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 SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issues on this appeal are:

   (a) whether, on the making of an application, under s 500(1)(b) of the *Migration Act 1958* (Cth) (the **Act**), to the Administrative Appeals **Tribunal** for review of a decision, under s 501(1), of a delegate of the relevant Minister to refuse to grant a visa:

      (i) the appellant accrued a right to have that application for review decided in compliance with the direction given under s 499(1) of the Act applicable at the time of the application to the Tribunal; and/or

      (ii) the Tribunal incurred an obligation to decide that application for review in compliance with the direction given under s 499(1) of the Act applicable at the time of the application to the Tribunal;

   and, if so:

   (b) whether the common law or s 7(2)(c) and (e) of the *Acts Interpretation Act 1901* (Cth), read with s 46(1)(a) of that Act and/or s 13(1) of the *Legislation Act 2003* (Cth), had the consequence that the repeal of the direction applicable at the time of the application to the Tribunal did not affect:

      (i) that right and/or obligation; and/or

      (ii) any legal proceeding in respect of any such right or obligation.

3. The appellant does not understand there to be any contention that, if he did accrue the relevant right or the Tribunal incur the relevant obligation, there might be some contrary intention such as to prevent the operation of the common law or statutory interpretative principle normally preserving such rights and obligations, so that issue (a) will be determinative of the appeal.

Part III: Notice of constitutional matter

4. The appellant does not consider a s 78B notice to be necessary.

Part IV: Reports of the judgments below

5. The judgment of the Full Court of the Federal Court is reported at *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 305 FCR 26 (**J**).

Part V: Facts

6. It is necessary to traverse the procedural history of this matter in some detail, as it provides context for the question for this Court's determination.

Visa application

7. The appellant arrived as an Egyptian national. He arrived in Australia on a student via in 2007, then aged 19 years. (**CAB 9 [6]**) In April 2013, the appellant applied for a Partner (Temporary) (Class UK) visa, which is the visa application the subject of the present proceedings. (**CAB 10 [7(g)], 82 [2(a)]**)

8. On 4 November 2014, a delegate of the Minister refused the application as the delegate was not satisfied that the appellant's marriage was genuine. (**CAB 11 [7(p)], 112 [11]**) The appellant applied to the Tribunal for review of that decision.

9. On 11 May 2016, the Tribunal found that at the time of the Tribunal's decision the appellant was in a genuine and continuing spousal relationship with his sponsor and met the visa criterion concerning that issue. (**CAB 12 [7(w)]**) The Tribunal set aside the delegate's decision and remitted the application to the Minister for determination of the remaining considerations.

10. On 10 August 2017, the Department issued the appellant with a notice of intention to consider refusal of his visa under s 501 of the Act. (**CAB 12 [7(z)], ABFM 4**) The notice enclosed the then applicable ministerial direction issued under s 499(1), which was Direction 65. (**ABFM 6**) Direction 65 was signed on 22 December 2014 and commenced on the day after it was signed. (**ABFM 23**)

11. On 9 November 2017, a delegate of the Minister refused the appellant's visa, purportedly in the exercise of the discretion under s 501(1) of the Act. (**CAB 82 [2(c)], 113 [13], ABFM 12**) That delegate was bound to, and purported to, comply with Direction 65.

12. On 4 December 2017, the appellant was notified of the decision.

First Tribunal decision on character

13. On 8 December 2017,[1] the appellant applied to the Tribunal for review of the delegate's decision. (**CAB 82 [2(d)]**)

14. On 26 February 2018, the Tribunal (constituted by Deputy President Boyle) affirmed the delegate's decision.[2] In doing so, the Tribunal was bound to, and purported to, comply with Direction 65.

15. On 22 March 2018, the appellant lodged with the Federal Court of Australia what purported to be an application to the Federal Court of Australia for judicial review of Deputy President Boyle's decision, although the application was in the form of an affidavit.

16. On 12 November 2018, the Federal Court (Colvin J) dismissed the application for judicial review.[3]

17. On 30 August 2019, after the appellant appealed to the Full Court of the Federal Court, the appeal was allowed, and orders were made – after correction on 3 October 2019 – requiring the Tribunal to "determine the applicant's application … according to law".[4]

Second Tribunal decision on character

18. On 6 November 2020, the Tribunal (constituted by Deputy President Britten-Jones) affirmed the delegate's decision.[5] The Tribunal purported to apply Direction 79. Direction 79 was signed on 20 December 2018 and commenced on 28 February 2019. (**ABFM 56**)

19. On 20 November 2020, the appellant lodged an application for judicial review of Deputy President Britten-Jones' decision in the Federal Court of Australia.

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[1] The application is expressed to be signed on 7 December 2017, but was lodged with the Tribunal on 8 December 2017. (**CAB 82 [2(d)]**)
[2] *Khalil and Minister for Immigration and Border Protection (Migration)* [2018] AATA 311.
[3] *Khalil v Minister for Home Affairs* [2018] FCA 1712.
[4] *Khalil v Minister for Home Affairs* (2019) 271 FCR 326.
[5] *Khalil and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 4592.

20. On 21 September 2021, the Federal Court (Murphy J) dismissed the application for judicial review.[6]

21. On 3 March 2022, after the appellant appealed to the Full Court of the Federal Court; the appeal was allowed, and orders were made that required the Tribunal to "determine the applicant's application for review according to law".[7]

Third Tribunal decision on character

22. On 26 October 2022, the Tribunal (constituted by Senior Members Tavoularis and Nikolic) affirmed the delegate's decision.[8] (**CAB 5, 14 [12], 83**) It is the decision of Senior Members Tavoularis and Nikolic that is the subject of the present proceedings. In making that decision, the Tribunal purported to apply Direction 90.[9] Direction 90 was signed on 8 March 2021 and commenced on 15 April 2021. (**ABFM 89**)

23. The appellant (then unrepresented) filed an application for judicial review of the decision of Senior Members Tavoularis and Nikolic in the Federal Court. After obtaining pro bono representation pursuant to a referral from the Court registry, the appellant lodged an amended originating application, ground 1 of which relevantly complained that "[t]he Tribunal erred jurisdictionally in failing to comply with Direction 65". (**CAB 74**)

24. With the consent of the parties, the primary judge (Moshinsky J) ordered that "The question whether ground 1 of the amended originating application is established be determined separately from, and in advance of, the other issues in the proceeding."[10] (**CAB 83 [5]**) The primary judge answered that question "No", concluding that he was bound to do so on what he found to be the indistinguishable authority of ***Jagroop*** *v*

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[6] *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1134.
[7] *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26.
[8] *Khalil and Minister for Immigration, Citizenship, and Multicultural Affairs (Migration)* [2022] AATA 3563.
[9] It is noted that the appellant did not contend before Senior Members Tavoularis and Nikolic that Direction 65 applied. However, the Minister did not suggest below that this would be a reason to dismiss a ground of judicial review on this issue: *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1528, [10]. (**CAB 84**)
[10] The balance of the proceeding was stood over pending delivery of this Court's decision in *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 196.

Minister for Immigration and Border Protection (2016) 241 FCR 461.[11] The Court ultimately made orders dismissing the amended originating application. (**CAB 96**)

25. The appellant appealed. The Full Court of the Federal Court dismissed the appeal, not being convinced that *Jagroop* was "plainly wrong" (J [129], see also [1], [2], [9]).[12] (**CAB 144, see also 109, 110, 112**)

26. What the above chronology reveals is that the appellant was entitled to have the review decided in compliance with Direction 65 at the time of his application to the Tribunal and at the time of the Tribunal made its initial "character" decision. It was only because the Tribunal exceeded its jurisdiction in making that decision, and did so again in making the second "character" decision, that the appellant, according to the Courts below, lost that entitlement and his review proceedings were thought to be governed by the less advantageous Direction 79 and then Direction 90.

Part VI: Argument

27. Three members of this Court left open in ***Nathanson*** *v Minister for Home Affairs* (2022) 276 CLR 80 at [9], the question of whether an applicant to the Tribunal for merits review of a decision to refuse a visa (or, as in *Nathanson*, not to revoke the cancellation of a visa) has an accrued right to have the application to the Tribunal determined in compliance with the ministerial direction that applied at the time of the application to the Tribunal.

28. That question now arising squarely for this Court's consideration, the Court should answer it "yes" for the following reasons:

(a) The common law and the *Acts Interpretation Act 1901* (Cth) protects accrued rights (and preserves obligations incurred) from laws and instruments that would otherwise "affect" them;

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[11] *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1528, [34], [38]. (**CAB 91, 92**)

[12] In the Full Court, "[t] he submissions of both parties proceeded on the basis that, if the Tribunal applied Direction 90 when it was required by law to apply Direction 65, that error would be material and would constitute jurisdictional error" J [25]. (**CAB 116**)

(b) A long line of authority illustrates the application of that protection to a person pursuing merits review proceedings of a government decision;

(c) The rationale for the protection is engaged here by reason of the binding, substantive (not procedural) operation of directions given under s 499(1) on review proceedings in the Tribunal;

(d) The Full Court's reasoning to the contrary cannot be accepted.

A. Common law and statutory protections of accrued rights

29. Both the common law and the *Acts Interpretation Act* protect accrued rights. It is necessary to say something about both sources of protection as the judgment below suggests there is a gap in coverage of the *Acts Interpretation Act*.

Common law protection of accrued rights, and related presumption against retrospectivity

30. The common law has long laboured to protect accrued rights from unintentional legislative derogation, and to preserve concomitant liabilities.

31. Shortly before the enactment of the *Acts Interpretation Act*, the common law's protection of accrued rights was expressed as follows:[13]

> Perhaps no rule of construction is more firmly establish than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.

32. The use of the word "retrospective" in that expression of the rule reveals the close relation between the specific rule protecting accrued rights and the more general presumption against retrospectivity. Indeed, Dixon CJ appears to have grouped the two rules together when his Honour spoke of "the rules of interpretation affecting what is so misleadingly called the retrospective operation of statutes".[14] His Honour's classic statement of those rules was in *Murphy v Maxwell*:[15]

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[13] *Re Athlumney; Ex pate Wilson* [1898] 2 QB 547, 551–552 (Wright J).
[14] *Chang Jeeng v Nuffield (Australia) Pty Ltd* (1959) 101 CLR 629, 637 (McTiernan and Windeyer JJ agreeing).
[15] *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).

> The general rule of the common law is that the statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.

33. Other examples can be found of this Court treating the protection of accrued rights as a species of the rule against retrospectivity.[16]

34. Thus, even though there is some looseness in the concept of retrospectivity,[17] it is apparent that the specific rule protecting accrued rights is animated by the same concerns as that which cause the common law to be hostile to retrospective legislation.[18] It is necessary to briefly identify those concerns, not because the presumption against retrospectivity has direct application in this case, but because attention to the values underlying that presumption assists in recognising the rationale for the rule protecting accrued rights, and ultimately demonstrates the rationale for that rule to be engaged here.

35. Three members of the Court in *Australian Education Union v Fair Work Australia* emphasised "the importance of the rationale underlying the common law principles of construction [specifically the presumption of prospectivity]", writing:[19]

> In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations.

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[16] See, eg, *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [44]–[50] (Gageler J).
[17] *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, [26] (French CJ, Crennan and Kiefel JJ). The appellant does not suggest that the presumption against retrospectivity has direct operation in his case; rather, the values underlying that presumption are relied upon by analogy.
[18] It is perhaps notable that in Professor Pearce's work, the rule protecting accrued rights is discussed as a subset, or particular application, of the principles concerning the retrospective operation of legislation: Pearce, *Statutory Interpretation in Australia* (10th ed, 2024) [10.42].
[19] *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, [30] (French CJ, Crennan and Kiefel JJ).

36. Their Honours explained that it was part of the judiciary's "constitutional function" to interpret legislation in such a way as to "mitigate or minimise the effects of the statute, from a date prior to its enactment, upon pre-existing rights and obligations".[20]

37. This articulation of the rationale for the presumption against retrospectivity, and the protection of accrued rights, can be understood to be rooted in considerations of justice. The unjustness of retrospective laws was recognised in the first edition of *Maxwell on the Interpretation of Statutes*.[21] The relevant unjustness of a retrospective law is that "it disappoints the justified expectations of those who, in acting, have relied on the assumption that the legal consequences of their acts will be determined by the known
10 state of the law established at the time of their acts".[22]

38. Insofar as the presumption against retrospectivity and the more specific rule protecting accrued rights are thus understood as rooted in "recognized principles that Parliament would be prima facie expected to respect",[23] they have been recognised to bear a resemblance to the principle of legality.[24]

Statutory protection of accrued rights

39. Statutory protections of accrued rights have been enacted in each Australian jurisdiction.[25] At the Commonwealth level, the relevant provision has existed in the *Acts Interpretation Act* since its inception, initially in s 8 and now in s 7.[26]

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[20] *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, [32] (French CJ, Crennan and Kiefel JJ).
[21] "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation", William Maxwell, *Maxwell on the Interpretation of Statutes* (1st ed, 1875) 190 cited with approval, and explained, in *Doro v Victorian Railways Commissioners* [1960] VR 84, 86 (Adam J).
[22] Hart, *The Concept of Law* (3rd ed, 2012) 276, quoted with approval in *Stephens v The Queen* (2022) 273 CLR 635, [33] (Keane, Gordon, Edelman and Gleeson JJ, Steward J agreeing at [49]). See also *Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557, [49] (Spigelman CJ).
[23] *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 93 (Isaacs J), quoted in *Stephens v The Queen* (2022) 273 CLR 635, [33] (Keane, Gordon, Edelman and Gleeson JJ, Steward J agreeing at [49]).
[24] *Spear v Hallenstein* [2018] VSC 169, [54] (Niall JA). See also *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485, [108] (Kirby J).
[25] Some of the minor differences between the provisions are discussed in Herzfeld and Prince, *Interpretation* (3rd ed, 2024) [9.690].
[26] The history of the Commonwealth and State provisions, and their United Kingdom predecessors, is canvassed in Jacobi, *Interpretation Acts: Origins and Meaning* (2019) chp 15.

40. In its terms, the provision applies only to primary legislation. However, s 46(1)(a) of the *Acts Interpretation Act* operates such that s 7 applies to instruments (other than a legislative instrument, notifiable instrument or a rule of court). Further, s 13(1)(a) of the *Legislation Act 2003* (Cth) has the effect of applying s 7 to legislative and notifiable instruments. As a result, it is unnecessary to determine the vexed question[27] of whether the ministerial directions in this case were *legislative* instruments, as they were plainly instruments to which s 7 of the *Acts Interpretation Act* applied:[28] J [35]. (**CAB 118**)

41. The Commonwealth provision, and its state and territory cognates, have regularly been said to be equivalent to, or to have enacted, the common law principle.[29]

10 42. One feature of s 7 of the *Acts Interpretation Act* should, however, be noted, as it featured in *Jagroop* and was again adverted to in the decision below. Section 7 only protects rights accrued under statute A from being affected by: (a) the amendment or repeal of statute A; or (b) the amendment or repeal of an instrument made under statute A. At least in terms, s 7 does not say anything about whether a right accrued under an *instrument* is protected from potential effect by the amendment or repeal of that instrument *by another instrument* made under the same statute. However, that circumstance would appear to be covered by either of the provisions[30] just mentioned extending the application of the statutory protection to instruments. That, presumably, is why nothing has previously been said about any gap in the coverage of the
20 Commonwealth provisions.

43. Both the common law and statutory rules are, of course, subject to a contrary intention.[31] The Minister has never identified any relevant contrary intention in this case. Thus, it is expected that the appeal will turn on whether the appellant accrued a right, or the

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[27] *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296, [54] (Robertson J); *DNN17 v Minister for Immigration and Border Protection (No 2)* [2019] FCA, [59] (Allsop CJ). Cf *Milne v Minister for Immigration and Citizenship* (2011) 120 ALD 405, [54] (the Court), special leave refused: *Milne v Minister for Immigration and Citizenship and Anor* [2011] HCASL 165.
[28] *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461, [25], [41]–[43] (Kenny and Mortimer JJ, Dowsett J agreeing).
[29] *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537, 582 (Windeyer J); *Repatriation Commission v Keeley* (2000) 98 FCR 108, [64] (Kiefel J); *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [27] (French CJ, Crennan, Kiefel and Keane JJ).
[30] *Acts Interpretation Act 1901* (Cth) s 46(1)(a); *Legislation Act 2003* (Cth) s 13(1)(a).
[31] *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485, [6] (Gleeson CJ); *Acts Interpretation Act* s 2(2).

Tribunal incurred an obligation, capable of being protected or preserved by the statutory or common law principle. As will now be explained, there is a long line of case law recognising that the initiation of merits review proceedings can result in the accrual of a right to the person seeking that review.

B. Accrued rights in merits review proceedings

44. Argument before the primary judge and the Full Court of the Federal Court focused primarily on three authorities concerning accrued rights in merits review proceedings: ***Esber*** *v The Commonwealth*;[32] ***Lee*** *v Secretary, Department of Social Security*;[33] and *Repatriation Commission v* ***Keeley***.[34] While there are other authorities on the subject,[35] attention to these three is sufficient to demonstrate that, even where a person on merits review may be entitled to no more than the potential exercise of a discretion in their favour, the commencement of such merits review proceedings can result in a right accruing in the relevant sense (that is, a broader sense than the narrow Hohfeldian one[36]).

Esber

45. When Kiefel CJ, Keane and Gleeson JJ in *Nathanson* left open the question now before the Court, their Honours referred to *Esber*. *Esber* concerned an application to the Tribunal for review of a decision of a "responsible officer" in relation to compensation payments under the *Compensation (Commonwealth Government Employees) Act 1971* (Cth) (**1971 Act**). After the application to the Tribunal was made, but before it was determined, the 1971 Act was repealed by the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (Cth) (**1988 Act**). The question before the High Court was whether the 1971 Act or the 1988 Act applied to the Tribunal proceedings. Mr Esber argued that the 1971 Act applied for two independent reasons:

    (a) the 1988 Act's transitional provisions preserved his entitlement to the proceedings being determined as if the 1971 Act continued to be in force; and

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[32] (1992) 174 CLR 430.
[33] (1996) 68 FCR 491.
[34] (2000) 98 FCR 108.
[35] See, eg, *Handa v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 95; *Douglas v Harness Racing Victoria* [2021] VSCA 128.
[36] *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).

(b) section 8 of the *Acts Interpretation Act* preserved that entitlement.[37]

46. While the majority decided the case in Mr Esber's favour on the first argument, it is the observations on the second argument that are of present relevance – those observations have been described as "seriously considered dicta",[38] and have been applied by McHugh J in a context analogous to the present.[39] The majority variously framed the accrued right in issue in that case;[40] the better[41] framing being that Mr Ebser had "a right to have his application to the Tribunal determined pursuant to Pt V of the 1971 Act".[42] Importantly, Mr Ebser had no accrued right to *succeed* on the review; that would ultimately depend on "value judgments"[43] made in the review proceedings. His right
10 was thus "inchoate or contingent", but it was no less a "substantive right" warranting the protection of s 8 (now s 7) of the *Acts Interpretation Act*.[44]

47. *Esber* has since been understood to stand for the proposition that a "right to review" can be protected by the *Acts Interpretation Act*, even if it is an "inchoate and contingent right".[45]

Lee v Secretary, Department of Social Security

48. In *Lee*, the question was whether a transitional provision in a 1988 statute preserved the application of a 1971 statute to merits review proceedings in the Tribunal, where those proceedings had been commenced, but not concluded, at the time of the latter statute's commencement.

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[37] *Esber*, 436 (Mason CJ, Deane, Toohey and Gaudron JJ).
[38] *Douglas v Harness Racing Victoria* [2021] VSCA 128, [35] (the Court).
[39] *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 75 ALJR 542, [26]–[28] (McHugh J).
[40] *Esber*, 440 (Mason CJ, Deane, Toohey and Gaudron JJ): "he had a right to have his claim … determined in his favour [in the Tribunal] if the delegate had wrongly refused his claim"; "a right to have the decision of the delegate reconsidered and determined by the Tribunal".
[41] This Court has subsequently explained that "the 'accrued right' at stake in *Esber* was concerned with the continuation of an application for review by the Administrative Appeals Tribunal and the determination of Mr Esber's entitlement to redeem his rights to further payments of compensation under the earlier legislation": *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485, [50] (Gaudron, McHugh, Gummow and Hayne JJ).
[42] *Esber*, 440 (Mason CJ, Deane, Toohey and Gaudron JJ).
[43] *Esber*, 446–7 (Brennan J).
[44] *Esber*, 440–1 (Mason CJ, Deane, Toohey and Gaudron JJ, citations omitted).
[45] *Yao v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 583, 590 (Black CJ and Sundberg J).

49. The two majority justices expressed the right in various ways,[46] including as a "right of review … to have the application for waiver reconsidered de novo in accordance with the discretion in [the provision] as it then stood".[47] This was held to be a right sufficient to engage the protection of the *Acts Interpretation Act*. By contrast, the dissentient considered this to be merely "a claim for the favourable exercise of an unstructured discretion" or "a claim for the favourable exercise of a statutory discretion and therefore not a right, either inchoate or contingent", and thus to be incapable of engaging the protection of the *Acts Interpretation Act*.[48]

50. The point that split the Court in *Lee* was thus whether a right to the exercise of a discretion could qualify as an "accrued right" for the purpose of the *Acts Interpretation Act*'s protection. The majority correctly understood it to follow from *Esber* that a right to access a discretionary decision-making process *is* capable of qualifying as an accrued right, so as to be protected from being "affected" by a subsequent enactment or instrument.

Repatriation Commission v Keeley

51. In *Keeley*, the question was whether the revocation and replacement of a statutory instrument known as a "Statement of Principles" affected an accrued right under the enabling Act to have a compensation claim determined by the Repatriation Commission and then the Tribunal. It was observed that "there was a material difference between the revoked Statement and the new Statement, and that the decision of the Tribunal may vary according to which of those Statements applied".[49] However, the Minster submitted that the provisions requiring compliance with Statements of Principles "were procedural in character and not substantive", and that those provisions "affected how rights recognised by the Act were to be determined but did not create new rights in replacement of others, or alter or terminate such rights".[50]

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[46] *Lee*, 504A (Cooper J: "rights in relation to the exercise of the administrative discretion … as it then stood"); 515E (Moore J: "a statutory right to seek review of a decision under a repealed Act"); 515E and 516A (Moore J: "a right to have the review undertaken by reference to the power exercised by the primary decision maker under the repealed Act").
[47] *Lee*, 505C (Cooper J).
[48] *Lee*, 499–500 (Davies J).
[49] *Keeley*, [31] (Lee and Cooper JJ).
[50] *Keeley*, [39] (Lee and Cooper JJ).

52. In response to this contention, the plurality focussed on the word "affect" in the *Acts Interpretation Act*, noting that this "will always be a question of degree" and will involve considerations of "injustice".[51] Ultimately, the plurality considered that the provisions empowering the making of Statements of Principles "show[ed] a clear intention by Parliament that such a Statement is to 'affect' the accrued right obtained by the lodgement of a claim", and concluded that the same analysis applied to the internal review proceedings such that the applicant was entitled to the application of the Statement at the time of application.[52] Kiefel J reasoned to similar effect.[53]

53. It now falls to explain why, on the logic of those authorities and consistently with the rationale for the protection of accrued rights exposed earlier, the appellant in this case had an accrued right (and the Tribunal a concomitant obligation) sufficient to engage the statutory or common law protections.

C. Accrued rights would have been "affected" by Direction 79, but for their protection

54. By making his application to the Tribunal under s 500(1)(b) of the *Migration Act*, the appellant accrued a right to a review of the delegate's decision under s 500(1) of the Act. That right was, relevantly, to a review in the exercise of the Tribunal's powers under s 25 of the *Administrative Appeals Tribunal Act 1977* (Cth) (**AAT Act**), resulting in a decision under s 43 of the AAT Act within 84 days (see s 500(6L) of the *Migration Act*).

55. Most importantly, by force of s 499(2A) of the Act, the right of review that so accrued was a right to a review conducted in compliance with Direction 65; the direction that was in force at the time of the application (and at the time of the expiration of 84 days from the date of his application, that is, the last day on which the Tribunal could ordinarily exercise its powers on the review).

56. That nature of the right to review which accrued to the appellant on making his application to the Tribunal is confirmed by attention to authorities discussing the character of merits review proceedings conducted by the Tribunal. In *Frugtniet v*

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[51] *Keeley*, [40] (Lee and Cooper JJ).
[52] *Keeley*, [44] (Lee and Cooper JJ).
[53] *Keeley*, [76]–[78] (Kiefel J).

Australian Securities and Investments Commission, three members of the Court explained:[54]

> … the AAT is not at large. It is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision. … The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker.

57. Here, there being no change in ministerial direction between the making of the delegate's decision and when the appellant applied to the Tribunal, he could reasonably expect that the Tribunal would decide his review on the basis of Direction 65. That expectation would have been disappointed by the giving of Direction 79 over a year later, were it not for the principles protecting such "reasonable expectations" and the rights accrued acting upon them.

58. The contrary position would see the appellant's right to review dramatically remoulded by the giving of Direction 79. It is to be recalled that ministerial directions given under s 499(1) must be complied with, and thus create mandatory relevant considerations for the Tribunal.[55] Indeed, it has been said by this Court that "any obligations imposed by that direction as part of the statutory task of the decision-maker are, and are intended by the scheme of the *Migration Act* by reason of the presence of s 499(2A), to be an essential or inviolable limitation on the power conferred by the relevant provisions of the *Migration Act*".[56] Accordingly, non-compliance with a ministerial direction has been described by this Court as "a breach by a statutory decision-maker of a condition governing the making of a decision".[57]

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[54] *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250, [14]–[15] (Kiefel CJ, Keane and Nettle JJ, citations omitted).
[55] *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, [64] (French CJ, Keifel, Bell and Keane JJ); *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610, [33] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).
[56] *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, [39] (Mortimer J).
[57] *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610, [31] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

59. The effect of Direction 79 was thus purportedly to change those things that the appellant was *entitled* to have considered, and that the Tribunal was *obliged* to consider, and the way those things were to be considered. That was plainly to *affect* the appellant's accrued right, and the Tribunal's obligation.

60. An analogy can be drawn with authority holding that a statute which changes the mandatory relevant considerations applicable to a discretionary exercise (there, criminal sentencing) engages the common law's protection of accrued rights.[58]

61. To the extent the distinction between procedural and substantive provisions still holds,[59] the giving of the new direction "increase[d] … the bar to the remedy" and should therefore be understood as substantive.[60] Insofar as the question is now one of "reasonable expectations",[61] an applicant to the Tribunal ought reasonably be able to expect that their review will be determined on the basis of the direction in place at the time of their application. The reasonableness of that expectation follows from the judicial recognition of its opposite; namely, the sense of unfairness that is inevitably felt when the goalposts are moved in the middle of the game.[62]

62. In light of the appellant having accrued a right to have his review conducted pursuant to Direction 65 – and in the absence of any suggestion of a contrary intention – the *Acts Interpretation Act*, or the common law, operates to protect that right.

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[58] *The State of Western Australia v Richards* (2008) 37 WAR 229, [36], see also [35] (Steytler P, Martin CJ, McLure and Buss JJA agreeing).
[59] *Stephens v The Queen* (2022) 273 CLR 635, [30]–[32] (Keane, Gordon, Edelman and Gleeson JJ), [49] (Steward J). See also *Kraljevich v Lake View and Star Ltd* (1945) 70 CLR 647, 652 (Dixon J) where a provision that "at first sight" looked like one concerned with procedure was "in substance" one concerned with liability.
[60] *Keeley*, [77] (Kiefel J).
[61] *Stephens v The Queen* (2022) 273 CLR 635, [33] (Keane, Gordon, Edelman and Gleeson JJ), [49] (Steward J). See also the reference to "legitimate expectations" in *Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557, [49] (Spigelman CJ).
[62] *Resort Management Services Ltd v Noosa Shire Council* [1997] 2 Qd R 291, 302 (Fryberg J): "when society regulates the activities of individuals, those rules should not be changed in such a way that those who are in the middle of an activity are disadvantaged". As to the permissibility of considering unfairness, see *Keeley*, [46] (Lee and Cooper JJ); *Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557, [49], [59] (Spigelman CJ).

D. Full Court's reasoning to the contrary cannot be accepted

63. The Full Court referred to a number of arguments that ultimately led it to the conclusion that *Jagroop* was not plainly wrong. The most significant arguments are dealt with below.

64. Adopting the first "difficulty" articulated in *Jagroop* (J [39] **CAB 119**), the Full Court in this case leveraged a purported gap in the protection offered by the *Acts Interpretation Act* where an accrued right is sourced in a *statute* and but is affected by the repeal of an *instrument* (J [49] **CAB 121**). Previous courts (including this Court) have not understood this to be a barrier to engagement of the *Acts Interpretation Act*. *Keeley* was an example of the *Acts Interpretation Act* being applied to protect a statutory right from being affected by the repeal of an instrument. In this Court, in *Re Minister for Immigration and Multicultural Affairs; Ex parte* ***Cohen***,[63] McHugh J identified the relevant right as having accrued under s 65(1) of the *Migration Act* and held that the *Acts Interpretation Act* protected that right from being affected by the amendments to the *Migration Regulations 1994* (Cth). On review in the Migration Review Tribunal, the Tribunal was thus bound to apply the earlier regulations. Against the background of those authorities, the suggestion that there is a gap in the coverage of the *Acts Interpretation Act* is doubtful. In any event, "[i]f the *Interpretation Act* does not apply, the rule of the common law on the subject must receive effect."[64]

65. Next, the Full Court referred to, but did not appear to embrace, the suggestion in *Jagroop* that s 499(2A) of the Act stood in the way of acceptance of the appellant's arguments (J [40] **CAB 119**). There is, with respect, nothing in the point. Section 499(2A) obliges the Tribunal to comply with directions given under sub-s (1). Conclusory reference to that provision begs the question, with *which* direction the Tribunal is required to comply.

66. Perhaps most important of the Full Court's reasons in this case was the "third reason" relied upon in *Jagroop* (J [41] **CAB 119**); namely, that changes in directions given under s 499(1) cannot "determine" the exercise of the *discretion* reposed by the statute to refuse a visa (or to affirm a decision to refuse a visa). It will be seen that this was a theme common to the Full Court's attempt to distinguish *Esber*, *Lee* and *Keeley*, which were

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[63] (2001) 75 ALJR 542, [26]–[29].
[64] *Maxwell v Murphy* (1957) 96 CLR 261, 266 (Dixon CJ). See also *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [50] (Gageler J).

each said (in different words) to involve changes to "objective conditions" or "objective criter[ia]" rather than changes to principles that "inform the exercise of a statutory discretion" (J [77], [87], [94] **CAB 130, 133, 134–135**).

67. The difficulty with that reasoning is the tension it creates with other aspects of the Full Court's reasons, in which the Court made allowances for the appellant's arguments (allowances beyond those made in *Jagroop*). In particular, the Full Court accepted that:

    (a) "the lodging of an application has the effect of creating a 'right' in the applicant" (J [51] **CAB 122**);

    (b) "Directions clearly can … affect the way the Tribunal exercises that discretion" (J [108] **CAB 138**);

    (c) "Ministerial Directions may have a real and substantive effect on the outcome of decision-making … the effect of Ministerial Directions cannot be described as purely 'procedural'" (J [108]–[109] **CAB 138**).

68. Thus, although the accrued right in the present case could be said to be "conditional"[65] – that is, conditional on satisfying the Tribunal to exercise its discretion favourably to the appellant – it was still a substantive right, and one that was significantly affected by the disapplication of Direction 65. The revocation of Direction 65 in this case "substantively reform[ed] the nature of the right",[66] just as did the revocation of the Statement of Principles in *Keeley*. In circumstances where directions set jurisdictional limits on the Tribunal, it is at best partially correct to say that the terms and scope of the Tribunal's discretion "remained unaltered" (J [94], see also [107]–[112] **CAB 135, see also 138–139**).

69. The final substantive point made by the Full Court was by reference to *Minogue v Victoria* (J [113]–[116] **CAB 139–141**).[67] However, the reasoning in that case was grounded in the very particular nature of parole, the availability of which is dependent on the imposition of a sentence at a much earlier point in time. That context did not

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[65] *NSW Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and Western Lands Act* (1988) 14 NSWLR 685, 694 (Hope JA, Samuels and Clarke JJA agreeing).
[66] *Keeley*, [42] (Lee and Cooper JJ).
[67] (2018) 264 CLR 252.

allow for any reasonable expectation as to the continuation of any particular statutory regime.[68]

70. The Full Court also identified a number of "practical considerations against overruling *Jagroop*" (J [64] **CAB 126**). The first two considerations and the final one (J [65]–[67], [72] **CAB 126, 128**) can have no purchase in this Court. If the effect of the *Acts Interpretation Act* or long-standing common law principle is that Direction 65 applied, then fidelity to the law demands that the appellant succeed. Concerns about consequences or executive reliance on *Jagroop* can have no role to play.

71. Other practical considerations raised by the Court concerned the timing of when any right accrued. The Court considered that the logic of the appellant's argument would extend to require delegates to comply with the direction given at the time of a visa application (J [69] **CAB 127**). While McHugh J's decision in *Cohen* would appear to require that, the question simply does not arise in this present case, as the Full Court ultimately acknowledged at J [69]. (**CAB 127**) The Court also asked rhetorically, why it was that the right accrued at the time of making the application for review (J [68]). (**CAB 127**) That question is answered by the many authorities to the effect that the right accrues on a step being taken to invoke the jurisdiction of the review body.[69]

E. Conclusion to argument

72. For the above reasons, the appellant accrued a right to have his application for review decided in compliance with Direction 65 when he made his application to the Tribunal. The purported revocation of Direction 65 by Direction 79 did not affect that right (and neither did the revocation of Direction 79 by Direction 90). Nor is there any contrary intention by which the usual statutory and/or common law preservation of accrued rights (and concomitant obligations) might be displaced.

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[68] *Minogue v Victoria* (2018) 264 CLR 252, [20] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), [104]–[105] (Gordon J).

[69] Pearce, *Interpretation Acts in Australia* (2018) [2.61]. See, eg, *Handa v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 95, [11] (Finkelstein J); *Re Ross; Ex parte Australian Liquor, Hospitality and Miscellaneous Workers' Union* (2001) 108 FCR 399, [52]–[53], [59] (the Court).

73. The Tribunal was thus bound to comply with Direction 65. It did not. There being no debate that such an error was material, and thus jurisdictional (J [25] **CAB 115–116**), this Court ought to allow the appeal and make the consequential orders sought by the appellant.

Part VII: Orders sought

74. The appellant seeks the following orders:

(a) The appeal be allowed.

(b) The orders made by the Full Court of the Federal Court on 11 September 2024 be set aside, and in lieu thereof:

(i) The appeal be allowed.

(ii) Orders 1, 2 and 3 made by the Federal Court on 6 December 2023, and orders 1 and 2 made by the Federal Court on 19 February 2024, be set aside, and in lieu thereof:

1. The separate question set out in the orders made on 6 July 2023 be answered: "Yes".

2. A writ of certiorari issue quashing the decision made by the second respondent on 26 October 2022.

3. A writ of mandamus issue requiring the second respondent, differently constituted, to determine the review according to law.

4. The first respondent pay the applicant's costs of the proceedings before the primary judge.

(c) The first respondent pay the appellant's costs of the appeal to the Full Court of the Federal Court.

(d) The first respondent pay the appellant's costs in this Court.

Part VIII: Estimate

75. The appellant estimates that he will require 1.5 hours for the oral presentation of his argument.

DATED: 24 December 2024

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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

ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2024, the Appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in his submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	*Acts Interpretation Act 1901* (Cth)	Compilation 36 (20 December 2018 to 11 August 2023)	ss 2, 7, 46	This version was applicable at the time Direction 79 commenced.	28 February 2019 (commencement of Direction 79)
2.	*Administrative Appeals Tribunal Act 1977* (Cth)	Compilation 51 (17 August 2022 to 30 June 2023)	ss 25, 43	This version was applicable at the time the Tribunal made the decision the	26 October 2022 (Tribunal made decision the subject of

				subject of the present proceedings.	present proceedings)
3.	*Legislation Act 2003* (Cth)	Compilation 39 (24 February 2019 to present)	s 13	This version was applicable at the time Direction 79 commenced.	28 February 2019 (commencement of Direction 79)
4.	*Migration Act 1958* (Cth)	Compilation 152 (1 September 2021 to 16 February 2023)	ss 499, 500, 501, 501CA	This version was applicable at the time the Tribunal made the decision the subject of the present proceedings.	26 October 2022 (Tribunal made decision the subject of present proceedings)