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

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

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Publication

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

Part II: Outline of Oral Submissions

2. ***The question of the reviewability of non-statutory executive powers should not be answered in the abstract.*** There are a large class of powers capable of being described as 'non-statutory executive powers.' Those powers, playing different roles in the execution and maintenance of the Constitution and laws made under it, are too different in nature to enable the question of their reviewability to be answered in an abstract or general way (**NSW WS** [6]).

3. ***The present power enables the operation of the machinery of government in execution and maintenance of a statutory power given to a Minister by Parliament.*** The power energises what was described by Gageler J in Comcare v Banerji (2019) 267 CLR 373 at [67] (**JBA Vol 3 Tab 15**) as the "human machinery to implement the exercise of executive power constitutionally vested in the Crown", operating in aid of the investiture in a Minister of the personal power conferred by s 351 of the Migration Act 1958 (Cth), such machinery operating "against the background of the inherent political accountability of Ministers for the administration of their departments to the House of Representatives and to the Senate." Such powers may by nature not be susceptible to review: WH Moore, The Constitution of the Commonwealth of Australia (1st ed, 1902) 212-214 (**JBA Vol 9 Tab 67**) (**NSW WS** [16]-[24]).

4. ***The common law does not supply a reason as to why powers of this nature should be constrained by reference to the concept of 'reasonableness'.*** Reference to historical common law concepts such as 'law and reason' do not assist in justifying the development of the law. That concept, historically, was not only contested but was more about the curial management of constitutional relationships; in particular, the relationship between Parliament and the executive government: eg Philip Hamburger, Law and Judicial Duty (HUP 2008) (**JBA Vol 9 Tab 66)** (**NSW WS** [45]ff).

5. ***To understand the nature of a power, it is preferable to draw conclusions from the constitutional circumstances in which that power is engaged.*** Section 351(7) of the Migration Act 1958 (Cth) reflects a Parliamentary choice to leave unaffected by law the circumstances in which there will be referral of applications for Ministerial consideration. That parliamentary choice is of constitutional significance: S10/2011 v Minister for Immigration (2012) 246 CLR 636 at [50] per French CJ and Kiefel J (**JBA Vol 6 Tab 31**) (**NSW WS** [15], [23]-[29]).

6. ***The Minister had no unilateral power to create law where there is none and could not dispense with the requirements of the law.*** Ordinarily, a ministerial officer would lack the power to create or alter rights of his or her own fiat; the executive must be *given* such power: CCSU v Minister for the Civil Service [1985] AC 374 at 417 per Lord Roskill (**JBA Vol 7 Tab 39**). Therefore, the Ministerial Guidelines had no force of law: **J** [14] per Kenny J (**NSW WS** [27]-[28], [52]).

7. ***There is no 'law' to supervise and enforce through the mechanism of judicial review.*** The result of Parliament's design of the power is that no discrete requirement of law applies to constrain the circumstances in which matters will be referred for Ministerial consideration of the exercise of the power in s 351 (and where the Minister has made no personal procedural decision). Parliament's choice to grant a power of that kind strongly tends against a conclusion that the Constitution, independently, imposes indirect constraints by imposing legal conditions on the actions of departmental officers (**NSW WS** [36]-[41], [58]-[65]).

10 8. ***It is not sufficient to identify an 'interest' affected by executive action in circumstances where that interest has no basis in law.*** Many people have an interest in the administration of government but to treat those interests as informing the content of public power risks impeding the ordinary business of execution and maintenance and subverting the constitutional framework. "The scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise": Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 36 per Brennan J (**JBA Vol 3 Tab 10**) (**NSW WS** [7]).

20 Dated 19 October 2022

M G Sexton SC SG
Ph: (02) 8688 5502
Michael.Sexton@justice.nsw.gov.au

M W R Adams
Ph: (02) 8688 5504
Michael.Adams@justice.nsw.gov.au

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