HIGH COURT OF AUSTRALIA

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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 SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The issue of law raised by the appeal is whether a Full Court of the Federal Court erred in holding that the Administrative Appeals Tribunal (**Tribunal**) was not, in reaching its decision with respect to the appellant, required to comply with Direction 65 made under s 499(1) of the *Migration Act 1958* (Cth) (**Migration Act**): **CAB 157**.

3. For the reasons developed below, the Full Court was correct to so hold. On its proper construction, s 499(2A) required the Tribunal to comply with applicable directions given under s 499(1) and not revoked at the time of its decision. The only such direction was Direction 90. The revocation of Direction 65 by Direction 79, which was in turn replaced by Direction 90, did not "affect" any rights "accrued" by the appellant.[1] Alternatively, Directions 79 and 90 manifested a sufficient intention to affect any such rights.

PART III: SECTION 78B NOTICES

4. The First Respondent (**Minister**) agrees that no s 78B notice is necessary: **AS [4]**.

PART IV: FACTS

5. On 10 April 2013, the appellant made a combined application for a Partner (Temporary) (Class UK) and Partner (Residence) (Class BS) visa: **CAB 10 [7(g)]**. That application was initially refused on the basis he was not in a genuine and continuing relationship, but the refusal was set aside on review: **CAB 11-12 [7(p)], [7(w)]**.

6. On 15 January 2016, the appellant was convicted of possessing a prohibited drug, cannabis, with intent to sell or supply. He was sentenced to 16 months' imprisonment: **CAB 12 [7(v)]**. The appellant has also been convicted of a range of other criminal offences: **CAB 9-12**. Most relevantly, these include a conviction on 24 February 2014 for aggravated assault occasioning actual bodily harm, which the appellant committed against his then-wife. The appellant was ordered to undertake a 6-month Intensive Supervision Order, which he breached: **CAB 10 [7(i)]**, **[7(j)]**, **[7(o)]**, **53-54 [96]**.

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[1] That reflects the settled position in the Federal Court since *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461 (***Jagroop***) at [6], [80] (Kenny and Mortimer JJ; Dowsett J agreeing).

7. On 9 November 2017, a delegate of the Minister refused the appellant's application for a Partner (Temporary) (Class UK) visa, relying on s 501(1) of the Migration Act: PJ [2(c)] (**CAB 82**); **ABFM 12**. The delegate applied Direction 65 (**ABFM 13 [5]**), which was the relevant direction made by the Minister under s 499(1) of the Migration Act and then in force: **ABFM 12**. On 8 December 2017, the appellant applied to the Tribunal for review of the delegate's decision: PJ [2(d)] (**CAB 82**).

8. On 20 December 2018, the Minister gave Direction 79. On 8 March 2021, the Minister gave Direction 90. Each of those directions was expressed to commence on, and to revoke the previous direction with effect from, a future date: **ABFM 56**, **89**. Direction 90, which commenced on 15 April 2021, contained new provisions requiring decision-makers to consider family violence[2] in a range of different ways: **ABFM 93-97**.[3]

9. On 26 October 2022, after two previous decisions of the Tribunal were quashed on judicial review,[4] the present Tribunal affirmed the delegate's decision to refuse the appellant's visa application: **CAB 5**. The Tribunal found that the appellant did not pass the character test, by reason of the sentence imposed on 15 January 2016: **CAB 36 [61]**.[5] In deciding whether it would exercise the direction in s 501(1) to refuse the appellant a visa, the Tribunal applied Direction 90: **CAB 13-16 [12]-[18]**. Both parties expressly submitted to the Tribunal that it should apply Direction 90.[6]

PART V: ARGUMENT

STATUTORY PROVISIONS

10. Section 501(1) of the Migration Act empowers the Minister to refuse to grant a visa to a person if the person does not satisfy the Minister that they pass the character test, as set out in s 501(6). The Minister may delegate this power.[7] A person in the position of the appellant could apply to the Tribunal for review of a delegate's decision under s 501.[8]

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2 Defined in para 4(1) to mean "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family…, or causes [them] to be fearful": **ABFM 90**.

3 The operation of these paragraphs was recently discussed in *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 196, especially at [37]-[40].

4 See *Khalil v Minister for Home Affairs* (2019) 271 FCR 326 and *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26.

5 See Migration Act, ss 501(6)(a) and (7)(c).

6 Applicant's Statement of Facts, Issues and Contentions, 10 June 2022 at [3]-[4]; Respondent's Statement of Facts, Issues and Contentions, 24 June 2022 at [4]; Applicant's Closing Submissions, 25 August 2022 at [2].

7 Migration Act, s 496(1).

8 Migration Act, s 500(1)(b). None of the exceptions in s 500(4A) apply.

11. Section 499(1) empowers the Minister to "give written directions to a person or body having functions or powers under" the Migration Act about "the performance of those functions" or "the exercise of those powers". Such a direction must not be inconsistent with the Act or Regulations.[9] By s 499(2A), the person or body "must comply with a direction under subsection (1)." A breach s 499(2A) will, if material, constitute jurisdictional error.[10]

12. Insofar as presently relevant, ss 7(2)(c) and (e) of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**) provide that the repeal or amendment[11] of an Act by another Act, or by an instrument under an Act, does not "affect": (i) any "right" or "obligation … acquired, accrued or incurred under the affected Act"; or (ii) any "investigation, legal proceeding or remedy in respect of any such right [or] obligation". Section 7 applies subject to a contrary intention.[12] It also applies to any instrument (including a legislative instrument) made under an Act, which would include a direction under s 499(2A), as if it were an Act.[13]

13. Section 7 is generally thought to reflect common law principles of interpretation (as **AS [41]** recognises). However, the appellant has not identified any common law principle that is said to be relevant to this appeal and wider than s 7 of the Acts Interpretation Act. The appellant accepts, for example, that any broader "presumption against retrospectivity"[14] has no "direct application in this case": **AS [34]**. For that reason, the Minister does not further address the applicable common law principles.

PROPER CONSTRUCTION OF SECTION 499(2A)

14. The appellant contends that the Tribunal was, in his case, required to comply with Direction 65 and not Direction 90. The starting point in evaluating that contention must be the proper construction of s 499(2A), which was the source of the Tribunal's statutory duty to comply with Ministerial directions. Two features of s 499(2A) are significant.

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9 Migration Act, s 499(2).
10 As it did in, eg, *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 (***LPDT***).
11 The terms "repeal" and "amendment" are given an extended definition in s 7(3).
12 Acts Interpretation Act, s 2(2).
13 Acts Interpretation Act, s 46(1)(a); *Legislation Act 2003* (Cth), s 13(1)(a).
14 To which the more general observations made in *Stephens v The Queen* (2022) 273 CLR 635 at [29]-[36] (Keane, Gordon, Edelman and Gleeson JJ), [49] (Steward J) were directed.

15. *First*, s 499(2A) applied directly to the Tribunal of its own force. The phrase "body … having functions or powers under" the Migration Act, appearing in s 499(1), included the Tribunal.[15] On review of a delegate's decision under s 501(1) of the Migration Act, the Tribunal "exercis[ed] decision-making power" under s 501 in deciding whether the discretion contained in that subsection was enlivened and, if so, how it should be exercised.[16] The Minister was therefore empowered to give the Tribunal directions about the exercise of that discretion, which s 499(2A) required the Tribunal to comply with. That is what the Minister did in Directions 65, 79 and 90, each of which is expressly directed to both delegates and the Tribunal: see **ABFM 54**, **87**, **90**. Because s 499(2A) applied of its own force to the Tribunal, the only question is what a direction made under s 499(1) requires of the Tribunal itself. This appeal therefore does not involve the question whether a merits review body must ordinarily apply the statute law as it exists at the time of the primary decision, or as at the date of the Tribunal's review: cf **AS [56]**.[17]

16. *Second*, on its proper construction s 499(2A) required the Tribunal to comply with any applicable directions that had been "given" to it by the Minister under s 499(1) (and not revoked) as at the time of its decision.[18] It is irrelevant to ask how a direction applied at an earlier point in time, such as the date of the delegate's decision, the appellant's application to the Tribunal, or the expiry of the 84-day period after which certain applications commenced under s 500 are taken to have been affirmed: cf **AS [55]**, **[57]**. A number of factors support this construction.

17. ***Text/context:*** Section 499(2A) relevantly requires a person or body to "comply" with directions given under s 499(1) "about" the "exercise" of a statutory power. That conditions the valid exercise of a power on (material) compliance with any directions

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15 *Uelese v Minister for Immigration and Borden Protection* (2015) 256 CLR 203 at [11], [19] (French CJ, Kiefel, Bell and Keane JJ); *LPDT* (2024) 98 ALJR 610 at [19] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), [38], [41] (Beech-Jones J). The Full Court correctly accepted this: FC [18] (**CAB 114**).

16 *LPDT* (2024) 98 ALJR 610 at [33] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

17 Quoting, in particular, from *Frugtniet v ASIC* (2019) 266 CLR 250 at [14]-[15] (Kiefel CJ, Keane and Nettle JJ), expressing the former view. In any case, that statement was *obiter* and derived only slender support from the authority cited for it. Indeed, Gaudron and Kirby JJ had earlier (in dissent, but not on this point) regarded it as "well settled" that a merits review body "is required … to apply the law as it stands at the date of the review": *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [63], citing *Esber v Commonwealth* (1992) 174 CLR 430 (***Esber***) at 440-441 (Mason CJ, Deane, Toohey and Gaudron JJ). See also *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 107 (Dixon J).

18 *Jagroop* (2016) 241 FCR 461 at [61] (Kenny and Mortimer JJ; Dowsett J agreeing). See also FC [40] (**CAB 119**).

given about its exercise.[19] As a matter of ordinary language, it directs attention to the directions in force at the time when the power is exercised. Indeed, once it is accepted – as the appellant conceded below[20] – that the Minister may change the direction applying in pending Tribunal cases, it follows that the reference in s 499(2A) to "a direction" must be construed as referring to any applicable direction given to the Tribunal that is in force at the time of its decision.

18. The text of s 499(2A) provides no foundation for reading that subsection as requiring compliance with any directions that are in force at any other time, including the time of any application for the exercise of a statutory power. Not only does the text accord no significance whatsoever to such an application, but many of the powers which can be the subject of directions under s 499(1) are not exercised on application, including (as the Full Court recognised) decisions to cancel visas under s 501: FC [69] (**CAB 127**).

19. ***Purpose:*** The purpose of s 499 is to enable the Minister to specify government policy so as to facilitate consistent decision-making by delegates and the Tribunal. The relevant explanatory memorandum described s 499 as empowering the Minister "to issue general policy directions" and as intended to "ensure the Minister retain[ed] responsibility for general policy direction".[21] This promotes "equity and consistency" of decision-making, given that "the Minister can only decide a tiny fraction [of decisions] personally."[22]

20. That purpose would be frustrated if the Tribunal was required to apply different policies depending on the time at which an application for review to the Tribunal was first made. Indeed, it would be likely to produce inconsistent decision-making, because a single member of the Tribunal making decisions with respect to multiple applications involving materially the same facts would be required to apply different directions under s 499 –

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19 See *LPDT* (2024) 98 ALJR 610 at [31], [33] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

20 See FC [30] (**CAB 117**).

21 Explanatory Memorandum to the Migration Legislation Amendment Bill 1989 (Cth) at [216]. Section 66DD initially required persons to comply with "general directions" given by the Minister. Later renumbered to s 499, the section was also partially re-enacted in terms which removed the "general" qualification. This was intended to expand the scope of the power, by enabling more precise directions to be made: see Explanatory Memorandum to Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998 (Cth) (**1998 Explanatory Memorandum**) at [30].

22 Commonwealth, *Parliamentary Debates*, Senate, 5 April 1989 at 924 (Senator Ray); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 June 1989 at 3449 (Mr Holding). See also Commonwealth, *Parliamentary Debates*, Senate, 11 November 1998 at 60 (Sen Kemp); *Plaintiff M64/2015 v Minister for Immigration and Borden Protection* (2015) 258 CLR 173 at [54].

and therefore to give different weight to the same facts – depending simply on the date of the application for review. In addition to creating the appearance of arbitrary decision-making, that would inhibit the capacity of the Minister to ensure that Tribunals give effect to current policies that take account of the government's view of what is appropriate having regard to Australia's international obligations, foreign relations, community safety or community values (eg, with respect to the seriousness of domestic violence).[23]

21. It follows from the above construction – adapting the majority's reasoning in the *AIRC Case*[24] – that "the content of the public duty" in s 499(2A) and the appellant's "correlative right to its discharge was fluid rather than fixed": if a new direction "place[d] additional restraints or conditions upon the exercise of the power" in s 501, "the obligation" in s 499(2A) "was correspondingly modified". That fluidity explains why, if it be relevant, a person in the appellant's position has no "reasonable" or "justified" expectation that superseded directions will be applied by the Tribunal simply because of the date of the original application to the Tribunal: cf **AS [37], [57], [61], [69]**.[25]

THE APPELLANT'S ARGUMENT

22. Directions 65, 79 and 90 followed a common pattern in describing their application and dealing with the direction that preceded it. Each, having been signed (and therefore "given"[26]) by the Minister on a particular date, was expressed to commence on a future date identified in cl 2. By cl 3, each stated that the prior direction "is revoked with effect from the date this Direction commences": **ABFM 23**, **56**, **89**.

23. Despite the clear terms in which, with effect from 28 February 2019, Direction 65 was revoked and replaced by Direction 79 (which was, in turn, subsequently revoked and replaced by Direction 90), the appellant argues that Direction 65 continued to govern the Tribunal's decision in his case over three years after that revocation had occurred. His argument appears to have three steps:

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23 See generally 1998 Explanatory Memorandum at [30]; Commonwealth, *Parliamentary Debates*, Senate, 11 November 1998 at 60 (Sen Kemp). See also, by analogy, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 44-5 (Mason J).

24 *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 (***AIRC Case***) at [46] (Gaudron, McHugh, Gummow and Hayne JJ).

25 That is particularly true given the Full Federal Court's decision to the contrary in *Jagroop* (2016) 241 FCR 461.

26 See generally *Reid v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 302 FCR 273 at [34]-[36] (the Court); *Rokobatini v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 583 at [9] (Whitlam and Gyles JJ).

(a) *First*, he contends that, upon applying to the Tribunal for review of the delegate's decision, he "accrued" a "right" of a kind that is preserved by s 7(2) of the Acts Interpretation Act.

(b) *Second*, he contends that the revocation of Direction 65 by Direction 79 (and, presumably, the commencement of Direction 90) would, if given effect in his case, have "affected" that accrued right.

(c) *Third*, he contends that Direction 79 does not reveal the contrary intention necessary to exclude the operation of s 7 of the Acts Interpretation Act so as to prevent it from preserving the operation of Direction 65 in his case.

10 24. Each of those steps should be rejected.

The appellant did not accrue any right that engages s 7 of the Acts Interpretation Act

25. The "first step" in applying the statutory and common law principles relied on by the appellant "is to identify the 'right' which the appellant says was acquired or accrued" upon filing his application for review.[27] That is because, absent such a right (or correlative "obligation … incurred"), those principles are simply not engaged.[28]

26. The appellant described the "accrued" right he relied on in different ways in the courts below: see PJ [19(a)] (**CAB 86**); FC [43] (**CAB 116**). In this Court, he appears to contend that he "accrued" two kinds of right in applying for review:

(a) *First*, he claims he became "entitled to … the potential exercise of a discretion in
20 [his] favour". This is variously described as a "conditional", "contingent" or "inchoate" right, in the sense that it was "conditional on satisfying the Tribunal to exercise its discretion favourably to the appellant". It is nevertheless said to be an "accrued right" attracting the operation of s 7 of the Acts Interpretation Act. These propositions emerge most clearly from **AS [44]**, **[46]-[47]**, **[49]-[50]**, **[68]**.

(b) *Second*, he claims he accrued a right to a review of the delegate's decision under s 500(1) of the Act and s 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), being "a right to a review conducted in compliance with Direction 65;

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27 *Esber* (1992) 174 CLR 430 at 439 (Mason CJ, Deane, Toohey and Gaudron JJ).
28 Acts Interpretation Act, ss 7(2)(c) and (e); *AIRC Case* (2002) 213 CLR 485 at [39].

the direction that was in force at the time of the application" to the Tribunal. This emerges most clearly from **AS [2(a)(i)], [54]-[57], [62], [72]**.

27. For the following reasons, the appellant did not accrued rights of either kind upon applying for review.

Authority

28. The appellant's submissions that, upon applying for review, he accrued a contingent right to a favourable exercise of the discretion in s 501, or a right to compliance with the direction in force at the time of that application, are contrary to authority. A long series of cases establish that an applicant for the exercise of a broadly framed discretion does not, in making that application, acquire or accrue rights of either kind.[29] The Minister relies on the whole of that stream of authority, but it suffices to address two foundational cases, before turning to *Esber* and other more recent decisions of this Court.

29. The Privy Council's decision in *Ho Po Sang* concerned an equivalent to s 7 of the Acts Interpretation Act,[30] and has been applied and referred to with approval numerous times in Australia, including in this Court.[31] The issue was whether a lessee had acquired or

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29 See, eg, *Director of Public Works v Ho Po Sang* [1961] AC 901 (***Ho Po Sang***) at 920-922 (Lord Morris); *Robertson v City of Nunawading* [1973] VR 819 at 820, 825-826 (the Court); *Ungar v City of Malvern* [1979] VR 259 (***Ungar***) at 264-266 (the Court); *JR Exports Pty Ltd v Australian Trade Commission* (1987) 14 FCR 161 at 163-165 (Fox J), 166 (Sheppard J); *NSW Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act* (1988) 14 NSWLR 685 (***NSW Aboriginal Land Council***) at 691-696 (Hope JA; Samuels and Clarke JJA agreeing); *Azevedo v Secretary, Department of Primary Industries and Energy* (1992) 35 FCR 284 (***Azevedo***) at 300 (French J); *Yao v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 583 (***Yao***) at 588-590 (Black CJ and Sundberg J), 596 (Davies J); *Kentlee Pty Ltd v Prince Consort Pty Ltd* [1998] 1 Qd R 162 (***Kentlee***) at 165, 177-181 (Fitzgerald P), 187, 189 (Dowsett J); *Durrisdeer Pty Ltd v Nordale Management Pty Ltd* [1998] 1 Qd R 138 (***Durrisdeer***) at 146-148 (Ambrose J; Pincus and McPherson JJA agreeing); *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340 (***Durham Holdings***) at [27]-[28] (Spigelman CJ; Handley and Giles JJA agreeing); *Byron Shire Council v Greenfields Mountain* (1999) 105 LGERA 445 at [21] (Fitzgerald JA; Mason P and Priestley JA agreeing); *Hicks v Aboriginal Legal Service of Western Australia (Inc)* (2001) 108 FCR 589 at [52]-[62] (Lee, Lindgren and Katz JJ); *Colley v Futurebrand FHA Pty Ltd* (2005) 63 NSWLR 291 at [22] (Handley JA; Giles JA agreeing); *R v Verdins* [2007] VSCA 10 at [46], [49] (Smith AJA; Buchanan and Ashley JJA agreeing); *Australand Corporation (Qld) Pty Ltd v Johnson* [2008] 1 Qd R 203 at [32]; *State of Western Australia v Richards* (2008) 37 WAR 229 (***Richards***) at [40] (Steytler P; Martin CJ, McClure and Buss JJA relevantly agreeing); *Fitzpatrick v Lifetime Support Authority* (2019) 134 SASR 305 at [83] (Stanley J; Kourakis CJ and Peek J agreeing).

30 Section 10 of the *Interpretation Ordinance* (HK), extracted in [1961] AC 901 at 909.

31 See the cases cited in fn 29 above; *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 577 (Taylor J), 583 (Windeyer J); *Mathieson v Burton* (1971) 124 CLR 1 (***Mathieson***) at 23 (Gibbs J); *Carr v Finance Corporation of Australia Ltd (No 2)* (1982) 150 CLR 139 at 152 (Mason, Murphy and Wilson JJ); *Esber* (1992) 174 CLR 430 at 440 (Mason CJ, Deane, Toohey and Gaudron JJ), 447-448 (Brennan J); *AIRC Case* (2002) 213 CLR 485 at [100], [137], [139] (Kirby J).

accrued any rights preserved by that section in applying to the Director of Public Works for a 'rebuilding certificate' and, following an appeal by his tenants, cross-petitioning the Governor for the grant of such a certificate (thereby invoking, in effect, a merits review mechanism). The Governor was required to consider the cross-petition, and could direct that a rebuilding certificate be given or not "in his absolute discretion".[32] The lessee claimed that by these steps he had accrued rights (albeit "subject … to the risk that these rights might be defeated"): (i) to have his application and cross-petition determined under the provisions in force at the time; and (ii) in the circumstances, to a certificate.[33]

30. Lord Morris, for the Privy Council, rejected these submissions. The lessee did not have a "right" to a certificate, "even of a contingent nature".[34] Rather, "[h]e had no more than a *hope*" of a favourable decision.[35] As Lord Morris explained:[36]

> On [the date of the repeal] the lessee was quite unable to know whether or not he would be given a rebuilding certificate, and until the petitions and cross-petition were taken into consideration by the Governor in Council no one could know. The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even though he may have had grounds for optimism as to his prospects.

31. It also followed that, even though the lessee was, prior to the repeal, "entitled to have the petitions and cross-petition considered" (compare **AS [44]**), this did not attract the protection afforded to an "accrued right"[37] or to an "investigation, legal proceeding or remedy" by the equivalents to ss 7(2)(c) and (e). As Lord Morris observed: "paragraph (e) … does not and cannot operate unless there is a [right accrued or acquired under a repealed enactment] as contemplated in paragraph (c)".[38] Paragraph (e) therefore manifested a "distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given": "[u]pon a repeal the former is preserved" while "[t]he latter is not."[39]

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32 The relevant provisions are set out in *Ho Po Sang* [1961] AC 901 at 904-905.
33 *Ho Po Sang* [1961] AC 901 at 914, 918 (Foster QC), 919-920 (Lord Morris).
34 See *Ho Po Sang* [1961] AC 901 at 924 (Lord Morris).
35 *Ho Po Sang* [1961] AC 901 at 920-921, 924 (Lord Morris) (original emphasis).
36 *Ho Po Sang* [1961] AC 901 at 921-922 (Lord Morris).
37 See *Ho Po Sang* [1961] AC 901 at 921 (Lord Morris).
38 *Ho Po Sang* [1961] AC 901 at 922 (Lord Morris). See also *Esber* (1992) 174 CLR 430 at 439 (Mason CJ, Deane, Toohey and Gaudron JJ).
39 *Ho Po Sang* [1961] AC 901 at 922 (Lord Morris). See also at 926.

32. The same distinction persists in s 7(2)(e). By that paragraph, Parliament itself has identified the kinds of "investigation, legal proceeding or remedy" it should be taken to preserve despite a repeal or amendment – relevantly, those which are "in respect of" a "right" or "obligation" "acquired, accrued or incurred".[40] Implicitly, and consistently with *Ho Po Sang*, Parliament should not be presumed to intend to preserve other kinds of investigations, proceedings or remedies – including proceedings "to decide whether some right should or should not be given" in the exercise of a discretionary power.

33. *Ho Po Sang* may be contrasted with *NSW Aboriginal Land Council*. There, the Council made a land rights claim, which the Minister was required to grant if satisfied of various matters as at the time of the claim, and to refuse if not so satisfied.[41] The Minister initially refused the claim, and the Council brought a statutory appeal (again, in effect, a merits review mechanism). The statute was then amended, and the Minister purported to approve the claim in accordance with the amended provisions. The issue was whether the Council had acquired or accrued a right to the application of the prior law upon making its claim and bringing its appeal.[42]

34. Justice Hope (Samuels and Clarke JJA agreeing) held that, upon making its claim, the Council acquired or accrued "a right to have the claim granted". That was because the Minister "had no discretion in the matter; he was simply required to look at a state of facts existing at the date of the claim".[43] "[I]f the facts establish that the conditions … are satisfied the Minister [wa]s then bound to grant the claim".[44] "If the Minister wrongly refused to grant it, [the Council] had the right to have the court grant it" on appeal.[45] Thus, although "[t]he right might be said to be a conditional one, namely, conditional upon the relevant facts being established, … the right was nonetheless a right because it was conditional." It was not merely an entitlement, as in *Ho Po Sang*, "to set in train an

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40 The concluding words of s 7(2) clarify that "[a]ny such … legal proceeding or remedy may be instituted, continued or enforced, … as if the affected Act … had not been repealed or amended." See also *Esber* (1992) 174 CLR 430 at 439 (Mason CJ, Deane, Toohey and Gaudron JJ).

41 By s 36(5) of the *Aboriginal Land Rights Act 1983* (NSW), extracted in *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 689.

42 *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 691 (Hope JA).

43 *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 691-692 (Hope JA).

44 *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 694 (Hope JA).

45 *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 694 (Hope JA). Earlier, Hope JA had explained that although the power to order a transfer appeared to be discretionary, the Court would be obliged to exercise that power if satisfied the conditions for allowing the claim were met: see at 692-693.

application for a grant which the Minister or on appeal, the court might, as a matter of discretion, grant or refuse."[46] The application of prior law was thus also preserved.[47]

35. The distinction established in these cases, which was applied in the numerous cases following them, is between: (i) an application for a decision-maker to create or alter rights by exercising a discretionary power; and (ii) an application for a decision-maker to grant a statutory benefit which the applicant is required to be granted in prescribed circumstances (usually upon certain facts being accepted by the decision-maker). By making an application of the latter kind, a person acquires or accrues a right in the sense protected by s 7(2)(c) of the Acts Interpretation Act, albeit one that is conditional on the prescribed circumstances being established. The continuation of such an application, once made, therefore attracts the protection in s 7(2)(e) of that Act. But the making of an application for the exercise of a discretionary power does not give rise to a right within s 7(2)(c), and its continuation therefore does not attract the protection in s 7(2)(e).

36. *Esber* did not alter this distinction, but rather applied it in a particular context.[48] "[T]he 'accrued right' at stake in *Esber* was concerned with the continuation of an application for review … and the determination of Mr Esber's entitlement to redeem his rights to further payment of compensation under" a 1971 Act.[49] Under s 49 of the 1971 Act, that entitlement depended primarily upon Mr Esber meeting certain conditions, and upon a calculation of the value of his existing entitlements.[50] The majority did not expressly decide whether s 49 conferred a residual discretion to refuse a request meeting those conditions, this not being "an easy question to answer", but evidently contemplated that the reasons which might found the exercise of any such discretion were limited.[51] Following Mr Esber's application to the Tribunal for review of a refusal to grant his request under s 49, the 1971 Act was repealed and replaced by a 1988 Act.

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46 *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 693-694 (Hope JA).
47 *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 697 (Hope JA).
48 As Fitzgerald P concluded after careful analysis in *Kentlee* [1998] 1 Qd R 162 at 167-169, 177, 181; and see 189 (Dowsett J). See also *AIRC Case* (2002) 213 CLR 485 at [136] (Kirby J), [157] (Callinan J); *Lee v Secretary, Department of Social Security* (1996) 68 FCR 491 (***Lee***) at 496-500 (Davies J); cf at 503-505 (Cooper J), 515 (Moore J). This question was averted to, but not decided, in *Durham Holdings* (1999) 47 NSWLR 340 at [28] (Spigelman CJ; Handley and Giles JJA agreeing).
49 *AIRC Case* (2002) 213 CLR 485 at [50] (Gaudron, McHugh, Gummow and Hayne JJ).
50 Extracted in *Esber* (1992) 174 CLR 430 at 434 (Mason CJ, Deane, Toohey and Gaudron JJ).
51 *Esber* (1992) 174 CLR 430 at 439 (Mason CJ, Deane, Toohey and Gaudron JJ). See also *Kentlee* [1998] 1 Qd R 162 at 167-169 (Fitzgerald P).

37. The majority held that transitional provisions required Mr Esber's Tribunal proceedings to be continued in accordance with the 1971 Act.[52] Their Honours' reasoning as to Mr Esber's accrued rights, which was deployed as "support for the construction … already reached",[53] was therefore obiter.[54] That reasoning nevertheless reflects and applies the distinction drawn in *Ho Po Sang* and *NSW Aboriginal Land Council*.

38. Adopting language similar to Hope JA's judgment in the latter case, the majority described Mr Esber's accrued right as one "to have his claim to redemption determined in his favour if the delegate had wrongly refused his claim".[55] Indeed, the majority expressly "borrow[ed]" from that judgment in describing Mr Esber's right as "conditional upon the relevant facts being established",[56] and referred to *Ho Po Sang* with apparent approval in describing it as "inchoate or contingent".[57] In doing so, their Honours can be seen to have embraced the distinction drawn in *Ho Po Sang* and *NSW Aboriginal Land Council*, but to have found that the Tribunal's decision-making power was sufficiently circumscribed as to give Mr Esber a right to redemption that was "contingent" in the sense discussed in those cases.[58] That is how Mr Esber's accrued right has since been understood by members of this Court.[59]

39. The *AIRC Case* illustrates the continuing relevance, after *Esber*, of the distinction between discretionary and non-discretionary powers. There, the respondent unions claimed that "they had acquired or accrued the 'right' to have their [industrial] dispute arbitrated in accordance with" the law in force when the Commission became obliged to "deal with [the] dispute … by arbitration".[60] In rejecting that submission, the majority in this Court explained that the arbitrator was not empowered to determine "existing legal

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52 *Esber* (1992) 174 CLR 430 at 436-438 (Mason CJ, Deane, Toohey and Gaudron JJ).
53 *Esber* (1992) 174 CLR 430 at 438 (Mason CJ, Deane, Toohey and Gaudron JJ).
54 See also *AIRC Case* (2002) 213 CLR 485 at [49] (Gaudron, McHugh, Gummow and Hayne JJ).
55 *Esber* (1992) 174 CLR 430 at 440 (Mason CJ, Deane, Toohey and Gaudron JJ) (emphasis added).
56 *Esber* (1992) 174 CLR 430 at 440 (Mason CJ, Deane, Toohey and Gaudron JJ), applying *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 694 (Hope JA). See also *Kentlee* [1998] 1 Qd R 162 at 168 (Fitzgerald P) and, similarly, *Azevedo* (1992) 35 FCR 284 at 300 (French J).
57 *Esber* (1992) 174 CLR 430 at 440, fn 21 (Mason CJ, Deane, Toohey and Gaudron JJ).
58 Compare, eg, *Ho Po Sang* [1961] AC 901 at 924 and *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 694 (Hope JA). Indeed, the majority adopted the "inchoate or contingent" language from *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541 at 552. In that passage, Lord Evershed "accept[ed] and adopt[ed]" Lord Morris's expression of the distinction in *Ho Po Sang*. The same language was relied on by Hope JA in *NSW Aboriginal Land Council* in relation to this very point: see at 696.
59 See especially *AIRC Case* (2002) 213 CLR 485 at [136] (Kirby J), [157] (Callinan J).
60 *AIRC Case* (2002) 213 CLR 485 at [36], [39]-[40] (Gaudron, McHugh, Gummow and Hayne JJ).

rights and liabilities" – which would "read[ily] accomodat[e] notions of accrued rights"[61] – but rather "the conditions to prevail in the future between the parties to the dispute", which were then given "the character of legal rights and obligations".[62] That being so, "[t]he requirement … that the arbitrator hear and determine a matter according to law allowed for changes in the content of that law".[63] In his separate reasons, Kirby J expressly endorsed the distinction drawn in *Ho Po Sang*.[64]

40. This Court's decision in *Minogue* also reflects that distinction. Mr Minogue submitted he had an accrued right to have his parole application decided in accordance with the law in force when his non-parole period expired or when he applied for parole.[65] The majority held that "no question of an accrued right" of this kind arose, such that "[h]is reliance on [the equivalent to s 7(2)] and cases such as *Esber* … is misplaced".[66] That conclusion was reached by reference to the *AIRC Case*, and to passages of *Crump* explaining that parole statutes "may be expected to change from time to time, to reflect changes in government policy and practice",[67] such that parole was to be assessed "in the light of whatever the legislation requires … when the application … comes to be determined."[68]

41. The cases relied on by the appellant do not assist him. *Cohen* concerned the repeal of a visa criterion specified in regulations, which the parties agreed continued to govern Mr Cohen's visa application.[69] It was central to McHugh J's acceptance of that agreement that s 65(1) of the Migration Act imposed a duty on the Minister to grant a visa if satisfied of prescribed criteria,[70] which was distinguished in a passage adopted by his Honour from "a power involving the exercise of a discretion".[71] *Keeley* was a case,

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61 *AIRC Case* (2002) 213 CLR 485 at [44] (Gaudron, McHugh, Gummow and Hayne JJ).

62 *AIRC Case* (2002) 213 CLR 485 at [45] (Gaudron, McHugh, Gummow and Hayne JJ). In *Ho Po Sang* terms, the arbitrator was conducting an investigation to decide what rights should or should not be given, not one as to an accrued right. Thus, neither ss 7(2)(c) nor (e) were engaged.

63 *AIRC Case* (2002) 213 CLR 485 at [46] (Gaudron, McHugh, Gummow and Hayne JJ).

64 *AIRC Case* (2002) 213 CLR 485 at [137]-[138] (Kirby J). See also at [157] (Callinan J).

65 *Minogue v Victoria* (2018) 264 CLR 252 (***Minogue***) at [14], [18].

66 *Minogue* (2018) 264 CLR 252 at [21] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ). See also at [105] (Gordon J).

67 *Minogue* (2018) 264 CLR 252 at [20] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ). See also at [107] (Gordon J); *Crump v New South Wales* (2012) 247 CLR 1 at [28], [36]-[37] (French CJ), [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Baker v The Queen* (2004) 223 CLR 513 at [7] (Gleeson CJ).

68 *Minogue* (2018) 264 CLR 252 at [20] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

69 *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 75 ALJR 542 (***Cohen***) at [24], [29].

70 *Cohen* (2001) 75 ALJR 542 at [28].

71 *Cohen* (2001) 75 ALJR 542 at [28], quoting from *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [41] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

like *Cohen* (and *Esber*) where the Tribunal was required to reach its decision – there, to pay a war widow's pension – by reference to detailed prescribed conditions rather than by exercising a discretion.[72] *Yao* and *Handa* both involved an application for judicial review,[73] which turns on establishing that a decision involved legal error when made.

42. The result in *Lee* – that an applicant for review of a discretionary waiver acquired a right to determination of that application in accordance with the law at the time of the application – is contrary to the weight of intermediate appellate authority identified above.[74] As Davies J correctly recognised in dissent, the discretionary nature of the waiver power meant that "the subject of Ms Lee's claims before the Tribunal was not 'a right acquired or accrued' in the sense explained by the majority in *Esber*".[75]

43. It is then necessary to explain why the principles outlined above, applied in the statutory context relevant to this appeal, require rejection of the appellant's submissions.

Appellant did not accrue a "contingent" right to a favourable decision

44. The appellant did not, in the courts below, clearly assert that he had accrued a "contingent" or "inchoate" right to a favourable decision: cf, eg, FC [43] (**CAB 120**). The Full Court's reasoning, insofar as it touched on that topic, was confined to explaining why the appellant's reliance on *Esber* and *Keeley* was misplaced: FC [73]-[78] (**CAB 129-130**). That reasoning was correct, and entirely consistent with the principles set out above. The application of those principles require rejection of the claimed right.

45. The appellant's application under s 500(1)(b) required the Tribunal to decide whether, as at the date of its decision, the correct and preferable decision was to refuse his application for a visa in the exercise of the discretion conferred by s 501(1). That is a discretionary power of obvious breadth. As is illustrated by the terms of Directions 65, 79 and 90, the exercise of that discretion will often turn on matters of policy (as was likewise true in

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72 See *Repatriation Commission v Keeley* (2000) 98 FCR 108 at [4]-[12] (Lee and Cooper JJ).

73 See *Yao* (1996) 69 FCR 583 at 585-586, 588-590 (Black CJ and Sundberg J), 595-596 (Davies J); *Handa v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 95 at [1], [4], [7]. Removal of judicial review jurisdiction also raises different issues: see *Minogue* (2018) 264 CLR 252 at [21] fn 15; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1; *Minister for Home Affairs v DLZ18* (2020) 270 CLR 372 at [27] (the Court).

74 See cases cited in fn 29 above. The correctness of *Lee* was doubted in *Yao* (1996) 69 FCR 583 at 90 (Black CJ and Sundberg J), although it was unnecessary to decide the point.

75 *Lee* (1996) 68 FCR 491 at 497 (Davies J). See also at 499.

Minogue). And, as in the *AIRC Case*, it is the Tribunal's decision about how to exercise that discretion that will govern whether the applicant is refused a visa,[76] not any rights accrued (explicitly or implicitly) when the application to the Tribunal is made.

46. In light of the above, in making his application the appellant did not accrue or acquire a right to a favourable decision in the sense preserved by s 7(2)(c). At best, he had "a hope or expectation that a right will be created" by the Tribunal's decision, which does not amount to an accrued right within s 7(2)(c).[77] The appellant's submission that he accrued a "conditional right" to a favourable decision (that is, a right "conditional on satisfying the Tribunal to exercise its discretion favourably to the appellant" (**AS [68]**)) does not use "conditional" in the sense contemplated in *Esber*, *AIRC* and the other authorities discussed above, and must be rejected. If accepted, it would collapse the distinction recognised in those cases between discretionary and non-discretionary powers.

Appellant did not accrue a right to compliance with Direction 65

47. In *Jagroop*,[78] Kenny and Mortimer JJ (Dowsett J agreeing) squarely rejected the argument that an applicant to the Tribunal accrued a right to have the Tribunal decide the review in compliance with the direction that was in force when the application to the Tribunal was made. The Full Court's reasons for rejecting that argument were correct. *Nathanson v Minister for Home Affairs*[79] did not "leave open" the contrary view: FC [97] (**CAB 135**); cf **AS [27]**. It simply recorded (without mentioning *Jagroop*) that it had not been suggested that the appellant had an accrued right to consideration of his application to the Tribunal in accordance with an earlier Direction. The Full Court below was correct to follow *Jagroop*: FC [9] (**CAB 112**). That is for four distinct reasons.

48. *First*, the appellant's argument that he accrued a right to have the Tribunal apply the direction that was in force when the application to the Tribunal was made is inconsistent with the proper construction of s 499(2A). That section, which applied directly to the

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76 See, by analogy, *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [70] (Gageler, Keane and Nettle JJ).

77 *Ho Po Sang* [1961] AC 901 at 920-922 (Lord Morris); *Mathieson* (1971) 124 CLR 1 at 23 (Gibbs J); *Ungar* [1979] VR 259 at 265-266 (the Court); *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 694, 696 (Hope JA; Samuels and Clarke JJA agreeing); *Richards* (2008) 37 WAR 229 at [40] (Steyer P; Martin CJ, McClure and Buss JJA agreeing); *Durrisdeer* [1998] 1 Qd R 138 at 146-147 (Ambrose J; Pincus and McPherson JJA agreeing).

78 *Jagroop* (2016) 241 FCR 461 at [61], [80].

79 (2022) 276 CLR 80 at [9] (Kiefel CJ, Keane and Gleeson JJ).

Tribunal, required the Tribunal to comply with a direction that is in force at the time when the Tribunal made its decision.[80] That is the argument addressed above in paragraphs 15 to 19. It provides a sufficient basis to dispose of the appeal.

49. *Second*, and in any event, the appellant's argument fails at the level of principle. Section 7(2) distinguishes, as the authorities outlined above emphasise, between rights (s 7(2)(c)), and the mechanisms for their enforcement (s 7(2)(e)). An "investigation, legal proceeding or remedy" to which the latter paragraph applies is protected from repeal only if it is "in respect of" a right accrued under s 7(2)(c). But, for the reasons set out in paragraphs 44 to 46 above, the appellant's Tribunal proceeding was not in respect of an accrued right (contingent or otherwise). The proceeding was, rather, one "to decide whether some right should or should not be given". A proceeding of that kind has never attracted the operation of s 7(2)(e).[81] It follows, as it did in *Ho Po Sang*, that s 7(2)(e) would not operate to preserve the application of prior law in the appellant's Tribunal proceeding, had that law been changed. A priori, s 7(2)(e) did not preserve the application of Direction 65. To the extent the applicant suggests that a "right of review" can engage s 7(2)(c) independently of s 7(2)(e) (**AS [49]**, **[54]**), that confuses the right with the remedy, and ignores the clear distinction drawn between the two paragraphs.[82]

50. *Third*, there is a disconnect between the right asserted and the provisions and principles the appellant invokes. He identifies the relevant "accrued right" as arising under s 500(1) of the Migration Act and s 25 of the AAT Act: **AS [54]-[57]**, **[62]**. When framed in that way, as was pointed out both in *Jagroop* and in the Full Court below, "the source of the right articulated by the applicant is not the Direction".[83] That is significant because the terms of s 7(2)(c) of the Acts Interpretation Act provide (relevantly) that "[i]f an Act, or an instrument under an Act … repeals or amends an Act (the ***affected Act***) … then the repeal or amendment does not affect any right … accrued … under the affected Act". Thus, s 7(2) has nothing to say about the asserted effect of the repeal of Direction 65 on a "right" that is said to accrue under statutory provisions that have been neither amended nor repealed. Yet the appellant does not contend that Directions 79 or 90 repealed or

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80 *Jagroop* (2016) 241 FCR 461 at [61] (Kenny and Mortimer JJ; Dowsett J agreeing); FC [40] (**CAB 119**).

81 *Ho Po Sang* [1961] AC 901 at 922, 926 (Lord Morris); *NSW Aboriginal Land Council* (1988) 14 NSWLR 685 at 693-694 (Hope JA; Samuels and Clarke JJA agreeing). See similarly *AIRC Case* (2002) 213 CLR 485 at [44]-[45], [50] (Gaudron, McHugh, Gummow and Hayne JJ).

82 Cf also, eg, *Esber* (1992) 174 CLR 430 at 439 (Mason CJ, Deane, Toohey and Gaudron JJ).

83 *Jagroop* (2016) 241 FCR 461 at [61] (Kenny and Mortimer JJ); FC [49]-[50] (**CAB 121-122**).

amended s 500 (or s 499) of the Migration Act or s 25 of the AAT Act, even in the extended sense provided for in s 7(3) of the Acts Interpretation Act. His argument entirely fails to connect the right upon which he relies to the language of s 7(2) that is said to protect that right.

51. The application of s 7 to the construction of statutory instruments by s 46(1)(a) of the Acts Interpretation Act takes the appellant no further. In that operation s 7(2) can only apply where the relevant right accrued under the affected instrument itself – ie, the instrument that is repealed or amended. But nowhere in the appellant's submissions does he suggest that he accrued any relevant rights under Direction 65 itself.[84] That is not, and has never been, the appellant's case: cf FC [43], [48]-[49] (**CAB 120-121**).

52. The above submission does not "leverage[] a purported gap in the protection offered by the *Acts Interpretation Act* where an accrued right is sourced in a *statute* and [sic] but is affected by the repeal of an *instrument*": cf **AS [64]**. It simply points out that, as the text of s 7(2) makes clear, that provision is concerned only with the effect of the repeal or amendment of the Act under which an accrued right arises. In any case, the purported "gap in the protection" to which the appellant refers is illusory. It is trite that, ordinarily, subordinate instruments may not be inconsistent with either their empowering statute[85] or other statutes.[86] Parliament may expressly empower the executive government to make instruments that amend primary legislation – by so-called Henry VIII clauses[87] – in which case s 7(2) would in terms protect rights accrued under the legislation from such an amendment. But there can be no suggestion Parliament has done so here. Section 499(2) expressly provides that s 499(1) does not empower the Minister to give directions that would be inconsistent with the Migration Act.[88] That being so, if the appellant had accrued any rights under statute, those rights could not be amended or

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84 That is so despite the appellant's undisputed submission that rights accrued under an instrument may be preserved notwithstanding the repeal of that instrument: **AS [42]**.

85 See *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [54] (French CJ).

86 See, eg, *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588 (Dixon J); *Stevens v Perrett* (1935) 53 CLR 449.

87 See, eg, *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 (***Goudappel***) at [31] (French CJ, Crennan, Kiefel and Keane JJ).

88 See, eg, *Price v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 301 FCR 484 at [71] (the Court); *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 370 at [19] (the Court); *Singh v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 296 FCR 582 at [23] (Mortimer J; Raper J agreeing).

repealed (and thereby "affected") by a direction under s 499. There would be no need for s 7 of the Acts Interpretation Act to apply, and no "gap" in its coverage.

53. *Fourth*, and finally, the appellant's claimed accrued right gives rise to several illogicalities:[89]

(a) *First*, it is a right to have the Direction to be applied by the Tribunal fixed at the time of the application to the Tribunal, despite the fact that the Tribunal is standing in the shoes of a delegate who is bound by the Direction that is in force when the delegate's decision is made: FC [68]-[72] (**CAB 126-128**).

(b) *Second*, the Tribunal was empowered under s 43(1)(c)(ii) of the AAT Act[90] to set aside the delegate's decision and remit the matter to the delegate with a particular direction or recommendation. Had that occurred the delegate would then have been required to apply a different direction to Direction 65 (see FC [128] (**CAB 144**)).

(c) *Third*, an applicant's character is to be assessed as at the date of the Tribunal's decision, but it would require an out-of-date Direction to be applied to any new offending which has occurred after the date of that Direction.

(d) *Fourth*, it would be a "right" that nonetheless does not prevent the Tribunal from having regard to, and giving weight to, the substance of the new matters in the current Direction as a matter of discretion, evidence or submission by the Minister.

Alternatively, Direction 79 manifested a contrary intention to the operation of s 7(2)

54. Even if the appellant did accrue rights which are capable of being affected by the revocation of Direction 65 by Direction 79, so as to engage s 7(2) of the Acts Interpretation Act, the preservation of such rights by s 7(2) is subject to a contrary intention. For the following reasons, Direction 79 manifested such a contrary intention.

55. The ordinary rules of statutory construction apply to the discernment of a contrary intention.[91] A provision does not therefore need to affect accrued rights expressly. It

89 *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642.
90 Now found in *Administrative Review Tribunal Act 2024* (Cth) s 105(c)(ii).
91 *Goudappel* (2014) 254 CLR 1 at [28] (French CJ, Crennan, Kiefel and Keane JJ).

need only appear "clearly" or "plainly" from the provision's text or context that it is designed to operate in a manner inconsistent with such a right.[92]

56. ***Text:*** Paragraph 3 of Direction 79 states that Direction 65 is "revoked with effect from the date this Direction commences", being 28 February 2019 (as is specified in para 2). That unambiguous text points against Direction 65 having any ongoing operation after 28 February 2019. As Gleeson CJ said in the *AIRC Case*,[93] "[t]he purpose of the *Acts Interpretation Act* is to resolve uncertainties about legislative intention; not to create them."

57. The conclusion that, from 28 February 2019, all decisions involving s 501 were intended to apply Direction 79 is reinforced by the fact that Direction 79 sets out a single set of principles and considerations which apply to all "decision-makers", that term being defined to include both delegates and the Tribunal: **ABFM 87**. This indicates that Direction 79 was designed to have a consistent application and operation with respect to those persons or bodies. That points against acceptance of the appellant's argument, which would require the Tribunal to apply different directions when making decisions under s 501 on the same date, the difference depending solely on the date on which the application for review was filed.

58. ***Context:*** Part of the context for Direction 79 is the Full Federal Court's decision in *Jagroop*,[94] which authoritatively determined that an applicant for review did not accrue any right to have the review conducted in accordance with the direction in force at the time when the application for review was made. That was the state of the law when Direction 79 was given: **ABFM 56**. In those circumstances, the Full Court was correct to observe that it is "probable" that Direction 79 (and the three subsequent Directions) "was issued on the understanding, and with the intention, that the legal effect of the Directions would be as described in *Jagroop*, and thus that each new Direction would apply to all Tribunal decisions made after its commencement": FC [65] (**CAB 126**).

59. ***Purpose:*** It would frustrate the purposes of s 499, being to ensure the consistent application of government policy in decision-making, were Direction 79 to be construed as leaving room for the operation of Direction 65 in some cases after it ceased to be in

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92 *Goudappel* (2014) 254 CLR 1 at [52] (Gageler J).
93 *AIRC Case* (2002) 213 CLR 485 at [14] (Gaudron, McHugh, Gummow and Hayne JJ).
94 (2016) 241 FCR 461.

force. Tribunals exercising the residual discretion under s 501 on the same date would be required to consider different matters, and/or to accord different weight to the same matters, depending on the date of the application for review. That would be so even if that required the Tribunal to apply a policy position that had changed in the period since the application for review was made, including as a result of a change in government. Further, as noted above, were the Tribunal to remit a matter to the delegate,[95] the delegate may be required by s 499(2A) to apply a different direction.

60. Finally, Direction 79 itself states that the principles it contains are "of critical importance in furthering" the objective of "protecting the Australian community from harm as a result of criminal activity or other serious conduct": [6.2(1)] (**ABFM 58**). The appellant's offending illustrates the point. Indeed, Direction 90 highlighted the "inherent nature of … family violence" as "so serious that even strong countervailing considerations may be insufficient" to justify not refusing a visa: **ABFM 92**. The Court should not readily impute to the Ministers who gave Directions 79 and 90 the intention that these protective principles would not be taken into account in deciding whether to refuse to grant a visa to a person to whom they applied in their terms, simply because that person sought review of the delegate's decision before the direction was given.

PART VI: ORDERS SOUGHT

61. For the foregoing reasons, the appeal should be dismissed with costs.

PART VII:

62. Up to 2.25 hours will be required to present the First Respondent's oral argument.

Dated: 20 February 2025

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[95] Under AAT Act, ss 43(1)(c)(ii). Indeed, a change in direction could itself justify the Tribunal remitting the decision to the delegate under s 42D(1) without proceeding to review it.

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

ANNEXURE TO FIRST RESPONDENT'S SUBMISSIONS

No	Description	Version	Provisions	Reasons for providing this version	Applicable dates (to what events, if any, this version applies)
1.	*Aboriginal Land Rights Act 1983* (NSW)	n/a	s 36	Considered in *NSW Aboriginal Land Council* (1988) 14 NSWLR 685	As at dates relevant to decision in that case
2.	*Acts Interpretation Act 1901* (Cth)	Version 36 (20 December 2018 to 11 August 2023)	ss 2, 7, 46	Relevant to construction of Direction 79	As at 20 December 2018 (date Direction 79 given)
3.	*Administrative Appeals Tribunal Act 1975* (Cth)	Version 51 (17 August 2022 to 30 June 2023)	ss 25, 42D. 43	Governed Tribunal's review	As at 22 October 2022 (date of Tribunal's decision)
4.	*Administrative Review Tribunal Act 2024* (Cth)	Version 1 (14 October 2024 to present)	s 105(c)(ii)	By way of illustration	n/a

No	Description	Version	Provisions	Reasons for providing this version	Applicable dates (to what events, if any, this version applies)
5.	*Interpretation Ordinance* (HK)	n/a	s 10	Considered in *Ho Po Sang* [1961] AC 901	As at dates relevant to decision in that case
6.	*Legislation Act 2003* (Cth)	Version 38 (26 October 2018 to 23 February 2019)	s 13(1)(a)	If relevant to construction of Direction 79	As at 20 December 2018 (date Direction 79 given)
7.	*Migration Act 1958* (Cth)	Version 152 (1 September 2021 to 16 February 2023)	ss 65, 496, 499, 500, 501	s 65 considered in *Cohen* (2001) 75 ALJR 542; otherwise Governed Tribunal's review	As at 22 October 2022 (date of Tribunal's decision)
8.	*Migration Legislation Amendment Act 1989* (Cth)	As made	s 31	Introduced s 499 (as s 66DD)	n/a
9.	*Compensation (Commonwealth Employees) Act 1971* (Cth)	9 March 1988 to 30 November 1988	s 49	Considered in *Esber* (1992) 174 CLR 430	As at dates relevant to that decision
10.	*Commonwealth Employees' Rehabilitation and Compensation Act 1988* (Cth)	As made	n/a	Considered in *Esber* (1992) 174 CLR 430	As at dates relevant to that decision