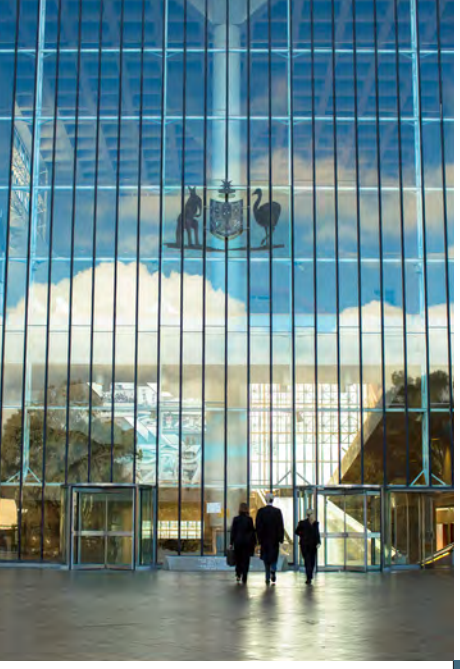

20 December 2023

Constitutional cases

Guidelines for referring cases to the Minister under the *Migration Act 1958* (Cth) are invalid

In this issue

By a 6:1 majority, the High Court has held that guidelines issued by the then Minister for Immigration and Border Protection to officers assisting the Minister in relation to the exercise of certain discretionary powers under the *Migration Act 1958* (Cth) (the Act) are invalid.

The majority (a joint judgment of Kiefel CJ, Gageler and Gleeson JJ, with Gordon J, Edelman J and Jagot J concurring separately) allowed 2 appeals against orders of the Full Court of the Federal Court. The High Court declared that 'decisions' that departmental officers made in purported compliance with the guidelines were beyond the executive power of the Commonwealth.

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
High Court of Australia, 12 April 2023
[2023] HCA 10

Background

Section 351 of the Migration Act is one of a class of provisions that has been variously described as a 'provision of last resort', a 'dispensing provision' and a 'ministerial override'. It empowers the Minister to substitute a decision of the Administrative Appeals Tribunal with one 'more favourable to the applicant'. The power is only exercisable by the Minister personally, and the Minister has no duty to consider exercising it.

In exercising powers of this kind, the Minister personally makes the first or both of 2 decisions. The Minister is not obliged to make either of them. The 'first stage' decision is procedural: a decision to either consider or not consider whether it is in the public interest to exercise the power. The 'second stage' decision is substantive. The Minister makes a decision:

- that it is in the public interest to exercise the power and to do so; or
- that it is not in the public interest to exercise the power and not to do so.

At various times, the Minister has issued guidelines to the department explaining when the Minister wishes to be put in a position to consider exercising the personal, non-compellable intervention powers conferred by the Act, including under s 351. The guidelines at issue in this case were made in 2016 (2016 guidelines). They stated the Minister wished to be able to decide whether to make a 'first stage' procedural decision only when the department had assessed the case as having 'unique and exceptional circumstances'. Cases outside this category were 'finalised' without being referred to the Minister. Earlier guidelines, issued in 2009 (2009 guidelines), were in broadly similar terms. However, they provided that all initial requests for ministerial consideration were to be provided to the Minister in summary form.

The appellants, Mr Davis and DCM20, requested that the Minister consider exercising the power under s 351. In both their cases, departmental officers finalised the requests for ministerial intervention without referral to the Minister.

Both appellants applied unsuccessfully for judicial review of the departmental officers' 'decisions'. They claimed the decisions were affected by legal unreasonableness. On appeal, the Full Court of the Federal Court held that, in principle, the 'decisions' were an exercise of non-statutory executive power that is subject to judicial review on the ground of legal unreasonableness. However, the court dismissed the appeals on the basis that the departmental officers' conduct was not in fact unreasonable. The Full Court, by majority, also refused Mr Davis leave to raise a second ground of appeal: that the guidelines and decisions made pursuant to them were beyond the executive power of the Commonwealth.

The High Court granted the appellants special leave to appeal. Mr Davis was also granted special leave to rely on his second ground of appeal. The Commonwealth respondents filed a notice of contention arguing that the Full Court erred in finding that the departmental officials' conduct was reviewable for unreasonableness. The Commonwealth Attorney-General, together with the Attorneys-General for New South Wales, South Australia and Victoria, intervened under s 78A of the *Judiciary Act 1903* (Cth) in support of the argument on the notice of contention.

During the High Court hearing, DCM20 was granted leave to amend their notice of appeal to argue, along with Mr Davis, that the guidelines exceed the executive power of the Commonwealth

The High Court's decision

The plurality (Kiefel CJ, Gageler and Gleeson JJ), together with Gordon J, Edelman J and Jagot J, found that the guidelines exceed the executive power of the Commonwealth. With the exception of Edelman J, the majority judges did not engage in detail with the question of whether an exercise of non-statutory, non-prerogative executive power is reviewable for unreasonableness. Justice Steward's dissenting judgment substantially reflects the arguments put by the Commonwealth respondents.

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The guidelines were invalid

Kiefel CJ, Gageler and Gleeson JJ

The plurality considered that before reaching any question of the reviewability of non-statutory, non-prerogative executive power, it was necessary to consider a 'logically anterior' question. That is whether, by conferring a statutory power on the Minister to substitute or not substitute a decision in the public interest, s 351 limits the executive power of the Commonwealth by excluding the capacity for another executive officer to decide whether it is in the public interest for the power to be exercised ([8]).

The plurality held that s 351 does limit the executive power in this way ([30]–[31]).

The plurality commenced their analysis by examining the terms of s 351. Their Honours recognised that s 351 involves 2 distinct statutory decisions: the first-stage 'procedural' decision to consider or not consider the exercise of the substantive power; and the second-stage 'substantive' decision to substitute or not substitute a decision of the Tribunal ([14]).

> ... the Minister may not devolve the assessment of whether it is in the 'public interest' to exercise the power in s 351(1) to a departmental officer ([18]).

The Minister may exercise the power to make a procedural decision ([16]) in advance, so as to never consider applications from a specified class of case. However, they may not do so in an 'unbounded' fashion ([18]). The Minister can exercise a capacity, which is neither conferred by statute nor sourced in the prerogative, to instruct departmental officers as to the occasions that the Minister wishes to consider making a procedural decision ([19]). However, the Minister may not devolve the assessment of whether it is in the 'public interest' to exercise the power in s 351(1) to a departmental officer ([18]).

Section 351(3) of the Act confers the power under s 351(1) exclusively on the Minister ([12]). Therefore, the plurality held, s 351(3) precludes departmental officers from playing an evaluative role for the purposes of the exercise of the power ([29]). The plurality ([31]) noted that:

> [To hold otherwise would allow the Minister to] circumvent [the limitation in s 351(3)] through a purported exercise of executive power which gives conclusive effect to an anterior consideration of the public interest undertaken by a departmental officer outside, but for the purpose of, the statutory power. What s 351 prevents the Minister or a departmental officer from doing directly in the exercise of statutory power, it prevents the Minister or a departmental officer from doing indirectly in the exercise of executive power.

> ... the 2016 guidelines impermissibly entrusted the evaluation of the public interest to departmental officers and exceeded the limitation imposed by s 351(3) ([38]).

The concept of 'unique or exceptional circumstances' used in the 2016 guidelines as a criterion for ministerial referral was 'an approximation of the public interest'. Therefore, the 2016 guidelines impermissibly entrusted the evaluation of the public interest to departmental officers and exceeded the limitation imposed by s 351(3) ([38]).

The plurality held that no Minister or officer of the Executive Government may authorise non-statutory action that is expressly or impliedly excluded by a law of the Commonwealth ([30]). That was the essential vice in the 2016 guidelines, which were inconsistent with the requirement in s 351 that the discretion conferred by that section be exercised personally by the Minister, if it was exercised at all ([32]).

Gordon J

Justice Gordon concurred with the orders proposed by the plurality. Her Honour held that s 351 requires that the decisions to exercise, or not to exercise, the power given by that section may be made only by the Minister ([66]). Her Honour concluded that the guidelines impermissibly devolved that power to departmental officers ([99]).

Justice Gordon ([67]) wrote separately to make the point that:

> It is always necessary first to identify the source of a power which is said to be executive power. It is not sufficient to state that the power is "non-statutory executive power" or "common law executive power". Each phrase assumes but does not demonstrate the existence of the asserted power.

The starting position for any case concerning the nature and scope of the executive power is: 'does the Executive have the asserted power and, if so, how?'. Justice Gordon criticised an approach which inverts that question and poses it as: what *prevents* the executive from doing what it seeks to do? ([72]).

The executive power is bounded by the Constitution, which defines the outer limits of what the executive may do without legislative authority. Determination of the scope of executive power 'cannot begin from a premise that it is the same as the ambit of British executive power at common law' ([77]). Justice Gordon reasoned that, where a Commonwealth law regulates or controls how executive power is to be exercised, the statute governs to the exclusion of any residual power ([96]).

> The Minister may instruct departmental officers to implement a procedural decision or seek advice and assistance to enable the Minister to make a decision. However, Gordon J considered that *both* of those functions 'cannot be divorced from the statute' ([102]).

In this case, the source of the power to issue instructions is the limb of s 61 of the Constitution which extends the executive power 'to the execution and maintenance ... of the laws of the Commonwealth' ([88]–[89]), as well as the limb allowing for the 'execution and maintenance of this Constitution' enlivened by the need to 'administer ... departments of State of the Commonwealth' in s 64 ([90]). The particular 2016 guidelines were issued under a power sourced from s 351 of the Act, read with ss 61 and 64 of the Constitution ([101]). Justice Gordon emphasised that this power should not be characterised as 'non-statutory' ([90], [101]). The Minister may instruct departmental officers to implement a procedural decision or seek advice and assistance to enable the Minister to make a decision. However, Gordon J considered that *both* of those functions 'cannot be divorced from the statute' ([102]).

In agreeing with the plurality, her Honour noted it would be within the Minister's power to make a first-stage 'procedural decision' to the effect of 'I will not consider making a substantive public interest decision in any case that has the following characteristics' where those characteristics are objective. However, this power does not extend to authorising departmental officers to make an evaluative judgment as to the public interest involved in a case ([99]).

Edelman J

Justice Edelman agreed with the orders made by the plurality, concluding that the guidelines unlawfully delegated the Minister's personal 'liberty' to departmental officials ([172]). While not deciding the issue, Edelman J made 2 observations about whether, *if* the departmental officers had merely been providing advice to the Minister, the conduct would be reviewable for unreasonableness.

In considering the 'anterior' question of whether the actions of the departmental officers exceeded the executive power of the Commonwealth, Edelman J cautioned against 'misdescribing a liberty to act as a power to act' ([108]) and identified a conceptual difference between a *power* which is attended by the 'ability to effect a change in legal relations' ([120]) and a *capacity* which is a 'general freedom of the Commonwealth Executive to act in a manner that does not affect the rights of others' ([123]). (This distinction was also identified in the submissions of the Commonwealth respondents.)

Justice Edelman criticised much of the previous jurisprudence as conflating the 2 concepts in the context of ministerial guidelines ([130]). His Honour said that at least 2 recent decisions of the High Court contained 'inadequate or erroneous assumptions or reasoning' ([182]). In his Honour's view, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (*Plaintiff S10*) and *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (SZSSJ) proceeded on the basis that 'the exercise of a liberty as to whether or not to consider a request will remain that of the Minister, no matter how much subjective evaluation is undertaken in any good faith decision by a departmental official not to bring the request to the attention of the Minister' ([191]). However, Edelman J held that, contrary to this premise of the earlier decisions, '[t]here is a point beyond which the evaluative scope given to the departmental officials is sufficiently broad that their decisions, in substance, amount to an exercise of the personal liberty of the Minister under the *Migration Act* to consider a request' ([192]).

His Honour concluded that the relevant inquiry in this case was whether the departmental officials assessing requests for ministerial intervention under the 2016 guidelines were exercising 'their liberty to obtain information, or to advise or assist the Minister in the exercise of the Minister's power' or were

engaging in 'an exercise of the Minister's personal liberty or power itself' ([141]). Justice Edelman held that the 2009 guidelines were an example of the former conduct insofar as they concerned initial requests for ministerial intervention ([155]–[156]).

Justice Edelman held that, because the 2016 guidelines (in contrast to the 2009 guidelines insofar as they concern initial requests) adopted a model under which some applications would never be brought to the attention of the Minister unless they satisfied broad evaluative criteria assessed by departmental officials ([157]), the officials were, in substance, exercising the Minister's personal liberty ([171]). The exercise of the liberty was unlawful because it fell outside the terms of s 351(3) ([172]).

In his Honour's concluding paragraph ([194]), Edelman J notes:

> It would have been a simple matter for the Commonwealth Parliament to have included an additional sub-section, s 351(8), permitting departmental officials, as either delegates or agents, to exercise a liberty to decide whether to refer to the Minister an application for the exercise of the personal override power.

Jagot J

Justice Jagot concurred with the orders proposed by the plurality. Her Honour characterised s 351 as creating a 'zone of exclusive Ministerial personal decision-making power' ([251]). While her Honour accepted that there are permissible ways in which departmental officers may assist or advise the Minister in order to facilitate the exercise of the power in s 351(1), those officers may not decide matters within that zone ([253]).

Consistently with the plurality's analysis, Jagot J characterised the 2016 guidelines as requiring officers to decide cases against 'certain evaluative "public interest" criteria' ([254], [282]) which in substance constituted an exercise of the power in s 351(1) of the Act.

Justice Jagot then made 5 observations about the power in s 351:

1) The division of the s 351 power into 2 steps or stages is necessary. Section 351(7) refers to considering exercising the power, so it indicates that the decision to consider is separate from the consideration itself ([298]).
2) The Minister does not need to deal with any or all requests by separating the procedural and substantive aspects of the power. If the Minister chooses, the Minister can make a single decision (to exercise or not to exercise the power to substitute a more favourable decision) about a class or certain classes of request or all requests ([299]).
3) Both the procedural and the substantive aspects of the power in s 351 give rise to a positive and a negative decision-making potential. A decision not to exercise a power may still be a decision under s 351(1) ([300]).
4) The power in s 351 has both procedural and substantive aspects, but it cannot be further 'disaggregated' ([301]).
5) The zone of exclusive ministerial personal decision-making power created by s 351 of the Act applies to the whole power in s 351(1). It applies to the procedural aspect of that power (deciding in the public interest to consider or not to consider exercising the power) and to the substantive aspect of that power (deciding in the public interest to exercise the power or not to exercise the power).

Justice Jagot emphasised that in *Plaintiff S10* and *SZSSJ* it was not argued that the relevant guidelines exceeded the executive power of the Commonwealth ([310]–[311]). Therefore, those cases were not an answer to the appellants' cases ([314]).

The real question is whether, as a matter of substance, an instruction purports to enable a departmental officer to decide a matter that is 'within the zone of exclusive Ministerial personal decision-making power created by s 351 of the Act' ([315]). Justice Jagot considered that, in performing an evaluative task under the 2016 guidelines and deciding to finalise a request without referral to the Minister, an officer both decided that the Minister should not make a procedural decision and, in substance, made a negative procedural decision about that request: 'In so doing, the departmental officers acted beyond the executive power, which was confined by s 351 of the Act' ([318]).

Dissenting judgment of Steward J

Justice Steward dissented. His Honour held that the 2016 guidelines, themselves having no legal force, relate only to giving practical expression to the text of s 351(7). That is, the guidelines did no more than give effect to a parliamentary intention that the Minister may rely on departmental officers to administer the scheme established by the Act such that the Minister need not consider particular classes of requests ([199]). In Steward J's analysis, the guidelines therefore had no effect on legal rights and obligations and judicial review has no role to play ([196]).

As to the characterisation of the power in s 351, his Honour reasoned that in dealing with the 'receipt of requests to exercise the power' the department does not need to assess 'what is in the public interest'. Also, the Minister is not confined to the grounds of 'public interest' in exercising the procedural step of the s 351(1) power ([201]). Accordingly, the 2016 guidelines, being anterior to a procedural decision, 'do not oblige an officer of the Department to mimic an exercise of the Minister's power' ([202]).

In this case, the Minister had no duty to consider whether to make a procedural or a substantive decision under s 351(1) ([240]). Therefore, the appellants had no legal right or interest capable of being vindicated in judicial review. His Honour did not accept that the fact the appellants' entitlement to a bridging visa is tied to making a request to the Minister to exercise their power under s 351(1) gave rise to a relevant legal right ([242]).

Justice Steward concluded his judgment by making 2 points on remedies and 'islands of power' ([243]ff):

1) The declaration made by the majority is not productive of any substantive remedy. The award of the declaration can in no way force the Minister to consider the appellants' requests anew. Therefore, the declarations are 'inutile' ([245]).
2) His Honour's conclusion on the availability of judicial review does not mean that actions of the executive would become 'immune from supervision and restraint'. Steward J held that departments' internal processes that do not involve the exercise of power are immune from judicial review. To hold otherwise would permit 'unnecessary and unwieldy challenges to the administration of government' ([247]).

The appellants had a sufficient material interest and therefore standing

The plurality, Steward J and Jagot J all addressed the question of whether the appellants had standing to seek the declaration in the amended notices of appeal.

> Mr Davis and DCM20 had a 'sufficient material interest' in seeking the declaration made by the court, because the declaration has the effect that their applications to the Minister have not been 'finalised' ([62]).

Chief Justice Kiefel, Gageler and Gleeson JJ held that Mr Davis and DCM20 had a 'sufficient material interest' in seeking the declaration made by the court, because the declaration has the effect that their applications to the Minister have not been 'finalised' ([62]). A declaration about whether decisions made by departmental officers exceeded executive power are plainly declarations of right and an appropriate matter for judicial determination ([61]). Justice Jagot agreed with the plurality, holding that the declaration would have 'foreseeable consequences' for the appellants ([289]).

Justice Steward held the appellants 'arguably' had standing to bring these proceedings ([240]).

The High Court did not decide whether the decisions were legally unreasonable

Because of the basis upon which the case was ultimately decided, it was not necessary for any majority judges to consider whether the conduct of the departmental officers was legally unreasonable.

However, Edelman J observed that:

1) there is 'obvious force' in Robertson J's decision in *Jabbour v Secretary, Department of Home Affairs* (2019) 269 FCR 438 that it would be incongruous for reasonableness to usually be an implied condition upon the exercise of *statutory* executive power but never to be implied as a condition on the exercise of *non-statutory* executive power ([174])
2) any reasonableness requirement for the exercise of a broad non-statutory executive power will involve a 'high threshold' ([176]) which would not have been met in this case.

In dissent, Steward J would have upheld the conclusions of the Full Court of the Federal Court that the conduct was not legally unreasonable, although his Honour was critical of the department's treatment of Mr Davis, describing it as 'ungenerous' and 'somewhat unsatisfactory' ([249]).

The Commonwealth's legal team

AGS (Niamh Lenagh-Maguire and Nick Pokarier from the Constitutional Litigation Unit and Emily Nance and Ned Rogers from AGS Dispute Resolution) acted for the Attorney-General and the Commonwealth respondents. The Commonwealth Solicitor-General, Dr Stephen Donaghue KC, Nick Wood SC and Megan Caristo appeared as counsel for the Commonwealth respondents.

The text of the decision is available at: https://eresources.hcourt.gov.au/showCase/2023/HCA/10

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ISSN 1443-9549 (Print)
ISSN 2204-6550 (Online)

Client Services 127–2023 12/23