



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M32 of 2022

BETWEEN:

MARTIN JOHN DAVIS

Appellant

and

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES
AND MULTICULTURAL AFFAIRS**

First Respondent

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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

No. S81 of 2022

20 BETWEEN:

DCM20

Appellant

and

SECRETARY OF DEPARTMENT OF HOME AFFAIRS

First Respondent

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

Second Respondent

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APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Publication

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

Part II: Argument

Each of the decisions was irrational or legally unreasonable

2. The decision to finalise each of the Appellants' requests without referral to the Minister was legally unreasonable: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350-351 [27]-[28], 365-366 [72]; cf *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 624 [39].

Davis (Ground 1): AS [6]-[16], [62]-[72]

- 10 3. The Assistant Director misapplied the Guidelines:
 - (a) by failing to have regard to evidence and submissions concerning hardship that would be caused to an elderly Australian citizen who was reliant on the Appellant for physical and emotional support; and
 - (b) by erroneously characterising the Appellant's complaints about the initial decision as a "repeat request" and finalising the request on that basis.
4. The Assistant Director unreasonably disregarded the length of time that the Appellant had resided in Australia and his business and property interests in Australia, and failed to consider whether the referral of his request was, or might be considered to be, in the public interest under s 12 of the Guidelines.

20 DCM20 (Grounds 1 and 2): AS [6]-[14], [54]-[69]

5. The Assistant Director misapplied the Guidelines, by failing to consider the significant change in circumstances and new substantive issues arising from the Appellant's request that she be granted a visitor visa in order to enable her to apply for an onshore carer visa.
6. Further or alternatively, the Assistant Director misunderstood and failed to consider the Appellant's claim that she faced a risk of harm or mistreatment on her return to Fiji that did not meet the criteria for the grant of any type of protection visa.

Section 351 and the Guidelines: Davis AS [20]-[34], DCM20 AS [18]-[32]

Section 351

- 30 7. Sections 351 and 417 of the *Migration Act* confer power on the Minister personally: (i) to consider whether to exercise the power in subs (1) in respect of a particular decision of the Tribunal (a "personal procedural decision"); and (ii) to exercise that power if the Minister thinks that it is in the public interest to do so (a "personal substantive decision").
 - *SZSSJ* (2016) 259 CLR 180 at 198-200 [46]-[55].
 - *Plaintiff S10/2011* (2012) 246 CLR 636 at 653 [51], 665 [91], [93].

8. Subject to any lawful instruction by the Minister, a request for intervention under s 351 or s 417 must be brought to the attention of the Minister for possible consideration.

The Guidelines

9. By issuing the Guidelines, the Minister has instructed Departmental officers as to the circumstances in which a request under (*inter alia*) ss 351 or 417 should be referred for possible consideration, and the circumstances in which the Minister does not wish to consider exercising the power conferred by s 351(1) or s 417(1).
10. While processes undertaken pursuant to the Guidelines precede a personal procedural decision by the Minister and have no statutory basis, such processes nevertheless have a relationship with and are not “divorced from” the *Migration Act*.
- 10 11. In particular, the finalisation by the Department of a request for Ministerial intervention under s 351 or s 417 is capable of affecting the rights and/or interests of a person who makes the request: see *Plaintiff S10/2011* (2012) 246 CLR 636 at 658-659 [64]-[70], 668 [100].
- (a) The finalisation of a request gives effect to a decision in advance by the Minister not to consider the exercise of power under s 351 or s 417, foreclosing the possible exercise of power to substitute a favourable decision (*e.g.* to grant a visa).
- (b) The finalisation of a request has a legal effect on eligibility for the grant of bridging visas under cl 050.212(6) of Sched 2 of the *Migration Regulations*.
- 20 (c) The finalisation of a request renders any future request for Ministerial intervention as a “repeat request” under the Guidelines.

The Guidelines are inconsistent with the Migration Act (Davis, Ground 2): Davis AS [56]-[61]

12. In so far as they delegate power to a Departmental officer to finalise a request without notice to the Minister on the basis that it does not raise unique or exceptional circumstances or involve the public interest, the Guidelines are inconsistent with the personal and non-delegable discretionary powers conferred on the Minister by s 351(1) and (3) or s 417(1) and (3).

Judicial review of non-statutory executive powers, functions and capacities: Davis AS [35]-[55], DCM20 AS [33]-[53]

- 30 13. A decision by an officer of the Department under the Guidelines to finalise a request without referral to the Minister is amenable to judicial review, including on the ground of legal unreasonableness.
- *Jabbour v Secretary, Department of Home Affairs* (2019) 269 FCR 438 at 455-460 [79]-[103].

14. Judicial review involves the declaration and enforcement of justiciable limits or constraints on executive powers, including powers derived from s 61 and 64 of the *Constitution*. This secures a basic element of the rule of law.
- *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39], 25 [42].
15. The jurisdiction extends to judicial review of the legality of an exercise of non-statutory executive powers or capacities. It is not necessary that such an exercise of non-statutory executive powers or capacities must affect legal rights in order to be subject to judicial review.
- 10 16. Non-statutory executive powers and capacities are subject to limits derived from the common law and s 61 of the *Constitution*, including a requirement that such powers must be exercised within the bounds of legal reasonableness, that is, subject to “the rules of reason and justice”.
- *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
17. In the context of a decision to finalise a s 351 or s 417 request for Ministerial intervention without referral to the Minister, the Guidelines identify the scope and purpose of the power exercised by the Departmental officer and inform and give content to the principles of legal unreasonableness.
18. In making a decision to finalise a s 351 or s 417 request for Ministerial intervention, an
20 officer of the Department is required to apply the Guidelines in good faith, and to act reasonably and on a correct understanding of the Guidelines.
19. Where an officer of the Department purports to finalise a s 351 or s 417 request for Ministerial intervention unlawfully – including by making a decision that is legally unreasonable – a court may grant declaratory relief, alone or together with certiorari, mandamus, prohibition or injunction (as appropriate), to give effect to the legal rights and duties of the parties.

Dated: 19 October 2022



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