



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: M32/2022  
File Title: Davis v. Minister for Immigration, Citizenship, Migrant Servic  
Registry: Melbourne  
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#### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

No. M32/2022

BETWEEN:

**MARTIN JOHN DAVIS**  
Appellant

and

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

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

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

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

No. S81/2022

BETWEEN:

**DCM20**  
Appellant

and

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

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

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**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE  
STATE OF VICTORIA (INTERVENING)**

**PART I: CERTIFICATION**

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

**PART II: OUTLINE**

2. The function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of the other branches of government through the

application of judicial process and through the grant, where appropriate, of judicial remedies: *DCM20 VS* [29].

- *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [39] (JBA 4 tab 17)

3. The processes undertaken by officers of the Department of Home Affairs (the **Department**) in relation to the appellants' requests for ministerial intervention were not subject to a legal limit requiring those processes to be carried out in accordance with any particular standard of legal reasonableness.
4. The Court should reject the appellants' attempts to identify the source of a legal limit of that kind.
5. The common law is not the source of such a limit, because:
  - 5.1 this Court has never recognised a common law principle to the effect that executive action generally, or non-statutory executive action in particular, must be undertaken in a way that is legally reasonable: *DCM20 VS* [32];
  - 5.2 instead, this Court has held that, where a power is conferred by statute, the Parliament is taken to have intended that the power be subject to a legal limit requiring it to be exercised in a way that is legally reasonable: *DCM20 VS* [33]-[36];
  - 5.3 the appellants have not explained how a free-standing requirement that executive action be undertaken in a way that is legally reasonable could operate — in particular, they have not explained:
    - (i) how the content of such a requirement would be determined;
    - (ii) the consequences of breach of such a requirement; or
    - (iii) the circumstances in which (or basis on which) such a requirement might be excluded; and
  - 5.4 in those circumstances, it would not be “incongruous” for this Court to reject the existence of the common law principle for which the appellants contend while accepting the existence of the principle of statutory construction through which legal reasonableness operates as a limit on the exercise of statutory

power, because the two principles could not operate in the same way as each other: *DCM20 VS* [37]; cf *Davis AS* [42], *DCM20 AS* [40].

6. The Constitution is not the source of such a limit, because:
- 6.1 the executive power of the Commonwealth has a wide variety of manifestations, in a wide variety of contexts — some statutory, and some non-statutory: *DCM20 VS* [38]; and
- 6.2 the source of a legal limit requiring statutory powers to be exercised reasonably has consistently been identified as the statute, not the Constitution: *DCM20 VS* [33]-[36].
- 10 7. If it is accepted that the processes undertaken by officers of the Department in relation to the appellants’ requests had no basis in the Act, it would follow that the Act was not the source of a legal limit requiring those processes to be carried out in accordance with any particular standard of legal reasonableness: *DCM20 VS* [39].
8. The Guidelines are not the source of such a limit, because the Act does not impose a duty on officers of the Department to comply with the Guidelines when carrying out the relevant processes: *DCM20 VS* [41].

Dated: 20 October 2022

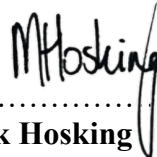


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