

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

MOHAMED YOUSSEF HELMI KHALIL APPELLANT

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL
AFFAIRS & ANOR RESPONDENTS

*Khalil v Minister for Immigration, Citizenship, Migrant Services and
Multicultural Affairs*

[2025] HCA 33

Date of Hearing: 1 April 2025

Date of Judgment: 3 September 2025

M112/2024

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

D J Hooke SC with J R Murphy for the appellant (instructed by Zarifi
Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, with
R S Francois and W C H Randles for the first respondent (instructed by
Sparke Helmore)

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Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Immigration – Visas – Ministerial directions under s 499(1) of *Migration Act 1958* (Cth) – Where delegate of Minister refused to grant appellant partner visa on character grounds – Where ministerial direction in force at time of refusal was Direction 65 – Where Direction 65 subsequently revoked – Where appellant applied to then Administrative Appeals Tribunal ("Tribunal") for review of delegate's decision – Where Direction 90 in force at time of Tribunal's decision – Where Tribunal applied Direction 90 and not Direction 65 – Whether Tribunal was required to comply with direction in force at time of its decision – Whether appellant had accrued right to have Tribunal determine his review in accordance with direction in force at time of delegate's decision.

Words and phrases – "accrued right", "affected Act", "character grounds", "family violence", "laws governing the exercise of powers and discretions", "legislative instrument", "merits review", "ministerial direction", "repeal or amendment", "time of the decision under review", "time of the exercise of the relevant function or power".

Acts Interpretation Act 1901 (Cth), ss 7(2), 46(1)(a).

Administrative Appeals Tribunal Act 1975 (Cth), ss 25, 43(1).

Legislation Act 2003 (Cth), s 13(1)(a).

Migration Act 1958 (Cth), ss 496, 499, 500(1), 501(1).

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. The appellant is an Egyptian national who exercised his statutory right to apply to the then Administrative Appeals Tribunal ("the Tribunal") for a review of a decision to refuse to grant him a visa. The decision under review was made by a delegate of the Minister administering the *Migration Act 1958* (Cth) ("the Migration Act") exercising the discretion conferred by s 501(1) of that Act to refuse to grant a visa on character grounds. Section 499(2A) of the Migration Act required the Tribunal to comply with written directions about the performance of its functions and the exercise of its powers given by the Minister under s 499(1) of that Act.

2 The issue presented by this appeal is whether the Tribunal was required to comply with the directions in force at the time of its decision,¹ as the Full Court of the Federal Court held in the decision under appeal, or with the directions in force at an earlier point in time.² The appellant contends that earlier time to be either the time of the making of the decision under review or the time of the making of the application for review.

3 For reasons to be explained, the Full Court correctly construed s 499(2A) of the Migration Act, read with Direction 90 as in force at the time of the Tribunal's decision, to have required the Tribunal to comply with the direction in force at the time of its decision and correctly rejected the appellant's claim to have accrued a right to have the Tribunal determine his review in accordance with earlier directions, so that s 7(2) of the *Acts Interpretation Act 1901* (Cth) ("the AIA") had no relevant operation. It follows that the appeal must be dismissed.

Legal framework for decisions under s 501(1)

4 The power conferred on the Minister by s 501(1) of the Migration Act to refuse to grant a visa on character grounds is delegable pursuant to s 496(1) of the

1 Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA dated 8 March 2021.

2 Relevantly, Direction No 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA dated 22 December 2014.

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Act. By s 496(1A), the delegate is, in the exercise of a power delegated under s 496(1), subject to the directions of the Minister.

5 Section 499(1) of the Migration Act empowers the Minister to give written directions to a person or body having functions or powers under the Act if the directions are about the performance of those functions or the exercise of those powers. The Tribunal was such a body. Section 499(2) clarifies that s 499(1) does not empower the Minister to give directions that would be inconsistent with the Migration Act or regulations made under the Act. Section 499(2A) states that "[a] person or body must comply with a direction under [s 499(1)]".

6 At relevant times, s 25(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") provided that an enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment. Section 500(1)(b) of the Migration Act duly provided that applications may be made to the Tribunal for review of decisions of a delegate of the Minister under s 501. Section 25(6) of the AAT Act addressed the possibility of conflict between the AAT Act and an Act providing for Tribunal review, by stating that, if an Act provided for applications to the Tribunal:

- "(a) that Act may also include provisions adding to, excluding or modifying the operation of any of the provisions of this Act in relation to such applications; and
- (b) those provisions have effect subject to any provisions so included."

7 Section 43(1) of the AAT Act set out the Tribunal's powers in the following terms:

"For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

- (a) affirming the decision under review;
- (b) varying the decision under review; or
- (c) setting aside the decision under review and:

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- (i) making a decision in substitution for the decision so set aside;
or
- (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal."

Background to the Tribunal's decision

8 In April 2013, the appellant applied for a partner visa, sponsored by his then spouse. Between November 2013 and January 2016, he was convicted of several offences. Of particular significance, in February 2014, he was convicted of an offence of unlawful assault occasioning bodily harm with circumstances of aggravation and sentenced to undertake an Intensive Supervision Order ("ISO") for six months. The assault was committed against his then spouse. In August 2014, he was found guilty of breaching the ISO and given a suspended imprisonment order for six months and fined \$500. In January 2016, he was convicted of possessing prohibited drugs with intent to sell or supply (cannabis) and sentenced to 16 months' imprisonment.

9 The appellant's visa application was first refused by a delegate of the Minister in November 2014, on the basis that he and his then spouse were not in a genuine and continuing relationship. In May 2016, the Tribunal set aside that decision and remitted the application for reconsideration. In November 2017, a delegate of the Minister again refused the visa application, this time in the exercise of the discretion in s 501(1) of the Migration Act.

10 When the delegate's decision was made, the direction in force under s 499(1) of the Migration Act was Direction 65. Among other things, Direction 65 specified that, in deciding whether to refuse to grant a visa under s 501(1), there were three primary considerations, being: (1) protection of the Australian community from criminal or other serious conduct; (2) the best interests of minor children in Australia; and (3) expectations of the Australian community. The delegate applied Direction 65 in making the decision.

11 The appellant applied to the Tribunal for review of the delegate's decision in December 2017. In December 2018, the then Minister revoked Direction 65 and replaced it with Direction 79 with effect from February 2019. Subsequently, in March 2021, the then Minister revoked Direction 79 and replaced it with Direction 90 with effect from April 2021. Direction 90 identified, as a fourth primary consideration in making a decision under s 501(1), whether conduct engaged in by

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the visa applicant constituted "family violence". Direction 90 defined "family violence" to mean "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family ... or causes the family member to be fearful", and specified an assault as an example of behaviour that may constitute family violence. Direction 90 also contained the following guidance concerning family violence:

"8.2 Family violence committed by the non-citizen"

- (1) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen ...
- (2) This consideration is relevant in circumstances where:
 - a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; ..."

12 In October 2022, applying Direction 90, the Tribunal decided to affirm the delegate's decision of November 2017. The reasons for the decision stated that, "[h]aving weighed all relevant considerations individually and cumulatively", the Tribunal decided to refuse to grant the appellant a visa because the primary considerations of protection of the Australian community, family violence committed by the non-citizen, and expectations of the Australian community "considerably outweigh[ed]" the combined weight to be given to the primary consideration of the best interests of minor children in Australia and other countervailing considerations. Concerning the appellant's conduct constituting family violence, the Tribunal found that the seriousness of the offending conduct, coupled with the Tribunal's assessment of the appellant's incomplete insight into and rehabilitation regarding family violence offending, weighed "moderately in favour of exercising the discretion to refuse" the appellant's visa.

Judgments of the courts below

13 The appellant applied to the Federal Court of Australia for judicial review of the Tribunal's October 2022 decision. His grounds of review included, relevantly, that the Tribunal made a jurisdictional error by failing to comply with

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Direction 65. The primary judge, Moshinsky J, in deciding as a separate question whether this ground of review was established, answered the question in the negative.³ Applying the reasons of the Full Court of the Federal Court of Australia in *Jagroop v Minister for Immigration and Border Protection*,⁴ the primary judge rejected the appellant's argument that he had an accrued right to have his application for review determined in accordance with the substantive law in force at the time of the appellant's application to the Tribunal, including Direction 65.⁵

14 The Full Court (McDonald J, Katzmann and Dowling JJ agreeing) dismissed the appellant's appeal, rejecting the appellant's submissions that *Jagroop* was distinguishable or wrongly decided,⁶ and therefore rejecting the appellant's argument that he had an accrued right to have his application to the Tribunal determined in accordance with the content of any particular ministerial direction.

The general principle

15 The power conferred on the Tribunal by s 43(1) of the AAT Act to exercise "all the powers and discretions that are conferred by any relevant enactment" on the original decision-maker indicated that the Tribunal's task was to apply the laws governing the exercise of powers and discretions in force at the time of the Tribunal's decision.⁷ Thus, as stated by Brennan J in *Esber v The Commonwealth*,⁸ "[w]here, on a rehearing de novo, the question for decision is whether an applicant should be granted a right, the law as it then exists is applied, not the law as it existed at an earlier time". His Honour cited *Re Costello and Secretary, Department of*

3 *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1528 ("*Khalil (FCA)*") at [3]-[7].

4 (2016) 241 FCR 461.

5 *Khalil (FCA)* [2023] FCA 1528 at [36]-[37].

6 *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 305 FCR 26 at 35 [42], 39 [61], 54 [129]-[130].

7 Subject to any provision excluding or modifying s 43(1) in another enactment, as contemplated by s 25(6) of the AAT Act.

8 (1992) 174 CLR 430 at 448.

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Transport,⁹ in which the Tribunal applied air navigation orders that governed a statutory power to issue a pilot's licence which were in force at the time of the Tribunal's decision, rather than the previous orders in force at the time of the decision under review.¹⁰

16 The principle stated by Brennan J in *Esber* is consistent with the general principle stated by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* that "an administrative decision-maker is required to make [their] decision on the basis of material available to [them] at the time the decision is made".¹¹ His Honour explained that principle as a "reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker".¹²

17 Thus, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*, Gaudron and Kirby JJ considered it "well settled" that a review body invested with a review power similar to that conferred by s 43(1) "is required, in conducting that review, to apply the law as it stands at the date of the review".¹³

18 Similarly, in *Shi v Migration Agents Registration Authority*, Kirby J applied Mason J's reasoning in *Peko-Wallsend* to conclude that the "merits review" provided for by the AAT Act was to be conducted on the basis of the most up to date evidence available.¹⁴ His Honour concluded:¹⁵

9 (1979) 2 ALD 934.

10 (1979) 2 ALD 934 at 944.

11 (1986) 162 CLR 24 at 45.

12 (1986) 162 CLR 24 at 45.

13 (2003) 211 CLR 441 at 464 [63].

14 (2008) 235 CLR 286 at 300 [42], 302 [51].

15 (2008) 235 CLR 286 at 304 [60].

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"[I]t necessarily follows that the Tribunal is able to utilise all of the powers enjoyed by the Authority at the time the Tribunal makes its decision, including powers that may have accrued to the Authority in the interval of time since the original decision was made. So much follows not only from general principles governing the accretion of powers affecting dispositions of bodies such as the Tribunal but also from the power of 'substitution' granted by s 43(1)(c)(i) of the AAT Act."

19 In *Shi*, Hayne and Heydon JJ likewise considered that, where nothing in the provisions of the Migration Act fixed a particular time as the point at which a migration agent's fitness to provide immigration assistance was to be assessed, the question for the Tribunal invited attention to the state of affairs as they existed at the time the Tribunal made its decision.¹⁶ To the extent that the dissenting reasons of Kiefel J can be read as stating that the Tribunal was ordinarily required to apply the law as it stood at the time of the decision under review, her Honour's reasons must be rejected as inconsistent with those of the majority.

20 *Frugtniet v Australian Securities and Investments Commission*¹⁷ is not authority contrary to the proposition stated by Brennan J in *Esber*. That case did not involve a repeal or amendment of the law applied by the original decision-maker, but rather the different question of whether the Tribunal's powers extended to considering spent convictions that the original decision-maker was prohibited from considering. The *obiter* statement by three of the Justices in *Frugtniet*, that the Tribunal "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",¹⁸ is not replicated in the judgment of the other four Justices and is incorrect.

21 The principle that the Tribunal was to apply the laws governing the exercise of powers and discretions in force at the time of the Tribunal's decision may be displaced by a provision of an enactment excluding or modifying s 43(1) of the AAT Act, as contemplated by s 25(6) of that Act. If not displaced, the principle

16 (2008) 235 CLR 286 at 315-316 [101].

17 (2019) 266 CLR 250.

18 (2019) 266 CLR 250 at 257 [14].

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requires the Tribunal to apply all relevant laws in force at the time of the Tribunal's decision including any relevant saving or transitional provision.

Section 499(2A) conforms to the general principle

22 Section 499(2A) of the Migration Act conforms to the principle stated by Brennan J in *Esber*. Importantly, the provision applied to the Tribunal directly, not derivatively by reason of the Tribunal standing in the shoes of the delegate. The requirement of s 499(2A) that a body, which included the Tribunal, "must comply with a direction" under s 499(1), cast as it is in the present tense, can only be understood as a requirement to comply with a direction in force at the time of the exercise of the relevant function or power. Through s 499(2A), the direction-making power conferred by s 499(1) facilitates the consistent, but not inflexible, application of government policy and practice as it may be expected to change from time to time.

23 Direction 90 provided, in terms, that "[t]his Direction commences on 15 April 2021". Being required by s 499(2A) to comply with a direction under s 499(1), the Tribunal that made the October 2022 decision was required to comply with Direction 90, being the direction then in force. The Tribunal was not required to comply with Direction 65, which had been revoked and had no legal effect under s 499(2A) on and from the date of its revocation. There is nothing in the statutory provisions or any relevant direction that made the direction applied in the decision under review applicable to the Tribunal's review.

Absence of an accrued right

24 It follows that the appellant's contention that he had an accrued right to a review by the Tribunal in accordance with Direction 65 must fail. In the absence of such a right, the appellant's attempt to rely upon s 7(2) of the AIA goes nowhere. Section 7(2) of the AIA provides that "[i]f an Act ... repeals or amends an Act (the **affected Act**) or a part of an Act, then the repeal or amendment does not ... (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or ... (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment". Section 7(2) continues by providing that "[a]ny such investigation, legal proceeding or remedy may be instituted, continued or enforced ... as if the affected Act or part had not been repealed or amended".

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25 Section 46(1)(a) of the AIA relevantly provides that "[i]f a provision confers ... the power to make an instrument other than a legislative instrument ... then: [the AIA] applies to any instrument so made as if it were an Act". For that purpose, "legislative instrument" has the same meaning as in the *Legislation Act 2003* (Cth) ("the LA"),¹⁹ s 13(1)(a) of which makes parallel provision to s 46(1)(a) of the AIA in respect of a provision which confers the power to make a legislative instrument.

26 As recognised in *Jagroop*,²⁰ none of those provisions is engaged by the repeal or amendment of a direction under s 499(1) of the Migration Act. Section 7(2)(c) and (e) of the AIA are plainly not engaged for the reason that the repeal or amendment of a direction is not the repeal or amendment of an Act or a part of an Act. Neither s 46(1)(a) of the AIA nor s 13(1)(a) of the LA is engaged, as the legal effect of a direction under s 499(1) of the Migration Act is limited to the obligation to comply imposed by s 499(2A) of that Act. A direction confers no legal right or privilege and imposes no legal obligation such as might be said to be acquired, accrued or incurred.

Conclusion

27 The appeal must be dismissed with costs.

19 *Acts Interpretation Act 1901* (Cth), s 2B.

20 (2016) 241 FCR 461 at 474 [61].