Commonwealth of Australia

Migration Act 1958

NEGATIVE PERSONAL PROCEDURAL DECISION (SECTION 351)

This decision applies to requests for Ministerial intervention under section 351 of the *Migration Act 1958* (Act), or section 417 as it stood prior to 14 October 2024, where:

a) the request was received by the Department on or after 12 April 2023, and before the date of this decision; and

b) a Minister has not, on or before the date of this decision, decided to consider, or not to consider, whether it is in the public interest to substitute a more favourable decision under subsection 351(1) or former subsection 417(1) of the Act.

I consider that:

- a large number of requests for Ministerial intervention under section 351 of the Act, or s 417 as it stood prior to 14 October 2024, have been impacted because of the practice that the High Court of Australia in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs* [2023] HCA 10 held to be beyond the executive power of the Commonwealth; and
- it is not in the public interest for a Minister to consider whether to substitute a more favourable decision for a decision of a Tribunal in circumstances where either of paragraphs 1 or 2 below is satisfied, for reasons including:
  - in respect of cases falling within paragraph 1:
    - the exceptional nature of the Minister's intervention powers; and
    - that it is inappropriate for a Minister to consider the exercise of intervention powers whilst a person has an ongoing application for a substantive visa, or ongoing merits or judicial review proceedings in relation to a visa decision; and
    - that it is inappropriate to consider Ministerial intervention where a person is an Australian citizen or already holds a permanent visa or a temporary visa that is not a bridging visa; and
    - that it is inappropriate to consider Ministerial intervention when a person is outside Australia and could make a new application for a visa; and
  - in respect of cases falling within both paragraphs, I intend to issue new instructions for my Department to apply when assisting Ministers in exercising their power under section 351, and a person adversely affected by this decision, who wishes to have a Minister make a decision under section 351, could make a new request for such a decision subject to those instructions as in force from time to time.

HON. TONY BURKE MP
Minister for Immigration and Citizenship

Therefore, exercising my power under subsection 351(1) of the Act and acting in the public interest, I decide that a Minister will not consider whether it is in the public interest to substitute a more favourable decision for a decision of the Administrative Appeals Tribunal or Administrative Review Tribunal in relation to any request for Ministerial intervention if, at the date of this decision:

1. the request concerns a decision of a Tribunal about a person who, at the date of this decision:
    - is an Australian citizen or permanent resident; or
    - is an organisation (rather than a natural person); or
    - holds a temporary visa that is not a bridging visa; or
    - is outside Australia and has no right to re-enter or has never entered Australia; or
    - holds a bridging visa and:
        - has an ongoing application for a substantive visa; or
        - has had an application for a substantive visa refused, and is seeking:
            - merits review of the decision to refuse; or
            - judicial review of a decision to refuse or of a decision to affirm a decision to refuse; or
2. both of the following are satisfied:
    - the request is not of a kind referred to in paragraph 1; and
    - the person who is the subject of the decision does not, at the date of this decision, meet any of criteria 1 to 12 specified in the positive personal procedural decision made, on the date of this decision, under section 351 of the Act.

Dated 4. 9. 25

Signed

HON. TONY BURKE MP
Minister for Immigration and Citizenship

Commonwealth of Australia

Migration Act 1958

NEGATIVE PERSONAL PROCEDURAL DECISION (SECTION 501J)

This decision applies to requests for Ministerial intervention under section 501J of the *Migration Act 1958* (Act) where:

a) the request was received by the Department on or after 12 April 2023, and before the date of this decision; and

b) a Minister has not, on or before the date of this decision, decided to consider, or not to consider, whether it is in the public interest to substitute a more favourable decision under subsection 501J(1) of the Act.

I consider that:

- a number of requests for Ministerial intervention under section 501J of the Act have been impacted because of the practice that the High Court of Australia in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs* [2023] HCA 10 held to be beyond the executive power of the Commonwealth; and
- it is not in the public interest for a Minister to consider whether to substitute a more favourable decision for a decision of a Tribunal in circumstances where either of paragraphs 1 or 2 below is satisfied, for reasons including;
  - in respect of cases falling within paragraph 1:
    - the exceptional nature of the Minister's intervention powers; and
    - that it is inappropriate for a Minister to consider the exercise of intervention powers whilst a person has an ongoing application for a substantive visa, or ongoing merits or judicial review proceedings in relation to a visa decision; and
    - that it is inappropriate to consider Ministerial intervention where a person is an Australian citizen or already holds a permanent visa or a temporary visa that is not a bridging visa; and
    - that it is inappropriate to consider Ministerial intervention when a person is outside Australia and could make a new application for a visa; and
  - in respect of cases falling within both paragraphs, I intend to issue new instructions for my Department to apply when assisting Ministers in exercising their power under section 501J, and a person adversely affected by this decision, who wishes to have a Minister make a decision under section 501J, could make a new request for such a decision subject to those instructions as in force from time to time.

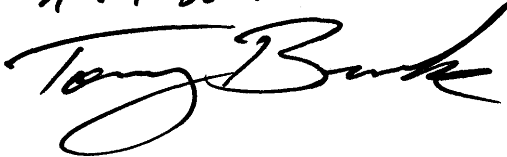
HON. TONY BURKE MP
Minister for Immigration and Citizenship

Therefore, exercising my power under subsection 501J(1) of the Act and acting in the public interest, I decide that a Minister will not consider whether it is in the public interest to substitute a more favourable decision for a decision of the Administrative Appeals Tribunal or Administrative Review Tribunal in relation to any request for Ministerial intervention if, at the date of this decision:

1. the request concerns a decision of a Tribunal about a person who, at the date of this decision:
    - is an Australian citizen or permanent resident; or
    - is an organisation (rather than a natural person); or
    - holds a temporary visa that is not a bridging visa; or
    - is outside Australia and has no right to re-enter or has never entered; or
    - holds a bridging visa and:
        - has an ongoing application for a substantive visa; or
        - has had an application for a substantive visa refused, and is seeking:
            - merits review of the decision to refuse; or
            - judicial review of a decision to refuse or of a decision to affirm a decision to refuse; or
2. both of the following are satisfied:
    - the request is not of a kind referred to in paragraph 1; and
    - the person who is the subject of the decision does not, at the date of this decision, meet any of criteria 1 to 12 specified in the positive personal procedural decision made, on the date of this decision, under section 501J of the Act.

Dated

Signed



HON. TONY BURKE MP
Minister for Immigration and Citizenship