HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M32/2022
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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

SECRETARY OF DEPARTMENT OF HOME AFFAIRS

Second Respondent

ASSISTANT DIRECTOR, MINISTERIAL INTERVENTION, DEPARTMENT OF HOME AFFAIRS

Third Respondent

APPELLANT'S REPLY

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I: Publication

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

II: Submissions

2. These submissions reply to the submissions of the Commonwealth parties (the First Respondent and the Attorney-General (Cth), intervening) filed on 1 August 2022 (**CS**); the submissions of the Attorney General (NSW), intervening, filed on 15 August 2022 (**NSW**); the submissions of the Attorney-General (SA), intervening, filed on 15 August 2022 (**SA**); and the submissions of the Attorney-General (Vic), intervening, filed on 15 August 2022 (**Vic**).

Notice of contention

3. In reply to the Notice of Contention filed by the First Respondent, the Appellant refers to and adopts paragraphs 3 to 16 of the Appellant's Reply dated 26 August 2022 filed in DCM20 v Secretary of Department of Home Affairs, Matter No S81 of 2021.

Ground 2

4. In reply to CS [9], there is no valid objection to the Appellant being permitted to raise Ground 2 on the appeal to this Court.

5. Ground 2 challenges the validity of the Guidelines. It is not a new ground, having been fully argued before the Full Court of the Federal Court. However, because the ground had not been raised at first instance, leave was required (FCJ [187], [330]). Before the Full Court, the First Respondent opposed leave primarily on the basis that the ground was said to lack merit, and not because he was prejudiced in dealing with it.[1]

6. Ground 2 was included in the Application for Special Leave to Appeal dated 21 January 2022. In his Response dated 10 February 2022, the First Respondent supported the grant of special leave to appeal (on both grounds), although "[f]or completeness" indicated that it would be submitted that the Full Court did not err in refusing leave to raise a new ground of appeal.[2] The Response proceeded to respond to the merits of the arguments in relation to the validity of the Guidelines, arguing that the Full Court "correctly concluded" that it was competent for the Minister to issue the Guidelines.[3]

7. More fundamentally, as was correctly recognised in the Response (at [14]), it is clear that the majority of the Full Court refused to grant leave to raise Ground 2 entirely on

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1 First Respondent's Further Submissions dated 19 May 2021 (VID 399 of 2020), para 26.1; see also First Respondent's Written Submissions dated 18 February 2021 (VID 399 of 2020), paras 33 to 37.

2 First Respondent's Response dated 10 February 2022, para 6.

3 First Respondent's Response dated 10 February 2022, paras 10 to 15.

the basis of the legal merits of the ground, and not for any other discretionary reason. Charlesworth J (with whom Kenny, Besanko and Griffiths JJ agreed) concluded that the argument was "not in accordance with authority" and that leave "should be refused on the basis that it has no merit": FCJ [330]-[331]. Accordingly, if the Appellant's arguments in relation to Ground 2 were to be accepted by this Court, it would necessarily follow that there was demonstrable legal error by the Full Court by reason of which the exercise of its discretion to refuse leave would have miscarried.

8. Accordingly, and contrary to the Commonwealth parties' submissions, the Appellant does impugn the Full Court's refusal of leave to rely on Ground 2. In CS [9], the Commonwealth parties labour under a misapprehension that the refusal of leave turned on discretionary considerations (such as delay or prejudice, neither of which was relied on below), when the ground was in fact addressed and determined below on its legal merits.

9. In reply to CS [10]-[12], the guidelines considered in *Plaintiff S10* were materially different from the Guidelines in the present matter.[4] In contrast to the previous guidelines, which provided for the Minister to be notified of the finalisation of requests that did not meet the criteria for referral,[5] the Guidelines explicitly provide that requests "will not be brought to [the Minister's] attention" if the Department assesses that the case does not have unique or exceptional circumstances and is inappropriate for the Minister to consider. As Griffiths J stated below, the effect of the Guidelines "was to devolve to Departmental officers' sole responsibility for rejecting a ministerial intervention request where it did not meet the 2016 Guidelines and without any notification being given to the Minister of such rejections."[6]

10. Thus, as Mortimer J correctly recognised below, [7] while there may be some dicta in *Plaintiff S10* that do not support the Appellant's argument as to the invalidity of the Guidelines, the decision in *Plaintiff S10* does not strictly preclude acceptance of that argument.

11. By purporting to empower a Departmental officer to determine that a request for Ministerial intervention will not be considered by the Minister, based on the officer's own subjective assessment as to whether there are "unique or exceptional circumstances" or whether it is appropriate for the Minister to consider the request, and then to prevent the existence of that request from being brought to the Minister's attention, the Guidelines foreclose the possible exercise of powers under s 351 of the

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4 AS [24], n 5.
5 FCJ [94], [224] (Amended Core Appeal Book (**ACAB**) 88-89, 123).
6 FCJ [95] (ACAB 89).
7 FCJ [141]-[145] (ACAB 102-103).

Migration Act that are required to be exercised by the Minister personally. While the Minister does not have a duty to consider whether to exercise those powers in any particular case (s 351(7)), he or she cannot simply devolve to the Department the function of deciding whether or not it is in the public interest for the Minister to consider the exercise of power to intervene.

12. In that way, the Guidelines act as a practical bar to the Minister's possible consideration and exercise of power under s 351(1).[8] The function of the Departmental officer performing an assessment under the Guidelines goes beyond simply assisting the Minister to decide whether he or she might want to consider the request.

10 13. In reply to CS [13], the Minister did not make a "purported privative clause decision" in issuing the Guidelines. The Federal Court had jurisdiction to determine whether the Guidelines were inconsistent with s 351 of the *Migration Act*.

Dated: 26 August 2022

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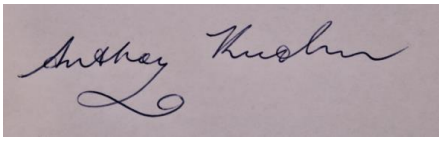

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[8] AS [60], n 57.