HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

NO M112 OF 2024

BETWEEN:

MOHAMED YOUSSEF HELMI KHALIL
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE REVIEW TRIBUNAL
Second Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. This reply is in a form suitable for publication on the internet.

PART II: ARGUMENT

Summary

2. These submissions reply to those of the **Minister** dated 20 February 2025 (**RS**) and adopt abbreviations used in the appellant's submissions dated 24 December 2024 (**AS**).

3. In summary, the appellant submits as follows in reply:

   (a) the inquiry as to whether a right accrued, or an obligation incurred, was affected by the repeal of Direction 65 cannot be avoided by asserting that the Tribunal was required to comply with any direction that had been given and not revoked (**cf RS [14]–[21]**);

   (b) the questions of whether a right has accrued, or an obligation has been incurred, and if so whether affected by the repeal of an instrument, is not to be determined by a binary distinction between discretionary and non-discretionary decisions (**cf RS [28]–[43]**). The proper inquiry is a substantive one looking at what a person would have lost, but for the protective common law or statutory presumption;

   (c) application of that proper approach in this case compels the conclusion that the appellant *did* accrue a right, and the Tribunal incur an obligation, at the time the application for review was made (**cf RS [54]–[53]**);

   (d) contrary to the Minister's entirely new assertion of a contrary intention at **RS [54]–[60] see also [23]**, the bare expression that an instrument revokes another instrument has never been enough to support a contrary intention, and nor do the other matters relied upon by the Minister.

Text, context and purpose of s 499(2A) beg the question

4. The Minister attempts an end run around the appellant's arguments by submitting that the "proper construction of s 499(2A) required the Tribunal to comply" with Direction 90 (**RS [16], see also [14]–[21]**). There are four problems with that submission.

5. *First*, the submission begs the question. To submit that the Tribunal was required to "comply with a direction under subsection (1)", is simply to restate the statutory text of s 499(2A) – it does not answer the inquiry of with *which* direction under subsection (1) the Tribunal was required to comply. To insert additional words into the inquiry by asking whether a particular direction was "applicable", "in force" or "given" and "not revoked" does not advance the analysis (**cf RS [16]–[17]**). The Full Court appeared to

acknowledge as much in this case, referring to this argument at J [40] (**CAB 119**) while summarising *Jagroop*, but not returning to it in the later analysis (presumably because the Court was not attracted to this aspect of *Jagroop*).

6. *Secondly*, insofar as the Minister relies on "consistency" in "policy" in support a reading of s 499(2A) to require compliance with the most recently given direction (**RS [19]–[20]**), that contention was dealt with (and held to be "neutral") by the Full Court at J [120] (**CAB 141**). Further, that contention is at odds with the authorities guiding the interpretation of statutory provisions which change sentencing policy in criminal matters. Such provisions – although they undoubtedly give effect to Parliament's policy position that, for example, sentences are too low for particular types of offending – are subject to the ordinary presumption that they apply prospectively, that is, not to proceedings that are pending at the time of the change in the law.[1]

7. *Thirdly*, the Minister cannot so easily sidestep the considered *obiter dicta* of three members of this Court in *Frugtniet* that a merits review body ordinarily applies the statute law as it exists at the time of the primary decision (**RS fn 17**). That is so whether the decision is characterized as having been made under the *Migration Act* or, as the appellant would submit, the AAT Act. This fundamental feature of merits review weighs against the Minister's submission that s 499(2A) necessarily commands compliance with the most recent direction given under s 499(1).

8. *Finally*, the Minister's submissions on text, context and purpose do not engage at all with the legislated "84 day rule", which confirms the reasonableness of an applicant's expectation that a Tribunal decision will be made in compliance with the direction in force at the time of their application to the Tribunal (**AS [55], cf RS [16]**).

Authority does not support binary distinction turning on discretion

9. The Minister relies heavily on what is said to be a "distinction" in the authorities, and persisting in s 7 of the *Acts Interpretation Act*, between an application for a decision maker to: (a) exercise a discretion; or (b) grant a statutory benefit (**RS [31], [32], [35], [38], [39], [40]**). Put simply, the Minister submits that the protection of accrued rights depends on a binary "distinction between discretionary and non-discretionary powers" (**RS [39]**). The postulated distinction would provide an unstable criterion for application of the common law and statutory rules (especially, in the latter case, in

[1] See the summary of authorities at *R v MJR* (2002) 54 NSWLR 368, [17]–[22] (Spigelman CJ, Grove J and Newman AJ agreeing). See, now, *Crimes Act 1914* (Cth), s 4F.

circumstances where it finds no textual support in the statute) because of the inherent ambiguity in the notion of a "discretion", which "signifies a number of different legal concepts".[2] The larger point, however, is that the distinction is not borne out by *Esber*.

10. As the Minister recognises at **RS [36]**, the majority in *Esber* did not consider it necessary to come to a final view as to whether the Tribunal in that case was exercising a discretion. That can only have been because their Honours did not regard classification of the power as discretionary or otherwise as determining the applicability of the *Acts Interpretation Act*'s protection of accrued rights. That is particularly so in circumstances where Brennan J in dissent *did* regard the discretionary-like nature of the power – entailing as it did "value judgments" – as counting conclusively against recognition of any accrued right.[3] Indeed, the Minister accepts at **RS [38]** that the holding in *Esber* turned on whether "the Tribunal's decision-making power was *sufficiently circumscribed* as to give Mr Esber a right". To frame the inquiry as turning on the sufficiency of circumscriptions is to acknowledge that more is in play than the posited binary distinction.

11. *Esber* has certainly been understood by lower Courts as capable of application to discretionary powers. That was the central majority holding in *Lee* (**AS [49]**), which is why the Minister is compelled to submit that it was wrongly decided (**RS [42]**).

12. The majority's approach in *Esber* of eschewing conclusive reliance on any characterisation of the power as discretionary or otherwise, is consistent with the authorities recognising that the proper approach to s 7 of the *Acts Interpretation Act* is to look to substance, not form, and not to take a narrow view of accrued rights.[4] The Full Court was thus right to regard the question of whether and how the discretion in this case was affected as being informative but "not itself conclusive" of the inquiry as to whether an accrued right had been affected: J [112] (**CAB 139**). Indeed, the Full Court accepted that "the lodging of an application has the effect of creating a 'right' in the applicant": J [51] (**CAB 122**).

Application of authority requires protection of accrued right in this case

13. The Minister's reliance on an arid and overly formalistic distinction between

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[2] *Norbis v Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ). See, further, F Bennion, "Distinguishing Judgment and Discretion" [2000] *Public Law* 368; HLA Hart, "Discretion" (2013) 127 *Harvard Law Review* 652.

[3] *Esber*, 446–7 (Brennan J).

[4] *Mathieson v Burton* (1971) 124 CLR 1, 12 (Windeyer J). See also *Carr v Finance Corporation of Australia Ltd (No 2)* (1982) 150 CLR 139, 151 (Mason, Murphy and Wilson JJ).

discretionary and non-discretionary decisions means that at no point does the Minister grapple with the practical and legal consequences for the appellant if Direction 65 was not preserved in its application to the review proceedings. The practical and legal consequences were, as the Full Court recognised, that changes in ministerial directions "have a real and substantive effect on the outcome of decision-making … [and] cannot be described as purely 'procedural'": J [108]–[109] (**CAB 138**).

14. As this Court has recently recognised, the "obligations imposed *by that direction*" pose "an essential and inviolable limitation on the power": **AS [58]**, emphasis added. Thus, while it may be accepted that the appellant's review proceedings ultimately called for the exercise of a (highly structured) discretion, the purported effects of the repeal of Direction 65 on that discretion were so significant as to properly be described as affecting the appellant's accrued right, in either of his framings: cf **RS [26]**.

No contrary intention

15. Contrary to what the appellant understood the Minister's position to be (**AS [3], [43], [62]**), and the way the Minister has argued the case at first instance and on the intermediate appeal, the Minister now asserts for the first time that the directions manifest a "contrary intention" to the application of the *Acts Interpretation Act* or the common law protection of accrued rights: **RS [3], [54]–[60]**. That should be rejected.

16. It must be emphasised that what is required is "reasonable certainty" as to the contrary intention; this usually requires the high bar of "necessary implication" or something arising "clearly" or "plainly" from the text of the provision.[5]

17. In the face of that requirement, the Minister's reliance on the bare words of the directions as *revoking* previous directions and *commencing* on a particular date is wholly insufficient (**RS [56]**). Those are ordinary words of amending or repealing legislation to which s 7 of the *Acts Interpretation Act* applies absent something more. The reliance on consistency at **RS [57] and [59]** takes the matter no further for the reasons that have been identified above, and were considered by the Full Court to be "neutral": J [120] (**CAB 141**). So, too, the invocation of the re-enactment presumption in the novel context of a ministerial direction, rather than a statute: **RS [58]**. The re-enactment presumption has properly been recognised as a slender reed by which to discern legislative intent if there is no positive indication that the judicial authority at

[5] *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [52] (Gageler J) and the authorities cited therein.

issue was actually considered in Parliament's deliberations.[6] The Minister's final point on this issue at **RS [60]** inverts the proper mode of analysis by suggesting that this Court "should not readily impute" a particular intention to the author of the instruments, when the effect of the *Acts Interpretation Act* is to presumptively impute an intention to the author of the instrument unless a contrary intention is manifest.

Conclusion

18. It is otherwise noted that the Minister has chosen at **RS [13]** not to respond to the appellant's submissions on the rationale for, and the values informing, the common law's protection of accrued rights (which rationale and values also undergird the statutory iteration of that protection). The Minister is wrong to sideline those matters. At the contestable penumbra of a rule's application, with "reasonable arguments" on both sides (J [129] **CAB 144**), it is proper to be guided by the rationale for the rule, and the values undergirding it.[7] Here, the rationale is grounded in rule of law and fairness concerns about preserving the ability of persons to make decisions, and order their affairs, based upon the law as it is at the time. While those concerns may properly be subjugated to other policy imperatives, and reasonable expectations disappointed, by a sovereign Parliament expressing itself clearly (or a Minster doing so clearly in an instrument), the statute and instruments at issue in this case do not go close to manifesting the required contrary intention. The appeal should be allowed.

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[6] *DPP Reference No 1 of 2019* (2021) 274 CLR 177, [12], see also [13] (Kiefel CJ, Keane and Gleeson JJ).
[7] For example, in *Carr v Finance Corporation of Australia Ltd (No 2)* (1982) 150 CLR 139, 151 (Mason, Murphy and Wilson JJ), it was observed: "The common law presumption against imputing to the legislature an intention to interfere retrospectively with rights which have already accrued does not call for a narrow conception of a right. If it were otherwise, the essential justice of the rule would be eroded."