HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **MOHAMED YOUSSEF HELMI KHALIL**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE REVIEW TRIBUNAL
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

1 This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Relevant provisions (RS [10]-[22], [25])

2 Sections 7(2)(c) and (e) of the *Acts Interpretation Act 1901* (Cth) (**Vol 1, Tab 3**) are central to the appeal. Section 7(2)(c) only protects rights that have accrued under the affected Act by the time of the repeal, and s 7(2)(e) only protects legal proceedings, investigations or remedies in respect of rights so accrued.

3 Section 499(1) of the *Migration Act 1958* (Cth) empowered the Minister to give written directions to the Tribunal: *LPDT* (2024) 98 ALJR 610 (**Vol 4, Tab 30**) at [19]. As the appellant properly concedes, that power extended to replacing the direction in pending proceedings: FC [30] (**CAB 117**); **RS [16]-[20]**. Directions cannot be inconsistent with the Act, and the Tribunal must comply with them: ss 499(2)-(2A).

4 Direction 79 was given by the Minister to "decision-makers". It commenced on 28 February 2019, and revoked Direction 65 with effect from that date: **ABFM 56 [2]-[3], 87**.

Principles and authority as to when a right accrues (RS [28]-[35])

5 Where a statute requires a benefit to be provided upon meeting prescribed criteria, a right to that benefit will accrue when a person satisfies all the criteria (including any requirement to apply for it). That is so even if the accrued right depends upon a process of fact-finding, and is therefore "inchoate" or "conditional" (in the sense of "conditional upon the relevant facts being established"). By contrast, where a statute confers a discretion to decide whether or not to grant a statutory benefit, no right accrues until the discretion is exercised favourably. A person who applies for such a benefit has merely a "hope or expectation that a right will be created". They do not accrue a right protected by s 7(2)(c).

- *Ho Po Sang* [1961] AC 901 (**Vol 4, Tab 24**) at 919-922, 926;
- *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 (**Vol 4, Tab 31**) at 694-696;
- *Mathieson v Burton* (1971) 124 CLR 1 (**Vol 3, Tab 15**) at 23-24 (Gibbs J).

6 An application or administrative proceeding that turns upon the exercise of a statutory discretion is thus not one "in respect of" an accrued right, but one "which is to decide whether some right should or should not be given": *Ho Po Sang* at 922, 926. It is therefore

not protected by s 7(2)(e).

7 *Esber* did not displace the above principles or authorities: cf **Reply [9], [13]**. The relevant discussion in *Esber* is *obiter*. Further, in the course of that discussion the majority relied on all of the cases cited above. While Mr Esber failed on the facts to establish a right to redemption, it was sufficient that he had accrued a "conditional" right to redemption, meaning a right the existence of which depended upon the relevant facts being established: *Esber* (1992) 174 CLR 430 (**Vol 3, Tab 12**) at 439-440. The point of departure between the majority and Brennan J concerned the construction of the legislative regime in question, rather than a difference on a point of principle concerning accrued rights: *Kentlee* [1998] 1 Qd R 162 (**Vol 4, Tab 28**) at 168, 177, 181 (Fitzgerald P), 189 (Dowsett J); cf **Reply [10]**.

8 More recent authority in this Court confirms that *Esber* does not suggest that an application to a tribunal for review of a discretionary decision gives rise to an accrued right to a decision in accordance with the law as at the time of that application. The *AIRC Case* suggests that the duty of the Tribunal, and any correlative right to its discharge, is "fluid rather than fixed" and that notions of accrued rights had no place in such a context: *A-G (Qld) v AIRC* (2002) 213 CLR 485 (**Vol 3, Tab 8**) at [39]-[40], [45]-[46], [49]-[50] (plurality), [137]-[138] (Kirby J), [157] (Callinan J). See also *Minogue v Victoria* (2018) 264 CLR 252 (**Vol 3, Tab 17**) at [18]-[21] (plurality), [105]-[108] (Gordon J).

9 *Lee* (1996) 68 FCR 491 (**Vol 4, Tab 29**) was wrongly decided, having turned on the view that *Esber* departed from *Ho Po Sang* and the cases following it: 504-505 (Cooper J), 515 (Moore J). For that reason, the correctness of *Lee* was doubted in *Yao v Minister* (1996) 69 FCR 583 (**Vol 4, Tab 36**) at 590 (Black CJ and Sundberg J).

Appellant did not accrue a relevant right (RS [23]-[24], [26]-[27], [44]-[53])

10 The appellant claims he accrued two rights under the *Migration Act* or the *Administrative Appeals Tribunal Act 1975* (Cth), not under Direction 65: **AS [54]**; FC [43] **(CAB 120)**.

11 The appellant did not accrue a right to a favourable decision that was "conditional" on the Tribunal deciding to exercise its discretion under s 501 favourably to him: cf **AS [68]**. The result and reasoning in *Ho Po Sang* and the cases applying it establish that an application for a discretionary benefit does not establish an accrued right, "conditional" or otherwise.

12 Nor did the appellant, in applying for review, accrue any right to a review conducted in compliance with the direction in force at the time of the application. That submission is

likewise contrary to authority: *AIRC Case* at [45]-[46]; *Minogue* at [19]-[21]; *Ho Po Sang* at 922. It ignores the distinctions drawn in ss 7(2)(c) and (e).

13 The obiter comment in *Frugtniet v ASIC* (2019) 266 CLR 250 (**Vol 3, Tab 13**) at [14] does not assist the appellant. It is not directed to situations where Parliament has changed the law. In its terms, it could only support a submission that the Tribunal apply the direction at the date of the delegate's decision, which is not the argument he advances. Finally, it is inconsistent with several other authorities, which should be preferred: *Esber* at 448 (Brennan J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 (**Vol 3, Tab 19**) at [63] (Gaudron and Kirby JJ); *AIRC Case* at [40] (plurality); *Shi v MARA* (2008) 235 CLR 286 (**Vol 3, Tab 20**) at [57], [60], [76] (Kirby J; Crennan J agreeing), [111] (Hayne and Heydon JJ).

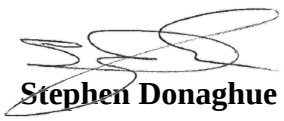
14 Section 500(6L) does no more than increase the practical likelihood that a Tribunal will make a decision applying the direction that was in force at the time of the application to the Tribunal. It does not require that to occur, and it does not give rise to a "reasonable expectation" that it will occur: *Khalil v Minister for Home Affairs* (2019) 271 FCR 326 at [64] (the Court); cf **AS [55]**; **Reply [8]**. In any case, a reasonable expectation cannot be equated with an accrued right: *Ho Po Sang* at 921-922.

Alternatively, Directions 79 and 90 manifested a contrary intention (RS [54]-[60])

15 Directions 79 and 90 manifested a sufficiently clear intention to operate in Tribunal proceedings pending at the time they commenced. They are expressed to revoke the former direction, and to apply, from a specific date. *Jagroop* suggested, at the time they were given, that this was sufficient to have that effect: *DPP Reference (No 1 of 2019)* (2021) 274 CLR 177 (**Vol 3, Tab 11**) at [16] and [51].

16 The substantive provisions of Directions 79 and 90 are directed to "decision-makers", without distinguishing between delegates and the Tribunal, suggesting they are intended to operate consistently. That is the purpose of s 499 more generally. It would undermine this purpose to construe the directions as applying differently to pending Tribunal proceedings.

Date: 1 April 2025



Stephen Donaghue **Rachel Francois** **Will Randles**