HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 10 Oct 2024 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:	P21/2024
File Title:	Minister for Immigration and Multicultural Affairs & Ors v. M
Registry:	Perth
Document filed:	Appellants' and AG-Cth's Supplementary Submissions
Filing party:	Appellants
Date filed:	10 Oct 2024

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
PERTH REGISTRY

BETWEEN:

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
First Appellant

SECRETARY, DEPARTMENT OF HOME AFFAIRS
Second Appellant

THE RELEVANT OFFICERS ACTING UNDER SECTION 198 OF THE MIGRATION ACT 1958
Third Appellant

and

MZAPC
Respondent

SUPPLEMENTARY SUBMISSIONS OF THE APPELLANTS AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING) ON GROUND ONE OF THE FURTHER AMENDED NOTICE OF CONTENTION

PART I: CERTIFICATION

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

PART II: ISSUE

2. Where an unlawful non-citizen makes a request to the Minister to exercise a personal, non-compellable power:

   (a) Is the duty to remove under s 198(6) of the *Migration Act 1958* (Cth) (**the Act**) suspended or postponed or deferred, until the request is brought to the "attention" of the Minister? Alternatively, is removal not "reasonably practicable" for as long as it takes to bring the request to the "attention" of the Minister?

   (b) Is there a duty on the Secretary to bring the request to the "attention" of the Minister?

PART III: NOTICE OF CONSTITUTIONAL MATTER

3. Notice has been given under s 78B of the *Judiciary Act 1903* (Cth): **CAB 101-104**.

PART IV: MATERIAL FACTS

4. The material facts are set out in the Commonwealth parties' submissions in chief at [7]-[10] and the respondent's supplementary submissions (**RSS**) at [4]-[5].

PART V: ARGUMENT

The respondent's contention

5. It is well settled that exercise of the powers that the respondent has requested be exercised, namely ss 48B, 195A, 351 and 417 of the Act, involves the making of two distinct decisions.[1] The first decision is "procedural" — it is either a decision to consider, or not to consider, whether to make a substantive decision. The second decision is "substantive" — it is either to exercise the power or not to exercise the power. Both the procedural decision and the substantive decision can only be made by

[1] See, most recently, *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at [14] (Kiefel CJ, Gageler and Gleeson JJ), [93] (Gordon J), [108] (Edelman J), [240] (Steward J), [296] (Jagot J). The decisions could be made at the same time: see *Davis* at [299] (Jagot J).

the Minister personally. However, officers of the Department can assist the Minister in making those decisions.

6. Where a procedural decision to consider making a substantive decision has been made in respect of a person, the length of the person's detention will be prolonged if officers of the Department need to take further steps to enable the Minister to make a substantive decision if the Minister wishes. In *Plaintiff M61/2010E v Commonwealth*,[2] this Court held (at [35]) that — in circumstances where a procedural decision had been made to consider the powers given by ss 46A and 195A of the Act — "s 198(2) should be read as accommodating the taking of steps for the purpose of informing the Minister of matters relevant to the possible exercise of power". The Court continued (at [35]) that, so long as those steps were taken "promptly", the detention is lawful.

7. The present case is different. The Minister has not made any procedural decision to consider exercising any of the relevant powers in respect of the respondent. The respondent submits that his case is nonetheless on a "conceptually similar footing" (**RSS [10]**). More particularly, the respondent submits that s 198(6) "do[es] not permit or require an officer to remove an unlawful non-citizen where they have requested the Minister to exercise a personal non-compellable power in their favour and the request has not been brought to the Minister's attention" (**RSS [11]**). A necessary implication of the respondent's argument is that the person's detention will be prolonged for as long as it takes for that to occur. However, and notwithstanding that the Minister has no duty to consider the exercise of any of those powers, the respondent submits that detention will not continue "at the unconstrained discretion of the Executive" because the Secretary of the Minister's Department has a duty, the performance of which is compellable by an order of mandamus, to bring requests to the Minister's attention (**RSS [14]**).

8. For the reasons below, the present case is not on a "conceptually similar footing" to *Plaintiff M61*. *First*, there is a critical distinction between steps taken before a procedural decision is made, and steps taken after such a decision. The distinction is that the taking of steps for the purpose of informing the Minister after a procedural decision is made has statutory significance, while the mere making of a request does not. That statutory significance provides the foundation to construe the removal

---

2 (2010) 243 CLR 319.

obligation in the Act as "accommodating" the taking of steps to inform the Minister of relevant matters after that procedural decision is made. *Secondly*, there is no duty imposed on the Secretary of the kind asserted by the respondent. Absent that duty, the respondent's contention necessarily amounts to a construction of the Act which ***does*** contemplate ongoing detention at the unconstrained discretion of the Executive. That it does not do so is ensured by the engagement of the obligation to remove.

The significance of a procedural decision

The meaning of "accommodates"

9. As noted above, this Court has held that s 198(2) "accommodates" the taking of steps for the purpose of informing the Minister of matters relevant to the possible exercise of the power ***after*** a procedural decision has been made. A question raised by the respondent's further amended notice of contention is what is meant by "accommodates" in this context. Before addressing that question, it is necessary to consider this Court's decision in *Plaintiff M61* and its subsequent decision in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[3] in more detail.

10. In *Plaintiff M61*, the Court held that the Minister had made a procedural decision to consider the exercise of the power under s 46A or s 195A (at [70]). The parties had agreed that the detention of the plaintiffs while consideration was being given to the exercise of those powers was lawful, but they disagreed as to why. The Commonwealth had submitted that the detention of an offshore entry person was permitted while the officer detaining the person awaited the possibility of the exercise of power under either s 46A or s 195A. In rejecting that submission, the Court said (at [65]):

> … deciding whether there is a relevant possibility of the exercise of power under either s 46A or s 195A would require some prediction of the likelihood of the exercise of a personal non-compellable power. A criterion of that kind is a very uncertain basis for determining whether detention is lawful or unlawful. Such a construction of the relevant provision should not be adopted unless no other construction is reasonably open. Instead, accommodation of the provisions governing detention and its duration, with what is done in relation to the possible exercise of power under ss 46A and 195A, must seek a firmer statutory foundation.

[3] (2014) 253 CLR 219.

11. The Court went on to identify the "firmer statutory foundation" in the making of the procedural decision. The Court said (at [71], see also [25], [35]):

> There having been a decision to consider exercise of the relevant powers in the present and other similar cases, the unchallenged assumption made in these matters, that detention during the conduct of the assessment and review processes was lawful, is seen to be soundly based. The obligation to remove as soon as reasonably practicable, imposed by s 198(2), is read in the light of other provisions of the *Migration Act*. ***The express reference in s 198(2)(c) to the possibility of making a valid application for a visa accommodates the consideration of whether to exercise the powers given by ss 46A and 195A.*** The accommodation is founded upon the taking of the first step towards the exercise of those statutory powers: the decision to consider their exercise. It is not founded upon necessarily uncertain prognostications about whether exercise of the available powers will ever be considered. [emphasis added]

12. In other words, the detention was lawful because the making of the procedural decision commenced a statutory process that ***could*** lead to the making of an application of a visa or the grant of a visa, in which case s 198 would no longer apply to the person.

13. In the later decision of *Plaintiff S4*, the Court was similarly concerned with the taking of steps after the making of the procedural decision. How those steps were accommodated by the removal duty was not in issue and was not the subject of competing argument between the parties. Nonetheless, the Court said (at [27]):

> Because those who are designated as unauthorised maritime arrivals cannot make a valid application for a visa, the primary purpose for detaining those persons is for effecting their removal from Australia. In this case, however, ***once the Minister decided that he would consider whether he would exercise his power to permit the plaintiff (and others) to make a valid application for a visa***, the detention was for a more complex purpose: for determining whether to permit a valid application for a visa (by making inquiries into matters relevant to the exercise of the power under s 46A and then deciding whether to exercise that power), and thereafter (according to the decision about exercising power under s 46A(2)) either for removal or for the processing of the permitted application. [emphasis added]

14. The Court then said that "the purposes must be pursued and carried into effect as soon as reasonably practicable" (at [28]). The Court explained (at [35]):[4]

> In the Act's operation with respect to the plaintiff, the requirement to remove unlawful non-citizens as soon as reasonably practicable is to be treated as the leading provision, to which provisions allowing consideration of whether to permit the application for, or the grant of, a visa to an unlawful non-citizen who is being held in detention are to be understood as subordinate. The powers to consider whether to permit the application for, and the grant of, a visa had themselves to be pursued as

[4] A failure to take steps as soon as reasonably practicable does not render the detention unlawful (in the sense of tortious), but rather means that the unlawful non-citizen can seek mandamus: see *Commonwealth v AJL20* (2021) 273 CLR 43.

> soon as reasonably practicable. Unless those powers were to be exercised in a way that culminated in the plaintiff's successfully applying for the grant of a visa, his detention had to be brought to an end by his removal from Australia as soon as reasonably practicable.

15. In other words, the Court held that the taking of steps after the procedural decision had to be done "as soon as reasonably practicable" because, unless the person was going to be allowed to apply for a visa or be granted a visa, the person had to be removed "as soon as reasonably practicable". The Court went on to say that "without the Minister deciding whether to permit the plaintiff to make a valid application for a visa, the powers to remove the plaintiff from Australia do not apply and may not be engaged" (at [58]).

16. In light of the discussion above, the "accommodation" to which the Court referred in *Plaintiff M61* could be understood in one of two ways:

    (a) *First*, it could mean that there is an implied exception to s 198(2), such that the duty to remove is suspended or postponed or deferred, once a procedural decision is made.

    (b) *Secondly*, it could mean that the phrase "as soon as reasonably practicable" in s 198(2) encompasses the taking of steps to inform the Minister in relation to the making of the substantive decision.

17. The Court's reasons in *Plaintiff M61* support the first view. As set out above, the Court relied upon the "express reference in s 198(2)(c) to the possibility of making a valid application for a visa" as the basis for the "accommodation". The Court's reasoning was that, given s 198 would no longer apply ***if*** a substantive decision was made, the duty to remove was suspended or postponed or deferred for the period in which the consideration of whether to make the substantive decision took place. Those steps needed to be taken "promptly" (at [35]), because — there being no time specified in the Act — the steps needed to be taken within a reasonable time.[5] That is not to impose a duty on the Minister to make either a procedural or substantive decision within a reasonable time, for that would contradict the express terms of the Act. Rather, it is that

---

[5] See *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [37] (Crennan, Bell, Gageler and Keane JJ). See also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [30] (French CJ) ("reasonable promptness").

the removal obligation is suspended or postponed or deferred ***only*** for a reasonable time, after which the obligation must be performed as soon as reasonably practicable.

18. This understanding of the reasons in *Plaintiff M61* is consistent with the way in which the Court described the Commonwealth's submission in *Plaintiff M61*. The Court recorded the submission as being (at [64]):

> that detention of an offshore entry person was permitted while the officer detaining the person awaited the ***possibility*** of the exercise of power under either s 46A or s 195A. That is, the obligation to bring to an end the detention of an unlawful non-citizen who is covered by s 193(1)(c), who has not subsequently been immigration cleared, and who has not made (and cannot make) a valid application for a visa, by removing that person from Australia as soon as reasonably practicable, was said to be suspended for so long as there remains a possibility (presumably a reasonable possibility) of an exercise of power under s 46A or s 195A. [original emphasis]

While that submission was rejected insofar as the "possibility" of the exercise of power was sufficient to render the detention lawful as explained at [10]–[11] above, the Court did not reject the "suspension" analysis once the "firmer statutory foundation" for the prolonging of the person's detention was identified.

19. There is support for both the first view and the second view in *Plaintiff S4*. It may be that the Court assumed the second view, given that (as explained in [13]–[15] above) the Court held that the steps after a procedural decision had been made needed to be taken "as soon as reasonably practicable", and not just "promptly" or within a reasonable time. That was because, unless a substantive decision was made, removal had to occur "as soon as reasonably practicable".[6] On the other hand, the Court's statement (at [58]) that "without the Minister deciding whether to permit the plaintiff to make a valid application for a visa, the powers to remove the plaintiff from Australia do not apply and may not be engaged" supports the first view. It may perhaps be reconciled with the Court's reference to the taking of steps "as soon as reasonably practicable" given the necessary consequence of the need to take the relevant steps is the prolonging of the person's detention. A degree of impression on these points is

---

[6] In *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at [38], the Full Court of the Federal Court seemed to understand *Plaintiff M61* in this way. The Court said that "[i]t has been held [in *Plaintiff M61*] that these words ["as soon as reasonably practicable"] are to be read as permitting detention while steps are taken to determine whether a person who is barred from making a visa application should be ***permitted*** by the Minister exercising his powers to lift that bar to make an application for a visa" (original emphasis).

unsurprising in circumstances where, as noted above, the point was neither in issue nor the subject of competing argument between the parties.

20. For the reasons in [23]–[33] below, the respondent's argument should be rejected on either view of the notion of "accommodation". But as a matter of principle, the first view should be accepted. Once the procedural decision is made, there is a possibility that a substantive decision will be made the consequence of which may be that s 198 no longer applies (either because the person is no longer an unlawful non-citizen or because the person can and does apply for a visa). Consistent with the Court's decision in *Plaintiff M61*, the implied suspension or postponement or deferral of the duty to remove is necessary to ensure that the possible favourable exercise of those powers is not rendered moot. That is the statutory foundation for a ***necessary*** implication (cf [39] below) that, once the procedural decision is made, the duty to remove is suspended or postponed or deferred for a reasonable time to allow the Minister to make any substantive decision.

21. The second view is difficult to square with the ordinary meaning of "practicable" in the context of the obligation to remove as soon as reasonably practicable. The word means "capable of being put in practice, done, or effected, especially with the available means or with reason or prudence; feasible".[7] That the word "practicable" has its ordinary meaning in this context has been accepted on a number of occasions. In *Al-Kateb v Godwin*,[8] Gummow J said that the word practicable "identifies that which is able to be put into practice and which can be effected or accomplished". In *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,[9] the Full Court of the Federal Court held that "[w]hether or not the removal of an unlawful non-citizen is practicable seems to be largely, if not entirely, concerned with whether the removal is possible from the officer's viewpoint". In *NATB v Minister for Immigration and Multicultural and Indigenous Affairs*,[10] the Full Court correctly held that the possible consequences of removal for a person once they are removed to another country were

---

7 *Macquarie Dictionary* (online); see also *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 305 (Stephen and Mason JJ).

8 (2004) 219 CLR 562 at [121]; see also [226] (Hayne J).

9 (2003) 131 FCR 146 at [65]. This passage was quoted with approval in *BIF23 by his litigation guardian the Public Advocate v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 301 FCR 229 at [51] (Markovic and Anderson JJ, Derrington J agreeing). See also *Snedden v Minister for Justice* (2014) 230 FCR 82 at [116] (Middleton and Wigney JJ, Pagone J agreeing); *WAJZ v Minister for Immigration and Multicultural and Indigenous Affairs [No 2]* (2004) 84 ALD 655 at [75] (French J).

10 (2003) 133 FCR 506 at [53].

not relevant to the assessment of reasonable practicability because they do not go to the ability to remove the person from Australia. Those possible consequences are addressed by other provisions of the Act.

22. It is not the case that the taking of steps to inform the Minister after the procedural decision means that removal is not practical or feasible or possible. A person may be capable of plane travel, and plane travel may be able to be booked, notwithstanding that those steps are taking place. Thus, it is not that the content of what is reasonably practicable "accommodates" the taking of steps to inform the Minister following a procedural decision. Rather, the better view is that officers need not comply with the duty while the relevant steps are being taken, provided that they are taken within a reasonable time, because the Act itself "accommodates" the taking of those steps by suspending or postponing or deferring for a reasonable time the need to perform the duty while they are taken.

No suspension, postponement or deferral, alternatively removal reasonably practicable absent a procedural decision

23. Ultimately, irrespective of whether the first or the second view of "accommodation" is adopted, the making of the procedural decision is of critical importance. That is because, on either view, the explanation of how s 198 "accommodates" the taking of steps to inform the Minister ***depends*** on the procedural decision having been made.

24. On the first view, consistently with the passage in *Plaintiff M61* quoted at [11] above, once the procedural decision is made, a statutory process is engaged. That statutory process provides a "foundation" for the suspension or postponement or deferral of the duty to remove. By contrast, the mere making of a request does not initiate any process under the Act. The Act expressly ascribes ***no*** legal significance merely to the making of a request, as the Minister has no duty to consider a case whether he or she is requested to do so by any person, or in any other circumstances: see ss 48B(6), 195A(4), 351(7) and 417(7). As this Court held in *Minister for Immigration and Border Protection v SZSSJ*,[11] "[i]f the Minister has not made a personal procedural decision to consider whether to make a substantive decision, a process undertaken by the Department on the Minister's instructions to assist the Minister to make the procedural decision ***has no***

[11] (2016) 259 CLR 180 at [54] (emphasis added).

statutory basis".[12] Justice Colvin thus correctly held in *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs*:[13]

> The principal difficulty with the characterisation of the legal contentions advanced by the applicant as being sufficiently arguable to support a grant of leave to appeal is that they seek to give some legal consequence to the fact that the applicant has made requests for the Minister to consider the exercise of the personal powers. The error lies in the notion that a request might be "pending" in some sense. The description of a request as "pending" ascribes to the request some characteristic that requires a decision or determination at some future time such that the request awaits some subsequent event that is to occur. However, as has been explained, the nature of the relevant powers is such that they are both personal and non-compellable. It would alter their character if the making of a request could give rise to some form of requirement for the Minister to indicate whether or not the request was to be considered.

Accordingly, there is no statutory "foundation" for the suspension of the duty to remove where there has only been a request for the exercise of a personal non-compellable power.

25. Further, the making of the procedural decision, and the fact that it indicates the Minister wishes to consider the exercise of power in respect of the person (or a category into which a person falls), is what gives content thereafter to the length of time for which the removal duty may be postponed or suspended or deferred. A reasonable time may be taken for the steps necessary to provide the Minister with information directed to the Minister's decision whether to exercise the power in question.

26. The respondent's contention must likewise be rejected on the second view of how the Act "accommodates" the taking of steps to inform the Minister following a procedural decision. The obligation in s 198(6) is an obligation to remove as soon as reasonably practicable having regard to the circumstances which are ***relevant*** to that obligation, in light of the scheme of the Act. Not all circumstances are relevant in this sense. For instance, as explained, the possible consequences of removal for a person once they are removed to another country are not relevant to the removal obligation, as they are dealt with by the Act in other ways.

---

[12] This proposition is not inconsistent with this Court's subsequent decision in *Davis*. That case raised a different problem, namely that officers were being directed by guidelines to act, prior to any procedural decision, in a manner beyond Executive power because they were being asked to perform part of the function reposed only in the Minister by the Act. The Court's conclusion did not controvert the proposition that, prior to any procedural decision, the processes were non-statutory. To the contrary, the fact that they ***were*** was the source of the problem.

[13] [2023] FCA 877 at [30].

27. Within the context of a legislative scheme that includes the possibility of the exercise of discretionary non-compellable powers, the Act ascribes significance to the making of a procedural decision by the Minister. It is thus relevant to the content of what is reasonably practicable within s 198(6) that steps may need to be taken to inform the Minister directed to their making a substantive decision. And it is that task which must be completed as soon as reasonably practicable.

28. By contrast, before the procedural decision is made, the Act expressly ascribes ***no*** legal significance to the making of a request, and therefore the mere making of a request is ***not*** a matter that is relevant to whether removal is reasonably practicable within s 198(6). The "accommodation" asserted by the respondent in the content of "reasonable practicability" could only be "founded" on "necessarily uncertain prognostications about whether exercise of the available powers will ever be considered". As this Court previously held in *Plaintiff M61* (at [71]), that is an insufficiently firm foundation upon which a person's detention can be prolonged.

29. On either view of the notion of "accommodation", the respondent's argument involves intolerable imprecision and uncertainty.

30. *First*, insofar as it is said that removal cannot occur until a request is brought to the Minister's "attention", it is unclear what that means. It cannot be that the Minister is required to read the request, as that would contradict the express statutory provision that the Minister has no duty to consider whether to exercise the relevant power. If something less than reading the request is sufficient, it is not clear what that would be. Is it sufficient for the request to be placed in the Minister's in tray? Does the Minister need to be specifically told that a request has been placed in the in tray? Does the Minister need to indicate that they are aware that the request is in the in tray? The true position is that ***none*** of these steps need to be taken because the Minister does not have any duty to consider the exercise of these powers.

31. *Secondly*, it is unclear why, on the respondent's argument, removal is only precluded in cases where a person has requested an exercise of power in their favour. The Act expressly treats cases involving requests in the same way as any other circumstance, ie the Minister has no duty to consider them. It is unclear on the respondent's argument how a case is to be treated where a request is by someone else on a person's behalf, or by someone else but about another person who is unaware of the request, or about a

group of people some or all of whom may be unaware of the request, or where there is no request at all but an officer of the Department thinks the Minister might want to consider a particular case. The respondent's apparent position that requests by individuals on their own behalf are to be treated differently has no foundation in the Act. It is a necessary consequence of the respondent's argument that detention can lawfully be prolonged even without a request by a person, simply because officers are preparing a brief for the Minister's attention about a particular case – even though that document could be ignored by the Minister when delivered to them. If that were permissible, one would expect it to be expressly authorised.

32. *Thirdly*, the Act does not impose any limit on the number of requests that can be made or prohibit a person (or someone else) from making an identical request on numerous occasions. Parliament could not have intended that removal could be stymied by a requirement for every request to be brought to the attention of the Minister (whatever that means). And if there are exceptions on the respondent's argument (for repeat requests, for instance), it is unclear on what basis within the Act those exceptions are to be recognised.

33. *Fourthly*, it is unclear on the respondent's argument what is to occur ***after*** a request is brought to the Minister's attention (whatever that means). If the respondent accepts that removal must occur thereafter as soon as reasonably practicable, it is not apparent what purpose bringing the request to the Minister's attention is said to serve. If the respondent contends that removal must be yet further delayed, given that the Minister is under no duty to consider the request and has not indicated any desire to consider it, for how long must removal be delayed? In practice, if removal were attempted before any positive indication from the Minister litigation would inevitably ensue. As a result, in practice, the respondent's argument would impose a duty on the Minister to make a procedural decision *not* to consider a request in every case prior to removal. That is directly contrary to the terms of the Act.

No inconsistency with *Davis*

34. Contrary to **RSS [12]-[13]**, the Commonwealth parties' construction is not inconsistent with this Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[14]

35. The Commonwealth parties accept that the Court "emphasised that ***only*** the Minister can make the procedural decision not to consider exercising a personal non-compellable power" (**RSS [13]**, emphasis in original). However, the fact that a request may not be brought to the Minister's "attention" before the person is removed does not mean that the relevant officer has made a "procedural decision".

36. As accepted by this Court in *Davis* (at [19] per Kiefel CJ, Gageler and Gleeson JJ, [169] per Edelman J, [253], [312] per Jagot J), it is within the Minister's power to give a non-statutory instruction to officers of their Department as to the occasions, if any, on which they wish to be put in a position to consider making a procedural decision. That may be done by reference to the characteristics of the case. If the Minister wishes to be put in a position to consider making a procedural decision in every case where an exercise of power is requested, the Minister may give an instruction to that effect.[15] However, the default position under the Act is that, unless the Minister chooses to consider a case, the case need not be considered.

37. Absent an instruction from the Minister, an officer's not bringing a request to the Minister's attention does not involve the officer usurping the Minster's choice whether to consider the case. It simply involves the officer giving effect to the default position under the Act, in circumstances where the Minister has chosen not to put in place a mechanism, departing from that default position, that would allow the Minister to be in a position either to make a procedural decision or not before any unlawful non-citizen is removed in the proper discharge of the duty imposed on officers by s 198.

---

[14] (2023) 97 ALJR 214.

[15] As at the date of these submissions, no instructions or guidelines are in place.

No duty to bring a request to the Minister's attention

Incongruity with the statutory scheme

38. In addition to the matters above, a critical component of the respondent's contention is that the Secretary "has an enforceable duty to bring a person's case to the attention of the Minister" (**RSS [14]**). If it were otherwise, the respondent's approach would involve prolongation of a person's detention until their request were brought to the Minister's "attention", but no constraint on how long that might take to occur. As the respondent implicitly concedes, that would involve detention at the unconstrained discretion of the Executive.

39. Notably (and tellingly), no provision of the Act is cited for the proposition that the Secretary has a duty of the kind upon which the respondent's contention depends. That is unsurprising — none of ss 48B, 195A, 351 or 417, nor indeed any other provision of the Act, imposes such a duty. "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."[16] For the following reasons, there is no basis upon which the Act can be construed as impliedly imposing the duty for which the respondent argues.

40. *First*, there are many provisions of the Act that ***do*** impose an express duty on the Secretary: see, eg, ss 197AC(5)-(6), 245J(1), 245K(1), 352(2)-(4), 375A(2)(a), 418(2)-(3), 473CB(1)-(2), 486N(1). Had Parliament intended to impose a duty on the Secretary, it may be expected that it would have done so expressly.

41. *Secondly*, what each of ss 48B, 195A, 351 and 417 ***do*** expressly provide is that the Minister is ***not*** under a duty to consider whether to exercise the relevant power, whether he or she is requested to do so by any person, or in any other circumstances: see ss 48B(6), 195A(4), 351(7) and 417(7). It would be incongruous to impose a duty on the Secretary, compellable by an order for mandamus, the sole purpose of which would be to ensure that the Minister can perform a function that they have no duty to perform. It cannot be that there is an enforceable duty to bring a request for the exercise of one of these powers to the attention of the Minister in circumstances where the Minister can lawfully ignore it.

---

[16] *Thompson v Goold & Co* [1910] AC 409 at 420 (Lord Mersey), cited in eg *Minogue v Victoria* (2018) 264 CLR 252 at [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

42. *Thirdly*, factors pointing strongly against the existence of such a duty are that, as explained above:

(a) it is unclear what it means to bring a request to the Minister's "attention": see [30] above;

(b) it is unclear what cases fall within the duty upon which the respondent's argument depends: see [31] above; and

(c) it is unclear how the asserted duty accommodates necessary exceptions (such as for repeat requests): see [32] above.

43. *Fourthly*, the implication upon which the respondent's position depends is simply unnecessary. That is because, as noted in [36] above, this Court accepted in *Davis* that it is within the Minister's power to give a non-statutory instruction to officers of their Department as to the occasions, if any, on which they wish to be put in a position to consider making a procedural decision. Such an instruction can deal with matters such as the exclusion of repeat requests and the manner in which a case is to be "brought to the Minister's attention". There is no necessity to imply an obligation upon the Secretary to bring to the Minister's attention every request, or the content of such an obligation, because the Act leaves open to the Minister to decide whether and, if so how, they wish for that to occur.

The *dicta* of Charlesworth J in *Davis*

44. Rather than rely on any textual or structural matters in support of the existence of the implied duty, the respondent relies on *dicta* of Charlesworth J (Griffiths J agreeing) in the reasons of the Full Court of the Federal Court in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[17] Though unnecessary to her Honour's decision, and in the absence of full argument on the question (see at [52] per Besanko J), her Honour reasoned that — absent the imposition of a duty on a departmental officer to bring the existence of a s 351 request to the Minister's attention — the officer would effectively be "intercepting" that request without legal authority and preventing the Minister from considering whether to exercise the power in s 351(1):

[17] (2021) 288 FCR 23.

at [259]-[260], [262], [266]-[267]. The reasoning was not agreed to by a majority of the five-member Full Court. It should not be approved by this Court.

45. A fundamental problem with Charlesworth J's reasoning is that the mere making of a request for the Minister to consider the exercise of power under s 351(1) has no legal consequence. The making of the request does not initiate any process under the Act that could be "intercepted" by a departmental officer, whether lawfully or unlawfully. As discussed at [24] above, the statutory process only commences once the Minister has made the procedural decision to consider whether to exercise the power.

46. What the reasoning of Charlesworth J also overlooks is the fact that, as noted above, the Minister has power to give a non-statutory instruction to officers of their Department as to the occasions, if any, on which they wish to be put in a position to consider making a procedural decision. There can be no thwarting of the Minister's ability to consider exercising the power in s 351(1) (or any of the other relevant powers) if such an instruction can be given. It is entirely within the control of the Minister to take whatever steps the Minister thinks fit to ensure that requests that the Minister wishes to consider, if any, are put before them. The notion that there is imposed on the Secretary or any officer in the Department a public legal duty, enforceable by mandamus, to bring to the attention of the Minister every request for intervention is impossible to reconcile with the availability of this power.

47. For these reasons, Charlesworth J was wrong to assert that "[t]he conferral of the procedural discretion upon the Minister ***necessarily contemplates*** that the Minister is to be made aware that an occasion for exercising the procedural power has arisen" (at [260], emphasis added). The conferral of the power to make a procedural decision means that the Minister can decide whether they wish to be "made aware that an occasion for exercising the procedural power has arisen". It does not "necessarily contemplate" that they must be made aware of any request. Indeed, the fact that the Minister is under no duty even to consider a request indicates precisely the opposite: that unless the Minister wishes to be made aware of a request, there is no obligation that that occur.

48. This point exposes another flaw in the reasoning of Charlesworth J. Her Honour seemed to suggest that, if the Minister has given a lawful instruction to their Department that they do not wish to be put in a position to decide whether to consider a request of the

kind at issue, then mandamus will not go to compel the referral of a s 351 request to the Minister: at [261]-[262], [264], [268]. But s 351 is not qualified in this way. In other words, the statute does not give any indication that mandamus will go to compel the Secretary to refer a s 351 request in some cases, but not others. If, as Charlesworth J reasoned (at [268]), "it is the Guidelines that confer the necessary authority to not refer the request" and "define the scope of that authority", then no duty enforceable by a writ of mandamus could exist in the absence of a valid instruction or guidelines detailing the circumstances in which the Minister wishes to be put in a position to consider making a procedural decision. That is the position in relation to all of the powers the respondent has sought to invoke.

49. Her Honour also misread the reasons of the Full Court in *Bedlington v Chong*.[18] In that case, the Full Court said that "[s]o long as the Secretary was acting in accordance with the guidelines, she had no duty to refer Ms Chong's application to the Minister". But the Full Court immediately continued that it "should not be understood as saying that, if the Secretary was not acting in accordance with the guidelines, Ms Chong was entitled to any relief", noting that that matter was not before the Court. The Full Court certainly did not say that, absent any guidelines or instruction in place, the Secretary would be under a duty, enforceable by mandamus, in every case to refer a s 351 request to the Minister.

50. In *Davis*, two of the members of the Full Court expressed reservations about Charlesworth J's view. Justice Mortimer was "not presently persuaded there is a duty enforceable by an order in the nature of mandamus, on the department officers (or indeed perhaps on the Minister) to 'consider whether to consider' exercising the dispensing powers" (at [121]). Her Honour said that she was "not persuaded this conclusion rests easily with the acknowledged personal nature of the powers in s 351, with s 351(7), and with a finding that the screening out process in the 2016 Guidelines is lawful" (at [122]). Justice Besanko "share[d] that reservation" (at [52]). His Honour said that "having regard to the terms of s 351 of the Act and, in particular subs[ection] (7), and the holding that the screening out process in the 2016 Guidelines is lawful, [he was] not persuaded that, even if the appeals were otherwise successful, there is a proper basis to issue a writ of mandamus or make an order in the nature

[18] (1998) 87 FCR 75 at 80–81.

thereof" (at [53]). Their Honours' reservations were correct, for the reasons set out above.

Application to the present case

51. The removal of the respondent was "reasonably practicable" before the injunction was issued. The duty to remove is not suspended or postponed or deferred by the mere making of requests by the respondent that the Minister consider exercising a non-compellable power in his favour. The phrase "as soon as reasonably practicable" does not encompass the time taken to bring those requests to the Minister's attention.

52. Accordingly, the premise upon which the courts below considered the question of the Federal Court's power to issue an injunction was correct. There was a statutory duty to remove the respondent from Australia which was required to be performed forthwith and which officers of the Commonwealth were ready to perform. For those reasons, the issue raised in the notice of appeal as to whether the Federal Court has power to suspend the operation of the law arises. The Court should conclude the Federal Court was wrong to assert that power, for the reasons in the Minister's previous submissions.

PART VI: FURTHER AMENDED NOTICE OF CONTENTION

53. The respondent's further amended notice of contention is addressed in these submissions, as well as in the Commonwealth parties' submissions filed on 13 June 2024 and their reply submissions filed on 18 July 2024.

PART VII: ESTIMATED TIME

54. The Commonwealth parties estimate that up to 2.5 hours will be required for oral argument, including reply.

Dated: 10 October 2024

Perry Herzfeld
02 8231 5057
pherzfeld@elevenwentworth.com

Jackson Wherrett
02 8066 0898
wherrett@elevenwentworth.com

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
First Appellant

SECRETARY, DEPARTMENT OF HOME AFFAIRS
Second Appellant

THE RELEVANT OFFICERS ACTING UNDER SECTION 198 OF THE MIGRATION ACT 1958
Third Appellant

and

MZAPC
Respondent

ANNEXURE TO THE SUPPLEMENTARY JOINT SUBMISSIONS OF THE APPELLANTS AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Commonwealth parties set out below a list of the constitutional provisions and statutes referred to in their submissions.

No	Description	Version	Provision(s)
1.	*Migration Act 1958* (Cth)	Current	ss 46A, 48B, 193, 195A, 197AC, 198, 245J, 245K, 351, 352, 375A, 417, 418, 473CB, 486N