HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **NO B66 OF 2020**

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Appellant

and

DEANNE LYNLEY MOORCROFT

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. Issue in the appeal

2. The issue in the appeal is the proper construction of paragraph (d) of the definition of "behaviour concern non-citizen" (**BCNC**) in s 5(1) of the *Migration Act 1958* (Cth). The appellant (the **Minister**) contends that the expression "removed or deported from", where it twice appears, means taken out of the country by or on behalf of the government *in fact*. The respondent contends that, at least where the expression first appears (removed etc. from Australia) it means taken out etc *validly* or *lawfully*. (The respondent accepted below that where the expression second appears, it should not be so construed, but now seeks to backtrack on that concession (**AS [2.3], [19], [20.2]**; **RS [3], [53]-[64]**; **Rep [2]**)).

3. The issue arises in circumstances where: (a) the respondent was granted a special category visa on 2 January 2018; (b) that visa was purportedly but invalidly cancelled on 3 January 2018; (c) the respondent was in fact removed from Australia on 4 January 2018; (d) her visa ceased to be in effect on her departure from Australia by operation of section 82(8) of the Act; and (e) on 28 June 2018 the cancellation decision was quashed. In circumstances where there was no power to remove the respondent on 4 January 2018, but where that removal in fact occurred (including because the respondent did not seek to enjoin it), was she "removed" from Australia within the definition of BCNC?

B. Proper approach to constructional question

4. That the power to remove is limited and (it is accepted) the power under s 198(2) was not enlivened in relation to the respondent on 4 January 2018 does not answer the constructional question: cf. PJ at [29]-[31]. The respondent was removed in fact, notwithstanding the quashing of the cancellation. The focus is on the provision empowering the *second actor* (the Minister or delegate determining the visa application): Forsyth & Hare (eds), *The Golden Metwand the Crooked Cord*, JBA 1858, 1864-1868.

C. Proper construction

5. Two features of the definition of BCNC are significant. First, each limb of the definition refer to governmental acts. Second, the identical expression ("removed or deported

from") twice appears in paragraph (d), and the Court would be slow to ascribe the same expression different meanings where it twice appears.

6. As to the first point, Parliament has elected to fix on convenient proxies for identifying individuals of "behaviour concern", being the "matters of public record" referred to in *Hicks* at [41]. That facilitates what Parliament should be taken to understand would, at least typically, be decision-making by delegates at ports prior to immigration clearance: cf. s 32(2)(a)(i). Any requirement to make evaluative judgments (as to claims of illegality in removal from Australia or another country) is apt to prolong clearance or detention. The respondent's construction is not adequately tested by an "easy case", such as presented here, where the delegate had the benefit of a court order as to the cancellation.

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7. As to the second point, the "sound rule of construction" discussed by Mason J in *Franzon* at 618 has particular strength where the two identical expressions are collocated in the same paragraph. Context does not demand or evince that the rule is displaced here: cf. *McGraw-Hinds* at 643-644, 655-656. The underlying principle is that courts should expect Parliament to use statutory language with a measure of precision.

8. On that premise, the respondent's construction would require delegates on occasion to assess claims as to the legality of actions of foreign governments. Delegates are ill-equipped to perform such a task at a port, and it is not readily to be supposed Parliament intended this. Further, where a constructional choice is available, the Court should incline against a construction that would require the Executive on occasion to assess the legality of actions of other governments within their territory (including legality by reference to the constitution of that government): *Plaintiff M68* at [48], [248]-[257], [414].

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9. The Minister accepts that paragraphs (a) to (c) of the definition of BCNC encompass acts of foreign courts (although the Minister places less emphasis on the reference to "sentenced to death" in (a)). However, there are significant differences between (a) to (c) (on the one hand) and (d) (on the other). Paragraphs (a) to (c) deal with non-physical legal acts that can be quashed or reversed by a court. Paragraph (d) deals with a physical action that cannot.

10. For a delegate to assess whether a conviction etc has been quashed by a court for the purposes of paragraphs (a) to (c), that involves the relatively simple action of determining whether the judicial arm of another country has *itself* quashed or reversed a conviction (such that in legal fact the visa applicant has not been convicted). Whereas, for a delegate

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to assess whether a person has been invalidly (itself not a sharply defined concept) or unlawfully removed may, instead, involve the delegate engaging in the complex evaluative assessment him or herself, rather than simply noting the outcome of that evaluative assessment performed by a foreign court (i.e., the quashing of a conviction). The latter task is relatively simple and familiar one: cf. *HZCP* at [76]-[78], [124], [181]-[182].

11. As for paragraph (e), it provides no contextual support for the respondent's construction. It merely allows for the prescription of circumstances in which a person has been excluded (in fact) from another country.

12. The principle of legality has no operation here. When the respondent returned to Australia on 29 January 2019 she had no "right" (fundamental or otherwise) to be in Australia unless she satisfied the visa criteria. The principle of legality provides no assistance in construing the content of the criteria that Parliament has selected in the exercise of its untramelled sovereign right to decide which aliens may be in the Australian community: *Falzon* at [92]; cf. **AS [49]-[52]**, **RS [70]-[76]**; **Rep [14]-[15]**. Nor, contrary to the responent's submissions, does the Minister's construction "overthrow fundamental principles" or "depart from the general system of law": cf. *Lee* at [313]; **RS [73]**.

13. Finally, "harsh" consequences are not an inevitable consequence of the Minister's construction. At least with respect to removal etc. from Australia, a person can always seek to enjoin that before it occurs. Sections 32(2)(b) and (c), and 195A (where available), also provide mechanisms that allow "harsh" results to be avoided. In any event, the Court should be slow to reason from a perception of harsh consequences in a given case, where Parliament has made a value judgment as to how the system should work (noting the relative efficiency of a construction which turns on relatively simple matters of public record as a proxy for "behaviour concern"): *Esso Australia* at 519.

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