the erroneous characterisation of the appellant's letter dated 15 May 2019 as a "repeat request" (see AS [62]), the Assistant

[6] J [3] (Kenny J) (CAB 58), [55] (Besanko J) (CAB 74), [97] (Griffiths J) (CAB 90) and [118(e)] (Mortimer J) (CAB 95).

Director had substantially considered the asserted impact upon Ms Giddins by reference to the Guidelines[7] and (b) the Assistant Director's evaluation of the evidence in relation to Ms Giddins against the "compassionate circumstances" criteria in the Guidelines "was not irrational, nor was it affected by legal unreasonableness in any other sense"[8] (contra AS [64]-[65]). Indeed, and as the primary judge held,[9] the terms of the Assistant Director's minute in relation to the second request positively evinced that the Assistant Director *had* considered this claim but was not satisfied that it rose to the level of "strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm to an Australian citizen".[10]

10 16. Further, as Griffiths J (with whom Kenny, Besanko and Mortimer JJ agreed on this issue) observed,[11] there was nothing unreasonable about the Assistant Director giving weight to the fact that there was no evidence that no other person in the community could provide support to Ms Giddins, particularly given the requirement in s 9 of the Guidelines that the appellant provide all relevant information relating to a request at the time the request is made (contra AS[67]-[69]). Contrary to the implied suggestion at AS [69]-[70], the Guidelines did not impose a duty on the Assistant Director to seek further information from the appellant before making her "decision" nor did the appellant's offer to provide further documentation upon request impose any such duty.

17. The appellant invites this Court to engage in merits review and find that the Assistant
20 Director acted unreasonably essentially because she did not place the weight that the appellant would have wished upon the length of time that he had lived in Australia, or his mistaken beliefs about his visa status during that period (AS [71]). That characterisation of the appellant's argument is particularly apt given the terms of the Guidelines, which did not invite the simple question whether there would there be "potential harm" including "loss of economic benefits" if an individual was removed. They called for the making of fundamentally evaluative judgments, such as whether there were "strong compassionate circumstances" that if not recognised would result in "serious, ongoing and irreversible

---

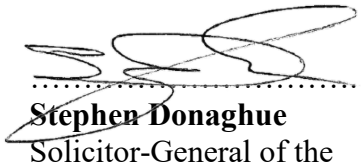
7 J [326], CAB 148.
8 J [327], CAB 148.
9 See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 791 at [46].
10 J [314], CAB 144-145.
11 J [103]-[104] and [109]-[113] (CAB 91-92 and 93); see further [3] (Kenny J) (CAB 58), [54] (Besanko J) (CAB 74), and [118(c)] (Mortimer J) (CAB 95).

harm to an Australian citizen"; or whether "exceptional economic [etc.] benefit would result from the person being permitted to remain in Australia".

PART VI ESTIMATED TIME

18. The Commonwealth parties estimate that 3 hours in total will be required for oral argument in this appeal and in the *DCM20* appeal to be heard at the same time.

Dated: 1 August 2022



.....	.....	.....
Stephen Donaghue Solicitor-General of the Commonwealth T: (02) 6141 4139	**Nick Wood** T: (03) 9225 6392 nick.wood@vicbar.com.au	**Megan Caristo** T: (02) 9376 0685 megan.caristo@banco.net.au

Counsel for the Commonwealth parties

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

ANNEXURE TO THE SUBMISSIONS OF THE COMMONWEALTH PARTIES

Pursuant to Practice Direction No.1 of 2019, the Commonwealth parties set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current	64, 67, Ch III
Statutory provisions			
2.	*Migration Act 1958* (Cth)	Compilation No. 144 (17 April 2019 to 29 August 2019)	4, 48B, 36(2A),189, 195A, 196, 198, 351, 417, 476A, 501J
Statutory instruments			
3.	*Migration Regulations 1994* (Cth)	Compilation No. 199 (17 April 2019 to 30 June 2019)	050.212, 050.517 of Schedule 2