HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 26 Aug 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S81/2022
File Title:	DCM20 v. Secretary of Department of Home Affairs & Anor
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	26 Aug 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S81 of 2022

BETWEEN:

DCM20

Appellant

and

SECRETARY OF DEPARTMENT OF HOME AFFAIRS

First Respondent

ASSISTANT DIRECTOR, MINISTERIAL INTERVENTION, DEPARTMENT OF HOME AFFAIRS

Second Respondent

APPELLANT'S REPLY

Rasan T Selliah
Suite 30, Level 4, 301 Castlereagh Street
SYDNEY NSW 2000

Tel: (02) 9635 5630
Fax: (02) 9635 5650
Email: rtslawyers@gmail.com
Ref: Rasan Thamilarasan Selliah

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**).

3. Contrary to CS [20], the decision in *Plaintiff S10*[1] is not inconsistent with a duty to bring requests for Ministerial intervention to the attention of the Minister, subject to any lawful instructions that may be given by the Minister (including as to the finalisation of such requests). Unlike the present Guidelines, the guidelines considered in *Plaintiff S10* provided for the Minister to be notified of the finalisation of requests that did not meet the guidelines for referral for possible consideration of the intervention powers.[2] *Plaintiff S10* said nothing about the situation where the request is neither brought to the Minister's attention nor dealt with in the manner specified in the guidelines promulgated by the Minister. The finalisation of the request by the Departmental officer forecloses any opportunity for possible consideration by the Minister, by implementing or giving effect to a decision by the Minister not to consider the exercise of his powers in specified categories of cases.

4. A majority in *Plaintiff S10* accepted that non-referral under the guidelines was "apt to affect adversely what is the sufficient interest of a party seeking the exercise of those powers in favour of that party", such that it would have attracted an obligation to afford procedural fairness but for the manifestation of a contrary statutory intention.[3] No principled basis has been advanced as to why such an effect on interests cannot also be sufficient to attract an obligation of legal reasonableness, enforceable by judicial review.

5. The Appellant does not agree that the Departmental officer's function under the Guidelines can be classified as a "bare" non-prerogative capacity that is no different to the conduct of any so-called "non-public actor" (*cf.* CS [17], [29]). It is a unique function of the public service to assist in the execution of the laws of the Commonwealth, including

---

1 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

2 See JM 76.9; FCJ [94], [224] (Amended Core Appeal Book (**ACAB**) 89-90, 124); *cf* CS [12].

3 *Plaintiff S10* at 658 [66], 659 [69]-[70] (Gummow, Hayne, Crennan and Bell JJ). This is separate from the direct effect of the finalisation of a request for Ministerial intervention for the purposes of the bridging visa criteria in cl 050.212(6) of Sch 2 of the *Migration Regulations*.

by carrying out Ministerial instructions. Even if the conduct of assessments were to be outsourced to a "non-public actor", such conduct would retain its public character and would be reviewable as such.[4] In other words, it is not the identity of the actor, but the nature of the function that is important, including for the purposes of amenability to judicial review and public law remedies.

6. In any event, even if the functions performed by the Second Respondent (the **Officer**) in assessing and finalising the Appellant's request (the **Functions**) involved a non-statutory non-prerogative executive capacity,[5] it does not follow that their exercise is not amenable to judicial review. As Brennan J stated in *Ainsworth v Criminal Justice Commission*:[6] "[a]lthough statutory powers which are capable of exercise to affect legal rights and liabilities can be distinguished from statutory functions which are performed in exercise of the capacities possessed by all, there is no reason to restrict judicial review to the purported exercise of powers" (citations omitted). Equally, there is no reason to restrict judicial review to the purported exercise of prerogative *powers*, and not non-prerogative *capacities*. In this regard, the executive power of the Commonwealth (including non-prerogative capacities) is not unlimited.[7]

7. In *Plaintiff M68/2015 v Minister for Immigration and Border Protection*,[8] Gageler J noted the "essential similarity" between acts done in the execution of a prerogative executive power or capacity and acts done in the execution of a non-prerogative executive capacity, in that in each case the provenance was found in "the non-statutory executive power of the Commonwealth which is constitutionally conferred by s 61 of the *Constitution* and which is accordingly constitutionally limited by s 61 of the *Constitution*".

8. While the Functions may, in one sense, consist of activities (such as reading documents and assessing information) of a kind that may be carried out by non-public actors, such activities performed by officers of the executive branch under the Guidelines have an effect and consequences that are different to the conduct of other persons (such as a private individual or corporation).[9] They can lead to, or preclude, an exercise of statutory dispensing powers to relax the operation of laws in respect of a person.[10] In this sense, it cannot be said that the Functions relate to the internal affairs of the government in how it

---

4 Compare *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***) at 333 [3], 336 [14], 344-245 [50]-[51].

5 CS [11], [15]-[18], [24]-[26], [29].

6 (1992) 175 CLR 564 at 585.

7 See, *e.g.*, *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v The Commonwealth (No 2)* (2014) 252 CLR 416.

8 (2016) 257 CLR 42 at 99 [137]-[138].

9 *Cf* CS [29]-[30], SA [34].

10 See *Plaintiff S10* at 659 [69] (Gummow, Hayne, Crennan and Bell JJ).

organises itself,[11] nor that their performance by the Officer involves "nothing more than reviewing a request … to assist the Minister to decide whether he might want to consider it".[12] The performance of the Functions (whether or not properly described as a capacity) is an activity that itself affects a person and in respect of which a process has been interposed.[13]

9. The ability of the Functions to have this effect is a result of their relationship with s 351 of the *Migration Act 1958* (Cth).[14] The relationship to laws of the Commonwealth that the assessment process has been accepted to have[15] is relevant to the public nature of the Functions and, therefore, their amenability to judicial review.

10. The passage from the judgment of Brennan J in *Attorney-General (NSW) v Quin*[16] on which the Commonwealth parties rely does not support a requirement that administrative action must have an effect on "enforceable rights" in order for it to be amenable to judicial review.[17] Brennan J was making a different point about the substantive protection of legitimate expectations and the distinction between legality and merits review. Thus, judicial review is unavailable to protect interests which are apt to be affected by "the *lawful* exercise of administrative or executive power" (emphasis added). However, Brennan J went on to state that "[j]udicial review has undoubtedly been invoked, and invoked beneficially, to set aside administrative acts and decisions which are unjust or otherwise inappropriate, but only when the purported exercise of power is excessive or otherwise *unlawful*" (emphasis added).[18]

11. In other words, where there is a legal limit or constraint on the existence, extent or exercise of administrative power (whether statutory or non-statutory), that limit is the source of rights that are enforceable by judicial review. To the extent that an effect on

---

11 CS [20].

12 CS [24].

13 See, *e.g.*, *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 KB 864.

14 See Appellant's Submissions filed 30 June 2022 (**AS**), [24]. The Appellant does not contend on the appeal to this Court that the Officer's assessment against the Guidelines itself involved the exercise of a statutory power: *cf.* CS [14]. In substance, it gave effect to a decision by the Minister not to consider the exercise of his statutory powers – the converse of the "personal procedural decision" that has been held to engage the statutory powers under the *Migration Act*.

15 *Plaintiff S10* at 655 [51] (French CJ and Kiefel JJ), 665 [93] (Gummow, Hayne, Crennan and Bell JJ); ACAB 62 (FC [13]-[14] (Kenny J). See also AS [24], NSW [20].

16 (1990) 170 CLR 1 ***(Quin)*** at 35-36.

17 CS [26]-[27], [33] and [39].

18 *Quin* (1990) 170 CLR 1 at 35. Brennan J also recognised that the duty of the courts "extends to judicial review of administrative action alleged to go beyond the power conferred by statute *or by the prerogative or alleged to be otherwise in disconformity with the law*" (emphasis added). See also *Annetts v McCann* (1990) 170 CLR 596 at 605, where Brennan J accepted that "[a] remedy by way of judicial review may protect … interests which do not amount to legal rights, powers or privileges".

rights is required, it is the right to legal reasonableness or procedural fairness that is enforced by judicial review, rather than any right to a particular outcome.[19]

12. In so far as the Commonwealth parties and interveners seek to rely on political and administrative accountability in the place of judicial review, the specific statutory mechanisms for Parliamentary oversight are limited to positive decisions to exercise the powers of Ministerial intervention, and have no application to decisions not to exercise or not to consider the exercise of such powers, let alone in respect of decisions by Departmental officers to finalise requests without referral to the Minister.[20] Neither the Ombudsman nor Parliamentary committees provide adequate redress for an individual affected by a particular decision to finalise a request for Ministerial intervention under s 351 of the *Migration Act*. Nor does ministerial responsibility play a role in circumstances where, on the Minister's instructions, the existence of a request that is "screened out" is never brought to the Minister's attention.[21] In any event, Ministerial responsibility for the exercise of powers and capacities by officers within the Department for which the Minister is responsible does not prevent or preclude judicial review of the exercise of such power.

13. This is not a case in which a remedy is available by means of private law causes of action.[22] Unlike the appellants in *L v South Australia*,[23] there is no further process by which the Functions could become subject to judicial review.

14. A legal obligation to exercise non-statutory powers or capacities in accordance with the principles of legal unreasonableness can be sourced otherwise than as an express or implied statutory condition.[24] Such an obligation is derived from the common law, and is supported by the purpose and context of s 61 of the *Constitution*. The obligation is given content by the subject matter, scope and purpose of the Guidelines. More generally, the scheme of responsible government established by Chapter II of the *Constitution* does not envisage the conferral on Departmental officers of a licence to ignore or misapply the lawful instructions of the Minister in relation to the "screening out" of requests made to the Minister for intervention under s 351 of the *Migration Act*.[25]

---

19 See also CS [32].

20 *Cf* CS [8], NSW [24], SA [39].

21 *Cf* NSW [33].

22 *Cf* CS [29].

23 (2017) 129 SASR 180.

24 AS [37]-[40], and see the cases cited in AS [36] nn 29 and 30; *cf* NSW [9]. Compare *Quin* (1990) 170 CLR 1 at 18 (Mason CJ), who considered that, while the principle against fettering gains some of its force from implied legislative intention, "[n]onetheless there is no reason why the same principle should not apply to common law powers and functions of the Crown or the Executive when they involve the making of decisions in the public interest."

25 See *e.g. DXO21 v Minister for Immigration* [2021] FCA 1656 at [12] (Logan J).

15. This is not inconsistent with the reasoning of Brennan J in *Kioa v West* as to the basis of judicial review of a decision made *in the exercise of a statutory power* on natural justice grounds.[26] Irrespective of whether it is now accepted that judicial review of such a decision depends on an implied statutory intention, the plurality in *Plaintiff S10* observed that the debate as to the source of procedural fairness obligations proceeds from a "false dichotomy" in circumstances where the source of the statutory implication is itself a common law principle of statutory interpretation.[27] The cases referred to by South Australia (SA [11]-[15]) say nothing against a common law source of obligations in circumstances where the power, function or capacity exercised by an officer is not conferred by statute. That the common law principle might not operate in precisely the same way as a principle of statutory construction does not mean that the common law principle must have no operation at all.[28] That the Parliament is now a source of an implied obligation to act reasonably in the exercise of a statutory power does not mean that the Parliament is the only source of such an obligation to act reasonably in the exercise of non-statutory executive powers, functions or capacities.[29]

16. There does not need to be an effect on legal rights for a declaration to issue.[30] Similar to the declaration made in *Plaintiff M61*,[31] the Court may declare that the Appellant has been denied a reasonable decision-making process in relation to her request for Ministerial intervention. Such a declaration will resolve the dispute between the parties[32] and produce the "foreseeable consequences"[33] outlined at AS [33].

Dated: 26 August 2022

C J Horan
T: (03) 9225 8430
F: (03) 9225 8668
E: chris.horan@vicbar.com.au

B Zipser
T: (02) 9231 4560
F: (02) 9235 2342
E: bzipser@selbornechambers.com.au

A R Sapienza
T: (02) 9151 2232
F: (02) 9335 3500
E: a.sapienza@level22.com.au

---

26 SA [11].
27 *Plaintiff S10* at 666 [97] (Gummow, Hayne, Crennan and Bell JJ).
28 *Cf* Vic [32]-[43]).
29 *Cf* NSW [47]-[58].
30 *Cf* CS [39], Vic [31].
31 *Plaintiff M61* at 360 [105].
32 *Cf Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1 at 32 (Kiefel J).
33 *Plaintiff M61* at 359 [103].