Federal Court of Australia

BAQ21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 369

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| File number: |  |
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| Judgment of: | **MOSHINSKY J** |
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| Date of judgment: | 16 April 2021 |
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| Catchwords: | **MIGRATION** – application for Ministerial intervention – where application assessed by Departmental officer under Minister’s guidelines – where officer considered that the circumstances of the case did not meet the Minister’s guidelines for referral and, accordingly, the request was finalised without referral – whether the officer’s decision was made unlawfully due to a misconstruction of the guidelines – whether the officer’s decision was legally unreasonable – whether the guidelines involved a delegation by the Minister of his power under the applicable provision – whether the guidelines involved an exercise by officers of the Department of the Minister’s power under the applicable provision  |
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| Legislation: | *Judiciary Act 1903* (Cth), s 39B*Migration Act 1958* (Cth), ss 46A, 48B, 195A, 349, 351, 415, 417, 501J  |
|  |  |
| Cases cited: | *Alfred v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 457*Bedlington v Chong* (1998) 87 FCR 75*Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 791*Jabbour v Secretary, Department of Home Affairs* [2019] FCA 452*Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180*Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319*Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219;*Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636*Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510*XAD (by her Litigation Guardian XAE) v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 495  |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 78 |
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| Date of hearing: | 21 October 2020, 8 December 2020  |
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| Counsel for the Applicant: | Mr A Krohn |
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| Solicitor for the Applicant: | Winstan Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr N Wood |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
|  |  |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |
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| Counsel for the Third Respondent: | The third respondent did not appear |

ORDERS

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|  | VID 1404 of 2019 |
|   |
| BETWEEN: | BAQ21Applicant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentSECRETARY OF THE DEPARTMENT OF HOME AFFAIRSSecond RespondentASSISTANT DIRECTOR, MINISTERIAL INTERVENTIONThird Respondent |

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| order made by: | MOSHINSKY J |
| DATE OF ORDER: | 16 APRIL 2021 |

ORDER AMENDED PURSUANT TO RULE 39.05 OF THE *FEDERAL COURT RULES 2011*

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the first respondent’s costs of the proceeding, to be fixed by way of a lump sum.
3. The applicant be referred to by the pseudonym ‘BAQ21’.

THE COURT DIRECTS THAT:

1. Within 14 days, the parties file any agreed proposed minutes of orders fixing a lump sum in relation to the first respondent’s costs.
2. In the absence of any agreement:
	1. within 21 days, the first respondent file and serve an affidavit constituting a Costs Summary in accordance with paragraphs 4.10 to 4.12 of the Court’s *Costs Practice Note* (*GPN-COSTS*);
	2. within a further 14 days, the applicant file and serve any Costs Response in accordance with paragraphs 4.13 to 4.14 of the *Costs Practice Note* (*GPN-COSTS*); and
	3. in the absence of any agreement having been reached within a further 14 days, the matter of an appropriate lump sum figure for the first respondent’s costs be referred to a Registrar for determination.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J:

## Introduction

1. On 17 February 2016, the Administrative Appeals Tribunal (the **Tribunal**) affirmed a decision to refuse to grant the applicant, a citizen of Vietnam, a permanent partner visa. On 13 September 2019, the Tribunal affirmed a decision to refuse to grant the applicant a protection visa.
2. On 8 October 2019, the applicant’s migration agent sent an email to the Department of Home Affairs (the **Department**) with a request on behalf of the applicant that the first respondent (the **Minister**) exercise his power under s 351 of the *Migration Act 1958* (Cth) to substitute a more favourable decision (for the applicant) for the decision made by the Tribunal on 13 September 2019. Section 351(1) provides in summary that, if the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under s 349 another decision, being a decision that is more favourable to the applicant. Section 351(3) provides that the power under subsection (1) may only be exercised by the Minister personally.
3. Section 417 is to similar effect, but applies in relation to a decision of the Tribunal under s 415. Although the applicant’s request for Ministerial intervention was expressed as a request that the Minister exercise his power under s 351, it may be that it should have referred to his power under s 417. However, it does not appear that anything turns on this for present purposes.
4. The applicant’s request was not referred to the Minister. On 20 November 2019, a case officer in the Department (named Lidia) completed a minute (with the title “Schedule”) (the **Minute**) addressed to Karen Dix, Assistant Director, Ministerial Intervention in the Department (the **Assistant Director**). The Assistant Director is the third respondent to the present proceeding. The Minute, which comprised seven pages, discussed the applicant’s request for Ministerial intervention. The case officer stated that she had assessed the request against the Minister’s guidelines (that is, the *Minister’s guidelines on ministerial powers (s351, s417 and s501J)* made by the then Minister for Immigration and Border Protection on 11 March 2016 and re-issued on 29 March 2016 (the **Minister’s Guidelines**)), which describe the circumstances where a case may be considered to have one or more unique or exceptional circumstances and is a case that the Minister wishes to have referred for his consideration. The case officer stated that the claims and circumstances presented in the applicant’s request were not unique or exceptional when assessed against the Minister’s Guidelines. Subsequently, on 9 December 2019, the Assistant Director marked a box on the Minute, signifying that she agreed with the assessment that the circumstances of the case did not meet the Minister’s Guidelines for referral and that, in accordance with the Guidelines, the Department should finalise the request without referral. The Assistant Director also signed the Minute. Accordingly, the applicant’s request was not referred to the Minister for consideration.
5. The applicant has commenced a proceeding in this Court seeking judicial review of the decision of the Assistant Director not to refer the applicant’s request for Ministerial intervention to the Minister. In broad terms, by grounds 1-4 of the applicant’s second further amended originating application dated 22 October 2020, the applicant contends that the decision was made unlawfully due to a misconstruction of the Minister’s Guidelines or that the decision was legally unreasonable.
6. In the alternative, by ground 5, the applicant contends that the decision was unlawful because the Minister’s Guidelines required an assessment by the Department of whether the applicant’s situation had “unique or exceptional circumstances”, and therefore a determination of whether it was of a kind that the Minister said he wished to consider or not to consider. The applicant contends that this involved:
7. a delegation by the Minister of his power under s 351 of the *Migration Act*, or an action handing over some of that power, in breach of s 351(3); or
8. an exercise by officers of the Department of the Minister’s power under s 351, in breach of s 351(3).
9. For the reasons that follow, I have concluded that none of the applicant’s grounds are made out.

## Procedural background

1. This matter was heard over two hearing days, 21 October 2020 and 8 December 2020. On both hearing days, the hearing took place by video (using Microsoft Teams) due to the restrictions in place due to the COVID-19 pandemic.
2. Shortly before the first hearing day, the applicant filed an interlocutory application (dated 16 October 2020) seeking various orders. This interlocutory application was dealt with at the outset of the hearing on 21 October 2020. Among other things, the applicant sought an order that the hearing be adjourned to a date to be fixed after judgment is given by the Full Court in the matter of *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (proceeding VID 399/2020), being an appeal from the judgment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 791. However, ultimately, this aspect of the interlocutory application was not pressed. In the alternative, the applicant sought an order that judgment in the present matter be deferred and the parties have leave to make submissions after the judgment of the Full Court in the *Davis* matter. I indicated that I was not inclined to make such an order but that, if judgment in the present case was still reserved when the Full Court gave judgment in the *Davis* matter, I would give the parties the opportunity to make supplementary submissions. As at the date of these reasons, the hearing of the appeal in the *Davis* matter has not yet taken place.
3. The applicant also sought leave to amend his further amended originating application dated 19 June 2020 (being the then current document) to the form of a proposed second further amended originating application. The effect of the proposed amendment was to add a new ground, namely ground 5. I granted the applicant leave to amend, but adjourned the hearing in relation to ground 5 to a later date. The hearing on 21 October 2020 proceeded in relation to grounds 1 to 4. The parties subsequently filed submissions (or further submissions) in relation to ground 5. The hearing resumed on 8 December 2020, on which occasion ground 5 was argued.
4. Although the originating application as originally filed named the Minister for Home Affairs as the first respondent, the current document (the second further amended originating application) amends the name of the first respondent so as to read “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”. I therefore proceed on the basis that the first respondent is the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.
5. At an early stage of the proceeding, on 23 January 2020, the Minister filed an objection to competency. However, this was filed in the context of the originating application in its original form. At the hearing of the proceeding on 21 October 2020, counsel for the Minister confirmed that the objection to competency had fallen away.

## Background facts and matters

1. It is not necessary for present purposes to set out the applicant’s immigration history prior to 2016. That history is summarised at pp 1-2 of the Minute.
2. On 17 February 2016, the Tribunal affirmed a decision to refuse to grant the applicant a permanent partner visa.
3. On 13 September 2019, the Tribunal affirmed a decision to refuse to grant the applicant a protection visa.
4. On 8 October 2019, the applicant’s migration agent sent an email to the Department with a request on behalf of the applicant that the Minister exercise his power under s 351 of the *Migration Act*. The email included the following:

We are instructed that [the applicant] wishes to make a Request for Ministerial Intervention. [The applicant] is seeking the Minister to exercise his power under section 351 of the Migration Act 1958 to substitute a more favourable decision for the decision made by the Administrative Appeals Tribunal on 13 September 2019.

We make this submission in support of [the applicant’s] request for Ministerial intervention, and request that the Minister consider these circumstances and information with compassion for [the applicant], his wife and their young daughter, [M].

We make this submission with reference to the Minister’s guidelines on the Minister’s power to intervene, which provides for unique or exceptional circumstances that includes strong compassionate circumstances that, if not recognised, would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit, where at least one member of the family is an Australian citizen or Australian permanent resident.

1. As noted above, although the applicant’s request for Ministerial intervention was expressed as a request that the Minister exercise his power under s 351, it may be that it should have referred to his power under s 417. This is because the decision of the Tribunal of 13 September 2019, which was referred to in the request for Ministerial intervention, was a decision under s 415, in respect of which s 417 is the relevant Ministerial intervention power. However, as noted above, it does not appear that anything turns on this for present purposes. The two provisions are in substantially the same terms, albeit referable to different types of decisions of the Tribunal.
2. Before referring to the balance of the email, it is convenient to set out ss 351 and 417. Section 351 relevantly provides as follows:

**351 Minister may substitute more favourable decision**

(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 349 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

(2) In exercising the power under subsection (1), the Minister is not bound by Subdivision AA or AC of Division 3 of Part 2 or by the regulations, but is bound by all other provisions of this Act.

(3) The power under subsection (1) may only be exercised by the Minister personally.

…

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

1. Section 417 relevantly provides:

**417 Minister may substitute more favourable decision**

(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

(2) In exercising the power under subsection (1) on or after 1 September 1994, the Minister is not bound by Subdivision AA or AC of Division 3 of Part 2 or by the regulations, but is bound by all other provisions of this Act.

(3) The power under subsection (1) may only be exercised by the Minister personally.

…

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

1. The email dated 8 October 2019 contained a submission in support of the request for Ministerial intervention and attached a number of supporting documents. The thrust of the submission was that the applicant, his wife (T) and their daughter (M) would suffer serious, ongoing and irreversible harm and continuing hardship unless the Minister exercised his power to intervene. It appears from the Minute (discussed below) that T is an Australian permanent resident. The documents attached to the email included a marriage certificate showing that the applicant and T were married in Australia in 2015. Also included was a birth certificate for M, who was born in Australia in 2016. The applicant and T were named as M’s parents on the birth certificate. Statutory declarations of the applicant and T were also provided.
2. The email dated 8 November 2019 included the following under the heading “Public Interest”:

Most importantly, the declarations of [the applicant] and [T] makes it clear that [M] desperately needs both her parents to remain in Australia. The couple’s child, [M] is still very young therefore requires the constant care, love and attention from both [the applicant] and [T], as her parents, can provide together. [The applicant] and [T] indicates that they are prepared to undergo DNA testing as necessary to prove the biological relationship between [the applicant] and his daughter.

(Errors in original.)

1. I will now outline the Minister’s Guidelines. The guidelines were made by the then Minister for Immigration and Border Protection on 11 March 2016. The guidelines were reissued with a slight change in name on 29 March 2016. Under the heading “Contents”, the following appears:

This departmental instruction, which provides guidelines on the ministerial intervention powers under s351, s417 and s501J, comprises:

* Minister’s guidelines on ministerial powers (s351, s417, s501J)
* Cases that should be brought to my attention
* Cases that should not be brought to my attention
* Requesting Ministerial intervention.
1. Under the heading “Minister’s guidelines on ministerial powers (s351, s417, s501J)”, sections 1, 2 and 3 appear. These sections are headed: (1) Purpose of these guidelines; (2) Minister’s public interest powers; and (3) Ministerial intervention principles.
2. Under the heading “Cases that should be brought to my attention”, sections 4 and 5 appear. These sections are headed: (4) Unique or exceptional circumstances; and (5) Other relevant information. Those sections state:

**4. Unique or exceptional circumstances**

Cases that have one or more unique or exceptional circumstances, such as those described below, may be referred to me for possible consideration of the use of my intervention powers:

* strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit, where at least one member of the family is an Australian citizen or Australian permanent resident
* compassionate circumstances regarding the age and/or health and/or psychological state of the person that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the person
* exceptional economic, scientific, cultural or other benefit would result from the person being permitted to remain in Australia
* circumstances not anticipated by relevant legislation; or clearly unintended consequences of legislation; or the application of relevant legislation leads to unfair or unreasonable results in a particular case
* the Department has determined that the person cannot be returned to their country/countries of citizenship or usual residence due to circumstances outside the person’s control
* a person’s particular circumstances or personal characteristics provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity if they return to their country of origin, but the mistreatment does not meet the criteria for the grant of any type of protection visa. For example, systematic harassment or denial of basic rights available to others in their country, or the person has experienced torture or trauma in their country of origin and is likely to experience further trauma if returned to that country
* the person is excluded from the grant of a protection visa or has had a protection visa cancelled or refused on character grounds and their circumstances have been assessed as engaging Australia’s non-refoulement obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm as provided in section 36(2A) of the Act.

**5. Other relevant information**

For all cases referred to me under these guidelines, the Department will provide information on any other relevant issues, including the following:

* circumstances that may bring Australia’s obligations under the Convention on the Rights of the Child into consideration, including the best interests of the child - which must be treated as a primary consideration, but can be balanced against other primary considerations
* circumstances that may bring Australia’s obligations under the International Covenant on Civil and Political Rights into consideration, particularly issues of family unity, which can be balanced against other rights and interests including the integrity of Australia’s migration programme
* whether the continued presence of the person in Australia would pose a threat to an individual in Australia or to Australian society or security or may prejudice Australia’s international relations
* whether there are character concerns in relation to the person, particularly concerns related to criminal conduct
* information about a person’s history of compliance with Australian laws, including migration laws, such as:
* any offence or fraud against the migration or citizenship legislation
* any failure to comply with their visa conditions
* any periods as an unlawful non-citizen in the community
* their history of cooperation and engagement with the department to resolve their immigration status, particularly in relation to identity and travel documents
* details of any ongoing court proceedings challenging a decision related to the case and any outcome available before I consider the case
* the level and nature of the person’s integration into the Australian community and the length of time they have been in Australia, both as a lawful and unlawful non-citizen.
1. Under the heading “Cases that should not be brought to my attention”, sections 6 and 7 appear. These sections are headed: (6) When the powers are not available; and (7) Inappropriate to consider.
2. Under the heading “Requesting Ministerial intervention”, sections 8 to 13 appear. These sections are headed: (8) Who can make a request? (9) How to make a request; (10) How requests for Ministerial intervention will be progressed; (11) Outcome of Minister’s consideration; (12) Minister’s powers not limited by Minister’s guidelines; (13) Removal policy. Section 12 is in the following terms:

**12. Minister’s powers not limited by Minister’s guidelines**

My powers to intervene in an individual case, where I believe it is in the public interest to do so, exist whether or not the case is brought to my attention in the manner described above, as long as a decision has been made by a relevant review tribunal and that decision continues to exist (for example, the review tribunal decision has not been overturned by a court).

I may consider intervening in cases where the circumstances do not fall within the unique or exceptional circumstances as described in section 4 of these guidelines, if I consider it to be in the public interest.

Where I believe it is appropriate, I will seek further information to help me to determine whether to consider intervening in a case.

1. On 20 November 2019, the case officer completed the Minute. The applicant’s immigration history was summarised on pp 1-2. The next section of the Minute is headed “Partner (subclass 801) visa refusal” and discusses the refusal (on 8 December 2014) of an application by the applicant for a subclass 801 visa. That decision was affirmed by the Tribunal on 17 February 2016. It appears from the Minute that this visa application related to a different partner (that is, a different person from T). The Minute notes that the delegate considered the couple’s responses in relation to adverse information where it was alleged the couple’s relationship was contrived, and found the evidence they presented on various aspects of the relationship was limited, inconsistent and demonstrated that they lacked knowledge about basic aspects of their relationship. The Minute notes that the delegate’s decision was affirmed by the Tribunal on the same grounds.
2. The Minute notes that on 7 November 2016, the applicant applied for a further partner (subclass 820/801) visa on the basis of his relationship with a new partner, T, but this was determined to be invalid due to the operation of the section 48 bar.
3. The next section of the Minute is headed “Second Protection visa refusal”. In this section, it is noted that the applicant applied for a protection visa (his second such application) on 9 May 2016 and that, on 14 February 2017, this application was refused. It is stated that on 18 September 2019, the Tribunal affirmed the decision. The Minute states that, prior to making the decision, the Tribunal had written to the applicant advising that it had considered all the material before it relating to the review application but was unable to make a favourable decision on the information alone, and invited the applicant to give oral evidence and present arguments at the hearing; however, the applicant’s representative advised that the applicant did not wish to attend the interview and consented to the decision being made without taking further action to allow or enable him to appear before the Tribunal. After some brief discussion of the Tribunal’s reasons for decision, it is noted that the applicant requested the Tribunal to refer his case to the Department for consideration under the Ministerial intervention guidelines on the grounds that he was married to a new partner and they have a child together; however, the Tribunal found that insufficient details were provided about the applicant’s family, and the Tribunal was not satisfied that the applicant’s circumstances warranted a referral for Ministerial intervention, indicating that it was open to him to make his own request.
4. The next section of the Minute is headed “Request Summary” and summarises the applicant’s request for Ministerial intervention as follows:
* His representative states that [the applicant] is now married to an Australian permanent resident, [T], and they share parenting responsibilities for their minor daughter, [M], claimed to be [the applicant’s] biological child. The couple are prepared to undertake DNA testing to prove the biological relationship between [the applicant] and his daughter. (See Relationship and parental claims below.)
* His representative contends if [the applicant] is not allowed to remain in Australia, this would result in serious ongoing and irreversible harm and continuing hardship, particularly to his daughter who is still very young. (See Australia’s international obligations below.)
* [The applicant] and his spouse are currently unemployed. They are living in [T’s] family’s home and rely on Centrelink payments. They submit, this is not a permanent arrangement as the family benefits that [T] receives are not enough to cover their expenses and they would like to be financially independent so that they can provide the best possible future to their daughter. [T] needs the support of her spouse and claims that she cannot look after [M] and earn income without [the applicant] in Australia.
1. The next section of the Minute is headed “Other Information” and deals with matters under the following sub-headings:
2. Family disposition;
3. Relationship and parental claims;
4. Australia’s international obligations;
5. Employment, skills, and qualifications; and
6. Offshore visa options.
7. The concluding section of the Minute as prepared by the case officer is headed “Assessment”. In this section, the case officer stated:

I have assessed this request against the Minister’s Guidelines on ministerial powers (s351) which describe the circumstances where a case may be considered to have one or more unique or exceptional circumstances and which the Minister wishes to have referred for his consideration.

The claims and circumstances presented in this request are not unique or exceptional when assessed against the Minister’s Guidelines. The case is assessed as not meeting the Guidelines for referral to the Minister.

1. The final section of the Minute is headed “Assistant Director”. In this section, the Assistant Director marked the box alongside the following statement:

I agree with the assessment that circumstances of this case do not meet the Minister’s Guidelines for referral and that, in accordance with the Guidelines, the Department should finalise this request without referral. Notification is to be provided to the client/representative that the request is finalised without referral.

1. The Assistant Director also signed the Minute.
2. On 9 December 2019, the Department sent a letter to the applicant stating that his request for Ministerial intervention had been assessed against the Minister’s Guidelines, and that the Department had assessed that the request did not meet the guidelines for referral to the Minister. The letter stated that the Department had, therefore, finalised the request without referral.

## The application in this Court

1. The applicant has commenced a proceeding in this Court seeking relief under s 39B of the *Judiciary Act 1903* (Cth) in relation to the decision not to refer his request for Ministerial intervention to the Minister. By his second further amended originating application the applicant seeks the following relief (apart from costs):

1. A declaration that the [Assistant Director], erred in [her] assessment and decision on or about 9 December 2019 of not referring to the Minister … the Applicant’s request for ministerial intervention under section 351 of the *Migration Act 1958* (Cth).

2. A declaration that the decision of the [Assistant Director] dated 9 December 2019 was not made in accordance with law, by the reasons of the grounds of this application.

3. A writ of certiorari to quash the decision of the [Assistant Director] dated 9 December 2019.

4. An injunction restraining the Minister by himself or by his Department, officers, delegates or agents or servants from taking any steps to remove the applicant from Australia or otherwise from giving effect to or relying upon the decision.

5. A writ of mandamus directed to the [Secretary, Department of Home Affairs] and [the Assistant Director] requiring them to refer or to take all necessary steps to refer the Applicant’s request to the Minister for Ministerial intervention.

1. The second further amended originating application contains the following grounds:

1. The Applicant applies to the Court for relief in relation to the action of the [Secretary, Department of Home Affairs] or [the Assistant Director] in deciding that the Applicant’s request for ministerial intervention under s 351 of the *Migration Act 1958* (Cth) (Migration Act) was inappropriate for consideration by the [Minister].

2. The “Minister’s Guidelines on ministerial powers” (Guidelines) were published by the Minister for the purpose of instructing officers of his Department, including the [Secretary, Department of Home Affairs] and [the Assistant Director], how to act as officers of the Commonwealth for the purpose of informing the Minister’s consideration of whether to consider exercising the power under s 351 of the Migration Act.

3. The Applicant’s request for the Minister to exercise power under s 351 of the Migration Act related to the interests of his family unit, including his Australian citizen wife and their Australian citizen child. The request relevantly said in part: …

4. The Decision was made unlawfully due to a misconstruction of the Guidelines. In particular:

(a) The letter dated 9 December 2019 notifying the Applicant of the decision not to refer the applicant’s request to the Minister said in part that “The Department has assessed that this request does not meet the guidelines for referral to the Minister.”

(b) It is to be inferred that the [Secretary, Department of Home Affairs] or [the Assistant Director] considered that the case did not have unique or exceptional circumstances such [as] those described in clause 4 of the Guidelines, when in fact the case did have unique or exceptional circumstances that were the same as or similar to those described in clause 4 of the Guidelines. In the premises, they misconstrued the Guidelines. Furthermore, it was legally unreasonable for them to conclude, as a matter of evaluation or judgment, that the Applicant’s case did not present unique or exceptional circumstances and did not meet the Guidelines.

(c) It is to be inferred that the [Secretary, Department of Home Affairs] or [the Assistant Director] considered that the case did not have unique or exceptional circumstances raising Australia’s international obligations under the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights* mentioned in clause 5 of the Guidelines, when in fact the case did raise those obligations especially relating to the best interests of the child, and to family unity. In the premises, the [Secretary, Department of Home Affairs] or [the Assistant Director] misconstrued the Guidelines. Furthermore, it was legally unreasonable for them to conclude, as a matter of evaluation or judgment, that the Applicant’s case did not meet the Guidelines.

(d) Clause 12 of the Guidelines directed consideration by the [Secretary, Department of Home Affairs] and [the Assistant Director] of whether it was in the public interest for the Minister to consider intervening in a case, even if the circumstances did not fall within the unique or exceptional circumstances described in clause 4 of the Guidelines or raise issues of Australia’s international obligations as mentioned in clause 5 of the Guidelines. It is to be inferred that even if the [Secretary, Department of Home Affairs] or [the Assistant Director] considered whether the case was like those described in clause 4 or 5, they did not go on to consider whether it may be in the public interest for the Minister to intervene in the case even if it fell outside the examples in clauses 4 and 5, and should be considered anyway, under clause 12. In the premises, the [Secretary, Department of Home Affairs] or [the Assistant Director] misconstrued the Guidelines and the Minister has not yet considered whether it is in the public interest for him to intervene in the case.

(e) Whether or not the case is brought to the Minister’s consideration in accordance with clauses 1 to 11 of the Guidelines, the [Minister] may consider intervening in cases where circumstances do not fall within the unique or exceptional circumstances in clause 4 of the Guidelines but the [Minister] considers it to be in the public interest.

5. … In the alternative to Ground 4, the decision was unlawful because the Minister’s Guidelines required an assessment by the Department of whether the applicant’s situation had “unique or exceptional circumstances” (Guidelines 10), and therefore a determination whether it was of a kind which the Minister said he wished to consider (Guidelines, 4) or not to consider (Guidelines 7). This involved:

(a) a delegation by the Minister of his power under section 351 of the *Migration Act* 1958, or an action handing over some of that power, in breach of section 351(3), or

(b) an exercise by officers of the Department of the Minister’s power under section 351 of the *Migration Act* 1958, in breach of section 351(3).

## Applicable principles: Ministerial intervention powers

1. Sections 351 and 417, which contain the relevant Ministerial intervention powers, have been set out at [18]-[19] above.
2. The High Court has considered the nature of Ministerial intervention and like powers in a number of cases, namely *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (the ***Offshore Processing Case***); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (***Plaintiff S10/2011***); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219; and *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (***SZSSJ***). I considered those cases in *XAD (by her Litigation Guardian XAE) v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 495 at [50]-[55]. Adapted for the purposes of the present case, the following principles may be stated.
3. First, the powers given by ss 351 and 417 of the *Migration Act* may only be exercised by the Minister personally: ss 351(3) and 417(3). The exercise of the power given by s 351(1) or 417(1) is constituted by two distinct steps: first, a decision whether to *consider* exercising the power; secondly, a decision whether to exercise the power: see *SZSSJ* at [52]-[53] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ. In *SZSSJ*, in the context of ss 48B, 195A and 417 of the *Migration Act*, but also applicable, in my view, to s 351, the Court stated at [53]:

… each section confers a non-compellable power that is exercised by the Minister personally making two distinct decisions: a procedural decision, to consider whether to make a substantive decision; and a substantive decision, to grant a visa or to lift the bar. The Minister has no obligation to make either decision, and neither the procedural decision nor the substantive decision of the Minister is conditioned by any requirement that the Minister afford procedural fairness.

1. Secondly, where the Minister decides to *consider* exercising the power under s 351(1) or 417(1), processes undertaken by the Department to assist the Minister’s consideration of whether to exercise the power will have a statutory basis: *SZSSJ* at [54]. On the other hand, where the Minister has not made a decision to consider exercising the relevant power, processes undertaken by the Department will not be characterised as statutory, and the principles of procedural fairness will generally not apply: see *Plaintiff S10/2011* at [41], [45]-[46], [50] per French CJ and Kiefel J; *SZSSJ* at [41], [47], [54]. In *SZSSJ*, the Court stated at [54]:

… processes undertaken by the Department to assist in the Minister’s consideration of the possible exercise of a non-compellable power derive their character from what the Minister personally has or has not done. If the Minister has made a personal procedural decision to consider whether to make a substantive decision, a process undertaken by the Department to assist the Minister’s consideration has a statutory basis in that prior procedural decision of the Minister. Having that statutory basis, the process attracts an implied statutory requirement to afford procedural fairness where the process has the effect of prolonging immigration detention. If 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 statutory basis and does not attract a requirement to afford procedural fairness.

1. Thirdly, because the relevant provisions state that the Minister does not have a duty to consider whether to exercise the power given by the section, mandamus will not issue to compel the Minister to consider or reconsider exercising the power, and there will be no utility in granting certiorari to quash recommendations in an assessment: *Offshore Processing Case* at [99]-[100] (in the context of s 46A). Nevertheless, it may be appropriate to make a declaration that an assessor failed to observe the requirements of procedural fairness in carrying out an assessment: *Offshore Processing Case* at [103].
2. Further, while the cases referred to above establish that, if 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 statutory basis and does not attract a requirement to afford procedural fairness, it has been accepted that such a process may be amenable to judicial review on the ground of legal unreasonableness: see *Jabbour v Secretary, Department of Home Affairs* [2019] FCA 452 (***Jabbour***) at [91]; see also *Alfred v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 457 at [22] per Mortimer J. In *Jabbour*, which concerned a request that the Minister exercise his power under s 351 and a decision of the Acting Assistant Director, NSW Ministerial Intervention, Department of Home Affairs (the second respondent in that case) not to refer the request to the Minister, Robertson J stated at [91]:

In my opinion, at the level of principle the non-statutory administrative action on the part of the second respondent in this case is amenable to judicial review for legal unreasonableness. Relevantly, the nature of that administrative action is informed by the guidelines. Although those guidelines take the form of instructions to officers of the Minister’s Department, that is not their only character. The instructions are promulgated and, amongst other things, set out how to make a request and how requests for Ministerial intervention will be progressed. The interests and potential rights of the applicants were affected by the administrative action. The guidelines provided a purpose and set out criteria or considerations.

1. Justice Robertson also stated at [102]:

In my opinion, the content of any condition of reasonableness in the exercise of non-statutory power is such that judicial review is available at least on the alternative analysis in *Minister for Immigration and Border Protection v Singh* [(2014) 231 FCR 437] at [47], that is, reasonableness review which concentrates on an examination of the reasoning process by which the decision-maker arrived at the administrative action. Because it focusses on the reasoning process of the decision-maker, this form of analysis does not depend upon the identification of statutory scope and purpose. Further, by reference to the guidelines, which as I have explained above bear on the nature of the relevant power, I accept that legal unreasonableness could be made out by reference to result: that is, the proposition that no reasonable decision-maker could have failed to refer the application to the Minister by reference to the description in the guidelines of unique or exceptional circumstances, if made out, would sound in legal error. In this analysis the guidelines and characteristics of the power identified at [91] above perform, in the non-statutory context, a function comparable to the scope and purpose of a statutory power.

1. In the present case, the Minister in his outline of submissions “formally submits” that Robertson J’s conclusion in *Jabbour* that a non-referral of a request for intervention to the Minister is “amenable to judicial review for legal unreasonableness” is wrong. However, the Minister goes on to make clear that he does not submit that Robertson J’s analysis is *plainly* wrong. Further, the Minister states that, “having regard to principles of comity, the Minister expects that a single Justice of this Court will adhere to it”. I agree with the proposition that, having regard to the principles of comity, I should follow the conclusion of Robertson J in *Jabbour*.

## Grounds 1 to 4

1. Consistently with the way the case was presented, I will consider grounds 1 to 4 together, and then consider ground 5.
2. The applicant’s submissions may be summarised as follows:
3. The conclusion in the Minute was that the “claims and circumstances presented in this request are not unique or exceptional when assessed against the Minister’s Guidelines”. That conclusion was manifestly unreasonable in that the separation which would follow from the applicant being forced to depart from Australia (on the Department’s figures in the Minute) would most likely be over 18 months and could be three years. It could also be permanent. This would affect the welfare of the applicant’s permanent resident wife and his claimed daughter (whose relationship to him he was willing to test by DNA testing), who was on a bridging visa. The difficulty of the wife raising the daughter in the absence of the father is not mitigated simply by the support of the wife’s extended family.
4. The decision of the applicant and his wife to conceive a child is not relevant to assessing whether the question of family unity is raised by the request, yet it features in the reasons for not referring the request to the Minister.
5. The issues of family unity and the best interests of the child are explicitly mentioned in section 5 of the Minister’s Guidelines. In this case, they were of such a kind that the request also met the criteria in section 4 of the Minister’s Guidelines. Although section 5 of the Minister’s Guidelines speaks only of information being given to the Minister (on family unity or the best interests of the child) *if the request is referred to the Minister*, the overarching heading “Cases that should be brought to my attention” covers both sections 4 and 5. A request which raises issues of family unity and of the best interests of the child, at least as central issues, must meet sections 4 and 5 of the Minister’s Guidelines.
6. The question whether there is “arbitrary” interference with family unity or other rights under international conventions is not limited to a mechanical consideration of the operation of the *Migration Act* and regulations without the exercise of the Minister’s power; rather the Minister’s Guidelines direct attention generally to “unique or exceptional circumstances”, “strong compassionate circumstances”, “clearly unintended consequences of legislation” and situations where “the application of relevant legislation leads to unfair or unreasonable results in a particular case” (section 4). Manifestly, in this case, the operation of the legislation without consideration by the Minister of the request would lead to unfair and unreasonable results for the applicant’s wife and child, and a harsh situation for the applicant.
7. The task of the Secretary of the Department and the Assistant Director was not to evaluate finely whether the Minister should exercise his personal power, but merely to evaluate whether to put the Minister in a situation where, according to the Minister’s Guidelines, he may be able to do so.
8. On the case put in the request, the case did have unique or exceptional circumstances that were the same as or similar to those described in section 4 of the Minister’s Guidelines. The case also had unique or exceptional circumstances raising Australia’s international obligations under the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights* (mentioned in section 5 of the Minister’s Guidelines), especially relating to the best interests of the child, and to family unity.
9. Whether or not the case is brought to the Minister’s consideration in accordance with sections 1 to 11 of the Minister’s Guidelines, the Minister may nevertheless consider intervening in cases where he considers it to be in the public interest to do so (section 12 of the guidelines). It is to be inferred that, even if the Secretary of the Department or the Assistant Director considered whether the case fell within section 4 or 5, they did not go on to consider whether it may be in the public interest for the Minister to intervene and thus whether the case should be considered in any event under section 12. The Secretary of the Department and the Assistant Director therefore unreasonably and wrongly construed or applied the Minister’s Guidelines.
10. Accordingly, the applicant submits that it was legally unreasonable for the Secretary of the Department or the Assistant Director to conclude that the applicant’s case did not present unique or exceptional circumstances and did not meet the Minister’s Guidelines, and not to refer the request to the Minister.
11. In my view, the applicant has not established that the non-referral of the applicant’s request to the Minister involved legal unreasonableness or involved a misconstruction of the Minister’s Guidelines.
12. First, many of the applicant’s submissions challenge the *merits* of the conclusion reached in the Minute and do not demonstrate that there was legal unreasonableness of the kind described in *Jabbour* at [102]. Many of the applicant’s submissions are to the effect that, on the case presented in the request, the case officer who prepared the Minute and the Assistant Director who agreed with the assessment should have concluded that there were “unique or exceptional circumstances” as described in section 4 of the Minister’s Guidelines. For example, the applicant submits that the Assistant Director’s assessment was “manifestly unreasonable” on the basis that if the applicant did not obtain a visa he may be separated from T and M for up to three years and it “could also be permanent”. Such submissions invite the Court to review the *merits* of the non-referral of the request, which is outside of the proper role of the Court on an application for judicial review, and is insufficient to establish legal unreasonableness of the kind described in *Jabbour* at [102].
13. Secondly, section 4 of the Minister’s Guidelines invites a question of evaluation or judgment as to whether or not a case has “unique or exceptional circumstances”, including of the kinds described in the dot points. These dot points, themselves, invite questions that are inherently evaluative – for example as to whether:
14. there are “strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible hardship to an Australian citizen or an Australian family unit, where at least one member of the family is an Australian citizen or Australian permanent resident”; and
15. there are “compassionate circumstances regarding the age and/or health and/or psychological state of the person that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the person”.
16. Having regard to the nature of the criteria in section 4, it was, in my view, *open* to the Assistant Director not to be satisfied that the case had “unique or exceptional circumstances” as described in section 4 of the Minister’s Guidelines.
17. Thirdly, the matters referred to in the Minute provide an intelligible justification for the conclusion reached in the Minute. For example, the Minute contains the following statements at pp 4-5 in support of the conclusion reached:
* The Department notes [M] was conceived and born prior to [T] being granted a permanent Partner visa as her father’s dependant. It does not appear that [T] declared she was in a partner relationship, nor does it appear she informed the Department of [M’s] birth prior to her being granted the Partner visa as a dependant.
* Given the claims the relationship is genuine, and that [M] is [the applicant’s] biological child, it is open to them to pursue DNA testing to conclusively determine paternity, and [the applicant] is able to lodge an offshore Partner visa application where their relationship claims can be assessed through appropriate migration channels.
* The Department acknowledges [the applicant] may prefer to remain in Australia with [T] and their claimed daughter, however a personal preference does not constitute exceptional circumstances meriting referral under the guidelines. Despite claims [T] needs [the applicant] to remain in Australia, she resides with her family and there is no evidence they are unable to continue to provide support to her while [the applicant] pursues an offshore Partner visa should he decide to. As a permanent resident, [T] is able to access relevant health, welfare, government and community services.
1. Further, at p 6 of the Minute, it is stated:
* It remains open to [T] to sponsor [the applicant] for an offshore Partner (subclass 309/100) visa. The Department notes separation is the reality for almost all offshore Partner visa applications and separation may be temporary subject to assessment against the relevant legislative criteria for an ongoing genuine relationship, and [T’s] ability to meet sponsorship approval requirements.
1. Fourthly, insofar as the applicant’s submissions rely on section 5 of the Minister’s Guidelines, I do not accept that the case officer or Assistant Director misconstrued section 5. Section 5 of the Minister’s Guidelines states that “[f]or all cases referred to me under these guidelines, the Department will provide information on any other relevant issues” including the matters set out in the dot points in that section. Accordingly, in its terms, section 5 is limited to cases that are referred to the Minister.
2. In any event, in the present case, the case officer (and thus the Assistant Director) *did* consider the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*. The Minute includes the following:

*International Covenant on Civil and Political Rights (ICCPR)*

* Australia has obligations under the ICCPR to not arbitrarily interfere with the family. The Covenant does not provide a person with absolute rights to enter or remain in a country of which they are not a national. State Parties to the Covenant may lawfully require non-citizens within their territory to leave.
* In this context, “arbitrary” means that any interference with family must have a legitimate purpose within the framework of the ICCPR in its entirety (which includes reasons of public order, national security, public health or morals or the rights and freedoms of others). Such an interference must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.
* The appropriateness of measures to maintain family unity can be balanced against other rights and interests, including the integrity of the migration program and the protection of the Australian community.
* While [the applicant’s] departure would result in separation from his spouse and claimed minor child, the Department notes they chose to enter into a relationship, and purportedly conceived a child together in the knowledge he did not have the right remain in Australia permanently. Their circumstances are not beyond their control. There is no evidence they are unable to maintain contact like other families separated by migration choices, nor is there evidence [T] and [M] are unable to visit him in Vietnam.
* A requirement [the applicant] departs Australia is the lawful and predictable outcome of Australian immigration law, and is not an arbitrary interference with family unity.

*The Convention on the Rights of the Child (CRC)*

* The circumstances of this case may engage Australia’s obligations under CRC. Article 3 of the CRC requires that in all government and administrative actions concerning children, the best interests of the child shall be a primary consideration. Australia’s obligations under the CRC extend to children under the age of 18 years while they reside in Australia.
* In this case, [the applicant’s] claimed daughter, [M], is almost four years old. In the absence of DNA evidence to conclusively establish paternity, the Department is not satisfied [the applicant] is [M’s] biological father as is claimed.
* The Department notes that [M] is in the primary care of her mother. There is no evidence [M] would suffer irreparable harm and continuing hardship as a result of [the applicant’s] departure, or that [M’s] best interests would not be met by her mother and extended family in Australia.
1. Fifthly, insofar as the applicant submits that the Assistant Director misconstrued section 12 of the Minister’s Guidelines, I do not accept that submission. Section 12 simply acknowledges that the Minister’s personal powers under ss 351, 417 and 501J of the *Migration Act* are not circumscribed by the assessment of “unique or exceptional circumstances”. It would be contrary to the structure and purpose of the Minister’s Guidelines to construe section 12 as instructing officers to refer to the Minister cases which have been assessed as not involving unique or exceptional circumstances as described in section 4. The purpose of the Minister’s Guidelines is to filter those cases that the Department should refer to the Minister for the Minister’s consideration (but nothing stops the Minister from considering exercising his powers under the relevant provisions, or exercising those powers, of his own volition).
2. For these reasons, grounds 1 to 4 are not made out.
3. In light of this conclusion, it is not necessary to consider the Minister’s submissions relating to availability of the relief sought by the applicant.

## Ground 5

1. In the applicant’s further written submissions in support of ground 5, he refers to the *Offshore Processing Case, Plaintiff S10/2011* and *SZSSJ*. The applicant submits that, while the High Court in those cases saw no difficulty with the existence of guidelines made by the Minister, in none of those cases was the Court’s attention directed to the *particular form* *of guidelines* which may be permissible.
2. The applicant submits that any guidelines must be consistent with the *Migration Act* and, in particular, the requirement in s 417(3) that the Minister’s power under s 417(1) be exercised personally. (The applicant’s submissions on this part of the case focus on the power in s 417.) The applicant submits that: the Minister may be able to give guidelines which direct staff to make a determination of objective fact, eg whether a Tribunal has made a decision, or whether a person has held a certain class of visa; the Minister may also be able, perhaps, to give guidelines with the effect that the opinion or subjective evaluation by staff of the Department may have the result of positively presenting a request to the Minister for him to consider the exercise of his power – thus maintaining the possibility that the Minister might take the procedural step to consider a request and the substantive step to exercise the power; however, what is in breach of s 417(3) and the other analogous provisions is a form of guidelines which requires staff to evaluate *qualitatively* and *subjectively* if a request should be prevented from going to the Minister, thus disabling the Minister from the freedom to take the procedural and substantive steps under s 417(1) and similar provisions.
3. The applicant refers to *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 (***Raikua***) at [63]-[64] per Lindgren J, and submits that Lindgren J did not consider or determine the limits of the form of guidelines permissible to be given by the Minister. The applicant submits that, if the Court concludes that Lindgren J did hold that it is within the power of the Minister to give guidelines which allow the subjective judgment of officers of the Department to prevent requests from reaching the Minister, his Honour’s decision was plainly wrong and should not be followed.
4. The applicant submits that the Minister’s Guidelines are in breach of s 417(3) because they require staff of the Department to make their own subjective assessment of whether there are “unique or exceptional circumstances” (see sections 4, 7, 10, 12); the Minister’s Guidelines thus disable the Minister from personal consideration of whether to exercise the relevant powers, by allowing a subjective assessment by persons other than the Minster of whether there are “unique and exceptional circumstances”. The applicant submits that section 12 does not heal this harm, as there is no suggestion how a request could get to the Minister, save in a very rare or spectacular case, without being subject to the process of vetting and possible subjective exclusion by the staff of the Department.
5. Accordingly, the applicant submits that the Minister’s Guidelines necessarily imply a limit to, or a contradiction of, the intention of the Parliament that the power given to the Minister by s 417(1) be exercised personally, according to the judgment of the Minister, and not by anyone else. Therefore, the applicant submits, the Minister’s Guidelines and the decision in this matter are unlawful.
6. In my view, the applicant’s central proposition, namely that the Minister’s Guidelines are inconsistent with the legislative requirement in s 417(3) that the Minister exercise the power in s 417(1) personally, is inconsistent with the authorities discussed below. Those authorities establish that it is within the competence of the Minister to make guidelines of relevantly the same character as the Minister’s Guidelines in the present case.
7. In *Plaintiff S10/2011*, at least a majority of the High Court accepted that it was within the competence of the Minister to make guidelines of the type in issue in that case. In that case, Gummow, Hayne, Crennan and Bell JJ stated at [91]:

The terms of the guidelines provide criteria to distinguish between requests which will not be referred to the Minister and those which may be referred to the Minister for consideration whether to exercise the relevant power. By these directions the Minister has determined in advance the circumstances in which he or she wishes to be put in a position to consider exercise of the discretionary powers by the advice of department officers. **It was within the competence of the Minister to do so** [Fn: *Bedlington v Chong* (1998) 87 FCR 75 at 80-81; *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 at 522-533 [63]-[66]. No question arises of the application of an “unpublished” Ministerial policy or guidelines inconsistent with “published” policy or guidelines; cf *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245]. The effect, as the Commonwealth Solicitor-General put it in oral argument, is that the adoption of the guidelines by the Minister represents decisions by the Minister that if a case is assessed as not meeting the guidelines, the Minister does not wish to consider the exercise of the dispensing power, and if a case is assessed favourably then the Minister does wish to consider that exercise.

(Emphasis added.)

1. Further, French CJ and Kiefel J appear to have implicitly accepted that it was competent for the Minister to make guidelines of the type in issue in the case: see *Plaintiff S10/2011* at [45]-[46].
2. There does not appear to be any relevant difference between the character of the guidelines in issue in *Plaintiff S10/2011* and the Minister’s Guidelines in the present case. Both sets of guidelines instructed officers in the Department to make evaluative judgments by reference to certain criteria bearing on whether cases should, or should not, be referred to the Minister for possible consideration under s 351 or 417: see *Plaintiff S10/2011* at [35] and [91].
3. Thus *Plaintiff S10/2011* is contrary to the applicant’s submissions in relation to ground 5.
4. Further, the cases cited by Gummow, Hayne, Crennan and Bell JJ in *Plaintiff S10/2011* at [91] are contrary to the applicant’s submissions. The cases cited were *Bedlington v Chong* (1998) 87 FCR 75 (***Bedlington***) and *Raikua*.
5. In *Bedlington*, the Full Court of this Court (Black CJ, Kiefel and Emmett JJ) considered whether it was open to the Minister to lay down guidelines for determining whether any possible exercise of the power conferred by s 48B(1) of the *Migration Act* should be referred to him (see 80E-F). The Full Court stated (at 80):

The guidelines constitute the Minister’s determination, in advance, of the circumstances in which he would consider exercising the power. By the guidelines, the Minister was, in effect, saying:

“Notwithstanding that I have no duty to consider the exercise of the power conferred by section 48B(I), I am prepared to consider exercising that power in the circumstances set out in the Guidelines.”

**There is no reason why the Minister should not lay down guidelines for the assistance** **and guidance of departmental officers, such as the Secretary, indicating the circumstances in which he was prepared to consider the exercise of the power conferred by s 48B(1).** That is what he did.

(Emphasis added.)

1. In *Raikua*, the applicant sought judicial review of a decision of an officer of the then Department of Immigration and Multicultural and Indigenous Affairs (Ms Connolly) not to refer an application for Ministerial intervention under s 417(1) to the Minister. In the course of his reasons, Lindgren J stated at [64]:

… it was permissible for the Minister take the decision not to consider exercising his power under s 417(1) by laying down guidelines as to the classes of case that were not to be referred to him (*Bedlington v Chong* (1998) 87 FCR 75, discussed further below) …

1. To the extent that the applicant in the present case submits that I should not follow *Raikua* on the above point, I do not accept that submission. The statement of Lindgren J quoted above applied the judgment of the Full Court in *Bedlington* and has subsequently been approved by four members of the High Court in *Plaintiff S10/2011*.
2. Further, in *SZSSJ*, a joint judgment of seven members of the High Court explained the Court’s reasoning in *Plaintiff S10/2011* as to the nature of the Ministerial intervention powers and the guidelines issued by the Minister in relation to them. The High Court stated at [46]-[47]:

46 *Plaintiff S10/2011* raised questions as to the characterisation of processes undertaken by the Department by reference to guidelines issued by the Minister setting out circumstances in which cases were in the ordinary course to be referred to the Minister for consideration of the possible exercise of one or more of the non-compellable powers conferred by ss 48B, 195A, 351 and 417. Two of the four plaintiffs were in immigration detention. The Department had not referred the cases of some plaintiffs to the Minister. The Department had referred the cases of other plaintiffs to the Minister following which the Minister had indicated that he would “not intervene”.

47 **Members of the Court, with the possible exception only of Heydon J, interpreted the guidelines as directed to when the Department was to refer cases to the Minister in order to allow the Minister to decide whether or not to consider exercising a non-compellable power: where the Department had not referred a case to the Minister, no statutory power had been engaged**; where the Department had referred a case to the Minister and the Minister had indicated that he would “not intervene”, the Minister had made a personal decision that he would not consider exercising any of the non-compellable powers [Fn: (2012) 246 CLR 636 at 653 [46], 655 [52], 665 [91]].

(Footnote omitted; emphasis added.)

1. This passage implicitly accepts that it is open to the Minister to lay down guidelines setting out the circumstances in which a request is, or is not, to be referred to the Minister for consideration of the exercise of the power in s 417 and other like provisions. There is no suggestion that the laying down of such guidelines constitutes a delegation of the Minister’s powers or that the officers of the Department who apply the guidelines are exercising the Minister’s powers.
2. For these reasons, ground 5 is rejected.
3. In light of this conclusion, it is unnecessary to deal with the Minister’s submission that the Court does not have jurisdiction to give the relief sought in respect of ground 5.

## Conclusion

1. It follows that the application is to be dismissed. There is no apparent reason why costs should not follow the event. Accordingly, I will also order that the applicant pay the Minister’s costs of the proceeding, to be fixed by way of a lump sum.

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| I certify that the preceding seventy-eight (78) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky. |

Associate:

Dated: 16 April 2021