



## HIGH COURT OF AUSTRALIA

12 April 2023

DAVIS v MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND  
MULTICULTURAL AFFAIRS & ORS; DCM20 v SECRETARY OF DEPARTMENT OF HOME  
AFFAIRS & ANOR  
[2023] HCA 10

Today the High Court, by majority, allowed two appeals from a decision of the Full Court of the Federal Court of Australia. The dispositive issue considered by the Court was whether instructions issued to departmental officers by the Minister in 2016 in the exercise of Commonwealth executive power ("Ministerial Instructions"), and purported decisions made by departmental officers in compliance with them, exceeded the limits of the executive power of the Commonwealth because the Ministerial Instructions purported to instruct those officers to make a decision which, by legislative stipulation, could be made only by the Minister personally.

Each appellant, upon a delegate of the Minister refusing their visa application and an administrative tribunal affirming that refusal, requested that the Minister exercise the power under s 351(1) of the *Migration Act 1958* (Cth) ("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 relevantly instructed departmental officers not to refer such requests to the Minister for consideration unless satisfied that the case had "unique or exceptional circumstances". The officers were not so satisfied and, in accordance with the Ministerial Instructions, the appellants' requests were finalised by the Department without referral. At first instance and on appeal before the Full Court, 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 Ministerial Instructions were unlawful.

The High Court granted the appellants special leave to appeal on both the unlawfulness and unreasonableness grounds of appeal. 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 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 that 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. For that reason, the Ministerial Instructions exceeded the limitation imposed by s 351(3) on the executive power of the Commonwealth. The decisions made in purported compliance with the Ministerial Instructions were therefore unlawful.

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*.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*