



HIGH COURT OF AUSTRALIA

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Details of Filing

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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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. The facts giving rise to the issue

1 Direction 65 applied at the time of the delegate’s character decision, the application to the Tribunal, and the Tribunal’s first character decision. Directions 79 and 90 only came later.

B. The accrued right in this case

2 The “first step” is to identify the relevant right: *Esber* pg 439 (**JBA Vol 3, Tab 12, pg 349**).

3 In this case, that requires close analysis of the jurisdiction being exercised by the Tribunal.

10 3.1. The appellant engaged the Tribunal’s merit review jurisdiction by making an application under s 500 of the *Migration Act*: **JBA Vol 1, Tab 4, pg 109**, see also s 25(1) of the AAT Act (**JBA Vol 2, Tab 5, pg 132**).

3.2. The Tribunal was then obliged to conduct a review of the delegate’s decision, which required it to “stand in the shoes” of the delegate and arrive at the correct or preferable decision: *Shi v MARA* pg 324-5 [134] (**JBA Vol 3, Tab 20, pg 620-1**).

3.3. Such a review ordinarily entails the Tribunal applying the law as it stood at the time of the decision under review, “subject to the same constraints” and “having regard to the same specified range of considerations”: *Frugtniet* pg 257 [14]-[15], 259 [21], 263 [29], 265 [31], 271 [51] (**JBA Vol 3, Tab 13, pg 372, 374, 378, 380, 386**).

20 3.4. The law as it stood at the time of the delegate’s decision required the delegate to comply with Direction 65: s 499(2A) of the Act (**JBA Vol 1, Tab 4, pg 108**).

4 Accordingly, the appellant accrued a right to have the decision reviewed in compliance with the direction given under s 499(1) of the *Migration Act* applicable at the time of: (a) the delegate’s decision; or (b) the application to the Tribunal: **AS [2(a)(i)]**.

5 The obligation to comply with Direction 65, and the concomitant right to a review in compliance with that direction, was substantive and not procedural: **AS [28(c)], [61]**.

5.1. The substance/procedure distinction can be useful, although is not always clear cut: see, eg, *Carr* pg 147-8 (**JBA Vol 3, Tab 10, pg 285-6**); *Esber* pg 440 (**JBA Vol 3, Tab 12, pg 350**). The court below recognised as much: **CAB pg 138 [109]**.

30 5.2. Directions set mandatory relevant considerations: *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at pg 221 [63]-[64] cited

at AS [58] fn 55; and compliance is “a condition governing the making of a decision”: *LPDT* pg 618 [31] (**JBA Vol 5, Tab 30, pg 871**).

6 No “narrow conception” should be given to the concept of “accrued rights”: *Carr* pg 151 (**JBA Vol 3, Tab 10, pg 289**); see also *Mathieson* pg 12 (**JBA Vol 3, Tab 15, pg 406**).

C. Appellant’s accrued right consistent with authority

Esber

7 The appellant in *Esber* framed the right in two ways: pg 439 (**JBA Vol 3, Tab 12, pg 349**). The majority adopted the latter: “at the least ... a right to have his application to the Tribunal determined pursuant to Pt V of the 1971 Act”: pg 440 (**JBA Vol 3, Tab 12, pg 350**).

10 8 That was a right protected by the *Acts Interpretation Act*, even assuming the appellant had no underlying “right” to redemption of payments: pg 440 (**JBA Vol 3, Tab 12, pg 350**).

Lee

9 While *Lee* is different to the present case (because the amendments there were to the statute), Cooper J held that “the right of review” was “a substantive and not a procedural right” and was a right to have the decision “reconsidered de novo in accordance with the discretion ... as it stood [at the time of the original decision]”: pg 505 (**JBA Vol 5, Tab 29, pg 849**). Moore J held that “a statutory right to seek a review” could qualify for the protection of the *Acts Interpretation Act* “even if the decision which is to be reviewed involved the exercise of a discretionary power”: pg 515 (**JBA Vol 5, Tab 29, pg 859**).

20 Keeley

10 The plurality held that where “the exercise of a discretion is subject to review”, on “initiation of a review proceeding” a right accrues: pg 121 [35]-[36], 122 [38] (**JBA Vol 5, Tab 34, pg 933, 934**).

11 The plurality (correctly) understood *Esber* not to require any “enforceable” right: pg 122 [38] (**JBA Vol 5, Tab 34, pg 934**).

12 Kiefel J came to the same conclusion on the basis that the repeal and replacement of the “statement of principles” “affected the content of Mrs Keeley’s right”: pg 131 [78] (**JBA Vol 5, Tab 34, pg 943**).

D. This Court’s decisions do not support a distinction based on “discretion”

30 13 The Privy Council in *Ho Po Sang* did not articulate any distinction by reference to the concept of a “discretion”: pg 921-2 (**JBA Vol 5, Tab 24, pg 754-5**).

- 14 In any event, that case concerned the exercise of a discretion by an original decision-maker. No question arose – as in *Esber* – as to the rights and obligations on review.
- 15 The majority in *Esber* did not consider “discretion” to be determinative: pg 439-40 (**JBA Vol 3, Tab 12, pg 349-50**); nor did the Full Court here: **CAB pg 139 [112]**. The Court in *Jagroop* was wrong to place such stock in this: pg 476 [71]-[73] (**JBA Vol 5, Tab 27, pg 802**).
- 16 The *AIRC Case* involved arbitration as to future rights and relationships, not merits review of an original decision: pg 503 [45] (**JBA Vol 3, Tab 8, pg 191**). Kirby J’s endorsement of *Ho Po Sang* needs to be understood in that context: pg 531 [137], [139] (**JBA Vol 3, Tab 8, pg 219**). The plurality did not recognise any distinction based on “discretion”.
- 10
- E. No contrary intention**
- 17 A contrary intention must appear with “reasonable certainty”, “clearly” or “plainly”: *ADCO* pg 15 [27], 21-2 [51]-[52] (**JBA Vol 3, Tab 7, pg 160, 166-7**).
- 18 Direction 79 is silent as to its effect on pending proceedings. The *Acts Interpretation Act* was designed to fill such silence: *Mathieson* pg 8 (**JBA Vol 3, Tab 15, pg 402**).
- 19 That Direction 79 “revoked” (*scil.* repealed) Direction 65 is a condition for the application of s 7(2), not an indication of its displacement: **ABFM pg 56, see also pg 89**. Similar language was used by the instrument in *Keeley*: pg 119 [30] (**JBA Vol 5, Tab 34, pg 931**).
- 20 The objective of Direction 79 “may explain why [it] was passed”, “but it does not assist in deciding whether it was intended that [it affect accrued rights]”: *Mathieson* pg 25 (**JBA Vol 3, Tab 15, pg 419**).
- 20
- 21 The First Respondent’s reliance on “consistency”, ignores that “the need for consistency of decisions of lay tribunals is equally met by applying the [Direction] existing at the time of the primary decision”: *Keeley* pg 132 [81] (**JBA Vol 5, Tab 34, pg 944**).

Dated: 1 April 2025



David Hooke SC



Julian R Murphy