Ministerial intervention applications and limits on executive power

By Jason Donnelly - Jun 02, 2023 8:55 am AEST

Snapshot

- In *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, the High Court considered whether there had been an unlawful exercise of the Minister's personal liberty by departmental officials.
- The *Migration Act 1958* (Cth) grants the Minister powers to grant visas and substitute a decision of the Administrative Appeals Tribunal if it is in the 'public interest to do so'.
- The statute does not permit departmental officers to make a decision entrusted exclusively to the Minister.
- The High Court decision has potentially far-reaching implications for the continuing validity of various ministerial intervention regimes made in purported furtherance of numerous statutory powers in the *Migration Act*.

The High Court of Australia ('**HCA**') published its decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 ('***Davis***') on 12 April 2023. It is one of the most important Australian migration law decisions ever published in relation to the ministerial intervention regime under the *Migration Act 1958* (Cth) (the '**Act**').

This article does two things. First, it provides a summary of the *Davis* decision. Second, and perhaps more importantly, the article discusses the broader implications of the decision in the context of ministerial intervention applications under the Act.

Davis explained

Each appellant, upon a delegate of the Minister refusing their visa application and the Administrative Appeals Tribunal (the '**Tribunal**') affirming that refusal, requested that the Minister exercise the power under s 351(1) of the Act to substitute a more favourable decision for the Tribunal's adverse decision '[i]f the Minister thinks that it is in the public interest to do so'.

Pursuant to s 351(3), that power may only be exercised by the Minister personally. The Ministerial Instructions (the '**MI**') instructed departmental officers not to refer such requests to the Minister for consideration unless satisfied that the case had 'unique or exceptional circumstances' (at [38], [41]).

The officers were not satisfied there were 'unique or exceptional circumstances' and, in accordance with the MI, the appellants' requests were finalised by the Department of Home Affairs (the '**Department**') without referral to the Minister. At first instance and on appeal before the Full Court of the Federal Court of Australia, the appellants unsuccessfully argued that the departmental officers' decisions were legally unreasonable. The Full Court refused leave to raise a new ground which alleged the MI were unlawful.

The HCA granted the appellants special leave to appeal on both the unlawfulness and unreasonableness grounds of appeal.

First, the HCA determined that the power conferred personally on the Minister by s 351(1) comprises two distinct decisions, each involving a non-delegable exercise of the statutory power:

(1) a procedural decision to consider or not to consider whether to make a substantive decision; and

(2) a substantive decision to substitute or not to substitute, in the public interest, a more favourable decision.

> *The broad criterion of 'compelling or compassionate' in the s 195A Guidelines require, in effect, a delegate of the Minister to evaluate the public interest and make a decision entrusted exclusively to the Minister.*

Second, the Minister could not exercise executive power, which is constrained by the statutory scheme, to delegate either of these decisions to departmental officers. The Court found the broad criterion of 'unique or exceptional circumstances' in the Ministerial Instructions required, in effect, a departmental officer to evaluate the public interest and make a decision entrusted exclusively to the Minister.

Third, given the preceding, the MI exceeded the limitation imposed by s 351(3) on the executive power of the Commonwealth. The decisions made, in purported compliance with the MI, were therefore unlawful.

Fourth, as the departmental officers' decisions were not decisions made under the Act, the appeals were not excluded from the jurisdiction of the Federal Court under s 476A(1) of the Act, and accordingly were not excluded from the High Court's appellate jurisdiction under s 73 of the *Constitution*.

The majority included Kiefel CJ, Gageler and Gleeson JJ (at [1]-[64]), Gordon J (at [65]-[102]), Edelman J (at [103]-[195]) and Jagot J (at [251]-[324]), while Justice Steward dissented (at [196]-[250]).

Legality of other ministerial intervention regimes

In the plurality judgment, Kiefel CJ, Gageler and Gleeson JJ explained that the structure of the section (i.e. 351) is 'relevantly indistinguishable from the structure of a number of other sections of the Act which confer personal and non-compellable powers on the Minister' (at [13]). Those other sections include ss 46A, 48B, 195A and 417.

Applying the reasoning in *Davis*, it is now questionable whether various policy documents and instructions that are said to guide delegates of the Minister in relation to personal and non-compellable powers under the Act are valid.

For example, s 195A of the Act provides that if the Minister thinks that it is in the public interest to do so, the Minister may grant a person a visa of a particular class (whether or not the person has applied for the visa). For that purpose, the Minister for Immigration and Border Protection (as he was then known) published a document titled 'Guidelines on Minister's detention intervention power – section 195A of the *Migration Act 1958* (Cth) (2016)' (the '**s 195A Guidelines**').

Paragraph 3 of the s 195A Guidelines provides that cases may be referred to the Minister for consideration under s 195A of the Act where, inter alia, there are other 'compelling or compassionate circumstances' which justify the consideration of the use of the public interest powers, and there is no other intervention power available to grant a visa to the person.

Following the reasoning in *Davis*, it is reasonably arguable that the broad criterion of 'compelling or compassionate' in the s 195A Guidelines require, in effect, a delegate of the Minister to evaluate the public interest and make a decision entrusted exclusively to the Minister. As such, it is reasonably arguable that the impugned policy principle in paragraph 3 of the s 195A Guidelines exceeds the limitation imposed by s 195A on the executive power of the Commonwealth.

An analogous argument can be mounted in relation to paragraph 10 of the 'Guidelines on the residence determination under sections 197AB and 197AD of the *Migration Act 1958* (2017)' (the '**ss 197AB and 197AD Guidelines**'). Paragraph 10 provides, inter alia, that various cases should not be referred to the Minister unless there are 'exceptional reasons'. That policy principle is a broad criterion that arguably mandates a delegate to evaluate the public interest (and following *Davis*, is invalid).

> *The impugned policy principle in paragraph 3 of the s 195A of the Guidelines exceeds the limitation imposed by s 195A on the executive power of the Commonwealth.*

Similar arguments can be made to policy principles of 'exceptional and compelling circumstances' in the 'Procedural instruction of the Ministerial intervention power under S48B of the *Migration Act 1958'* (the '**s 48B PI**').

Potential law reform

Justice Edelman held that 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 (at [194]).

It may well be that these obiter dictum comments of Edelman J are picked up by the Commonwealth to amend the Act accordingly. Otherwise, on the current statutory regime, the Minister will need to make the procedural decision to consider or not to consider whether to make a substantive decision.

Given the high number of ministerial intervention applications, it would not seem practicable that the Minister could personally make a procedural decision in all cases. It follows that the obiter comments

made by Edelman J, as outlined above, should be accommodated as a matter of urgency.

Legality of previous decisions

There is no doubt that *Davis* is a landmark decision. The judgment has much broader implications than for the appellants in *Davis*.

Applying the reasoning in *Davis*, a not insubstantial number of ministerial intervention applications are likely to have been unlawfully decided (on the basis that many of those applications were purportedly decided by a delegate who simply did not have the power to make the impugned procedural decision).

Given the preceding, the Commonwealth may need to introduce amending legislation that has the legal effect of retrospectively validating many purported procedural decisions. Otherwise, another potential implication may be a spate of judicial review applications challenging the legality of purported procedural decisions of departmental officers.

Conclusion

The *Davis* decision has made it clear that a non-statutory instruction is itself bounded by the exclusivity which the statutory power confers on the Minister (at [21]). That is, the 'extension by s 61 of the *Constitution* of the executive power of the Commonwealth to "the execution and maintenance … of the laws of the Commonwealth" does not authorise a Minister or any other officer of the Executive Government of the Commonwealth to undertake any non-statutory action that is expressly or impliedly excluded by a law of the Commonwealth' (at [30]).

The Executive Government was and remains relevantly subordinated to the Parliament (*Plaintiff M68-2015 v Minister for Immigration and Border Protection* [2016] HCA 1 at [123]). *Davis* is a textbook case in point. If a statute regulates or controls how executive power is to be exercised, then the statute governs to the exclusion of any residual power (*CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 at [279]).

Ultimately, as *Davis* showed, there was an 'unlawful exercise of the Minister's personal liberty by departmental officials' (at [114]).

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