HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No: B66 of 2020

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
Appellant

and

DEANNA LYNLEY MOORCROFT
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The respondent, Deanna Lynley Moorcroft, certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issue

2. This appeal gives rise to the following issue: whether the phrase "removed … from Australia" in subpara (d) of the definition of "behaviour concern non-citizen" (**BCNC**) in s 5(1) of the *Migration Act 1958* (Cth) (**Act**) refers to removal *in fact* (as contended for by the appellant, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**Minister**)) or to *lawful* or *valid* removal in accordance with Division 8 of Part 2 of the Act (as contended for by the respondent).

3. At [2.3] of his submissions filed on 4 December 2020 (**AS**), the Minister refers to a submission advanced by the respondent in the Federal Court, namely, that the phrase "removed … from another country" in subpara (d) of the definition of BCNC refers to removal *in fact*. That question does not fall for determination in these proceedings. In any event, for the reasons developed in Part V of these submissions, the respondent contends that those words are to be read as referring to *lawful* or *valid* removal from another country and that, even if they do refer to removal *in fact*, that does not detract from the force of the respondent's argument as to the construction of the words "removed … from Australia".[1]

Part III: Section 78B Notices

4. The respondent has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

Part IV: Facts

[1] In so far as the respondent requires leave to advance the former argument, he seeks it. No question of the application of r 42.08.5 of the *High Court Rules 2004* (Cth) arises, for the argument is not one which could properly be the subject of a notice of contention, even if it had been raised below. That is because a submission about the proper construction of the words "removed … from another country", even if accepted, cannot of itself support the orders made below. This case concerns the proper construction of the words "removed … from Australia".

5. There are no factual issues in dispute. The respondent generally agrees with the Minister's summary of the facts at AS [5]-[13].

6. The respondent also agrees with the Minister's chronology filed on 4 December 2020 but would add the following by way of supplementation:
   (a) On 17 November 2013, the respondent arrived in Australia and was granted a Special Category (subclass 444) visa (**special category visa**): Core Appeal Book (**CAB**) at 14 [1].
   (b) On 24 December 2017, the respondent returned to New Zealand to visit members of her family: CAB 14 [2].
   (c) On 2 January 2018, the respondent returned to Australia by plane: CAB 14 [2]-[3].

7. A summary can also be found at [2]-[10] of the reasons for judgment of the Federal Court (**J**): CAB 33-35.

Part V: Argument

Overview

8. For the reasons that follow, the respondent was not "removed … from Australia" on 4 January 2018 consequent upon the unlawful cancellation on 3 January 2018 of the special category visa that she previously held. Accordingly, the respondent did not fall foul of the criterion for the grant of that visa in s 32(2)(a)(ii) of the Act.

9. *First*, the text and context of the phrase, and the object of the Act, indicate that a non-citizen will not have been removed from Australia within the meaning of subpara (d) of the definition of BCNC unless his or her removal was effected in accordance with Division 8 of Part 2 of the Act.

10. *Secondly* and alternatively, the context and purpose of subpara (d) of the definition of BCNC support the implication of the word "lawfully" or "validly" in that provision, so that it, relevantly, reads: "has been lawfully [or validly] removed … from Australia".

11. The construction for which the Minister contends leads not only to harsh, but also absurd, outcomes. It has the effect that a non-citizen in the position of the respondent could never be granted a special category visa in the future – even if he or she were able to establish on judicial review that his or her purported removal from Australia was unlawful. It would also have the effect that a non-citizen in the position of the respondent who, for example, has been removed from Australia in bad faith or for an

improper purpose could never be granted a special category visa. The construction for which the respondent contends, on the other hand, is not only consistent with the text and context of the provision but it does not run into such difficulties.

Text

12. As this Court has repeatedly emphasised, the starting point in construing a statutory provision is its text, having regard to its context and legislative purpose.[2] Ordinarily, the intended meaning of statutory words will accord with their grammatical meaning. However, the context, the consequences of the grammatical meaning, the purpose of the statute or any applicable canons of construction may require a different construction to be adopted.[3]

13. The law also eschews the adoption of rigid rules in statutory construction.[4] In some circumstances, a court will be justified in "reading a statutory provision as if it contained additional words or omitted words".[5] Those words "are sometimes words of limitation" and "sometimes words of extension" but they are "always words of explanation".[6] Where there is a constructional choice between alternative meanings, none of which is wholly ungrammatical or unnatural, consideration needs to be given to "the relative coherence of the alternatives with identified statutory objects or policies".[7]

14. Section 32(2)(a)(ii) of the Act provides that a criterion for the grant of a special category visa is that the Minister is satisfied that the applicant for the visa "is neither a [BCNC] nor a health concern non-citizen".

15. A BCNC is defined in s 5(1) as, relevantly, "a non-citizen who … has been removed … from Australia". The word "remove" is defined in s 5(1) as "remove from Australia". A "removee" is defined in s 5(1) as "an unlawful non-citizen removed, or to be removed, under Division 8 of Part 2".

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2 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ (and the cases there cited). See, more recently, *Minister for Home Affairs v DLZ18* (2020) 95 ALJR 14 at 20 [44] per Kiefel CJ, Bell, Gageler, Keane and Gordon JJ.

3 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ.

4 *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 (***Taylor***) at 548 [37] per French CJ, Crennan and Bell JJ.

5 *Taylor* at 548 [38] per French CJ, Crennan and Bell JJ.

6 *Taylor* at 556 [65] per Gageler and Keane JJ.

7 *Taylor* at 557 [66] per Gageler and Keane JJ.

16. An "unlawful non-citizen" is defined in s 14(1) of the Act as "[a] non-citizen in the migration zone who is not a lawful non-citizen". Section 13(1) defines a "lawful non-citizen" as "[a] non-citizen in the migration zone who holds a visa that is in effect". If a non-citizen's visa is cancelled while that person is in the migration zone, by force of s 15 of the Act, that person becomes, on the cancellation, an unlawful non-citizen unless, immediately before the cancellation, he or she is given another visa that is in effect.

17. Division 8 of Part 2 of the Act deals with removal of unlawful non-citizens from Australia, regional processing and transitory persons. Under the Act, 'removal' is distinct from 'deportation' which is separately provided for in Division 9 of Part 2 of the Act. Section 198 of the Act imposes an obligation on officers of the Commonwealth to remove unlawful non-citizens as soon as reasonably practicable.

18. The purported cancellation of the respondent's visa on 3 January 2018 was affected by jurisdictional error, and quashed by the Federal Circuit Court: J [8] (CAB 34). For the purposes of the Act, it was void, ab initio, and had no effect.[8] The respondent's special category visa, therefore, was never cancelled such that she did not became an unlawful non-citizen at any time prior to her removal from Australia on 4 January 2018. The Minister concedes as much at AS [14]. As the power to remove in s 198 only applies to an unlawful non-citizen, the respondent was not lawfully removed in accordance with that section. Her physical removal did not constitute removal within the meaning of the Act. Rather, the respondent was removed, purportedly, pursuant to the Act.

19. In contending that the phrase "removed … from Australia" connotes nothing more than removal in fact (AS [26]-[32]), the Minister overlooks the definition of "removee" in s 5(1). This definition fed into the Federal Court's analysis (see J [31], [35]: CAB 41-42) and is an important consideration. Because "removee" is given a particular meaning by the Act, other grammatical forms of that word, such as the words "remove", "removed" and "removal", have corresponding meanings.[9] It follows that "removed", as that word is used in the opening part of subpara (d) of the definition of BCNC, means "removed from Australia under Division 8 of Part 2 of the Act". The definition not only "fix[es] upon governmental acts … in relation to an individual as a convenient proxy for identifying individuals of "behaviour concern"" (AS [37])[10] but it requires that those

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8 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 [24] per Kiefel CJ, Gageler and Keane JJ.

9 *Acts Interpretation Act 1901* (Cth), s 18A.

10 The respondent places no reliance on the example of the abducted child given by the Federal Court at J [34] (CAB 41-42) (*cf* AS [32], [36]). However, the Minister's argument that removal includes any form of de facto removal by government officials extends to completely arbitrary acts and acts in bad faith in

acts – here, removal from Australia – be performed in accordance with law (*cf* AS [26]-[32]).

20. As the respondent was not an unlawful non-citizen when she was purportedly removed from Australia, she was never a removee under the Act. And since she was, and is, not a removee, she was never "removed" for the purposes of the definition of BCNC. The Federal Court was correct so to conclude at J [30]-[31] and [35] (CAB 41-42).

21. At AS [15], the Minister contends that "the retrospective nullification (by order made on 28 June 2018) of the cancellation decision (purportedly made on 3 January 2018) does not entail that the respondent was not removed from Australia (which was done on 4 January 2018)" and observes that "[c]ertiorari was never granted with respect to the "act" of removal". But not even the institution of judicial review proceedings seeking to quash the legal consequences attached to the decision to remove the respondent from Australia, being a "migration decision" within the meaning of ss 5(1) and 474 of the Act,[11] would be enough for her to satisfy the criterion for the grant of a special category visa in s 32(2)(a)(ii). On the Minister's construction of the definition of BCNC, in the absence of the making of a regulation under ss 32(2)(b) and (c) (discussed later in these submissions), the respondent (and others in her position) will forever fall foul of s 32(2)(a)(ii).[12]

22. Further, contrary to AS [16], it was not necessary—impractical as it might be for an unrepresented person in immigration clearance[13]—to enjoin officers of the Commonwealth from purporting to remove the respondent from Australia, since her removal was never effected under the Act. Nor is it necessary (or, for that matter, sufficient for the purpose of satisfying the criterion in s 32(2)(a)(ii)) for the respondent to seek to quash the decision purportedly to remove her from Australia, since that physical act did not, for the reasons given above, achieve in law "remov[al] … from Australia" for the purposes of subpara (d) of the definition of BCNC.

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addition to actions where the jurisdictional error has resulted from a genuine mistake by officials as is appeared to be acknowledged at AS [32].

11 A decision to remove a non-citizen from Australia is at least the "doing or refusing to do any other act or thing": s 474(3)(g).

12 The respondent was required to make a fresh application for a special category visa as the special category visa that she previously held, being a temporary visa to remain in Australia, ceased to be in effect upon her "leav[ing] Australia", even though the decision to cancel the earlier visa was affected by jurisdictional error: s 82(8). See *Hicks v Nixon* (2004) 138 FCR 32 at 42 [44], [49] per Nicholson J; *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 427 (***Hicks***) at 438 [39] per French, Marshall and Mansfield JJ.

13 In the respondent's case, this was a period of less than 24 hours: her visa was purportedly cancelled on 3 January 2018 (Appellant's Book of Further Materials (**AFM**) at 17 [5], 43-47) and her removal from Australia was effected at 8:25 am on 4 January 2018 (AFM at 69).

23. The Minister's reliance on the *Brian Lawlor* principle[14] (AS [29], though *cf* AS [31]) is misplaced. The respondent did not here seek merits review of a decision to refuse to grant to her a visa that was affected by jurisdictional error.

Context and purpose

24. The construction of the definition of BCNC for which the respondent contends is consistent with its context and purpose, and the object of the Act.

25. So far as the object of the Act is concerned, s 4(1) provides that the object is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". To advance that object, s 4(4) provides that the Act "provides for the removal or deportation from Australia of non-citizens *whose presence in Australia is not permitted by this Act*" [emphasis added]. The Act contemplates, therefore, that only an unlawful non-citizen may be removed or deported from Australia. If that is so, it would be inconsistent with the object of the Act to read subpara (d) of the definition of BCNC as preventing a non-citizen from being granted a visa solely on account of his or her having been unlawfully removed or deported from Australia.

26. So far as context and purpose are concerned, support for the respondent's construction of subpara (d) of the definition of BCNC may be found in other parts of the definition. The other components of the definition evince a purpose of identifying defined levels of behaviour of concern. A removal from Australia under the Act, based as it is on unlawful entry and refusal or cancellation of a visa,[15] serves the purpose of identifying behaviour of concern. A purported removal that is not effected under the Act, because it is affected by jurisdictional error, fails to serve the purpose of the definition and of identifying a mandatory criterion (s 32(2)(a)(ii)) for refusal of a special category visa.

27. If a non-citizen has been removed from Australia consequent upon cancellation of his or her visa, but the decision to cancel the visa is later set aside for jurisdictional error, the consequence of an unlawful administrative act having been effected by the Commonwealth should not be sheeted home to the visa applicant. The Minister's construction of subpara (d) of the definition of BCNC, however, has that effect.

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14 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307.

15 See, in particular, s 198(2) of the Act.

28. The legislative history of the definition of BCNC also supports the respondent's construction.

29. Section 4 of the *Migration Reform Act 1992* (Cth) (**Reform Act**) introduced the definition of BCNC into the Act. It has not been amended since its introduction. Section 10 of the Reform Act enacted s 32 of the Act (then s 26A). The criterion for the grant of a special category visa in s 32(2)(a)(ii) has remained in the same terms since its enactment.

30. The Explanatory Memorandum to the Migration Reform Bill 1992 (Cth) (**1992 EM**) provides no relevant commentary on the definition of BCNC.[16] That may be an indication that the Parliament did not turn its mind to the question of a visa applicant losing his or her entitlement under the Act to be granted a visa as a result of a previous government act that was purportedly, but not validly, performed under the Act.

31. However, the Reform Act also enacted a definition of the phrase "allowed inhabitant of the Protected Zone" which relevantly meant "an inhabitant of the Protected Zone, other than such an inhabitant … who is a [BCNC]". It, together with the definition of BCNC, commenced on 1 November 1993.[17] The former was in place only for a period of approximately 10 months, when it was repealed and replaced by s 4 of the *Migration Legislation Amendment Act 1994* (Cth) (**1994 Act**), which commenced on 1 September 1994.[18] The new definition of "allowed inhabitant of the Protected Zone" did not include a reference to BCNC. However, there is an indication in the Explanatory Memorandum to the Migration Legislation Amendment Bill 1994 (Cth) (**1994 EM**) as to what was intended by the definition of BCNC. It relevantly provided as follows (emphasis added):[19]

> "The definition of 'allowed inhabitant of the Protected Zone' is replaced by a definition which will place fewer restrictions on the inhabitants of the Protected Zone (an area between Australia and Papua New Guinea). Rather than an *automatic exclusion of inhabitants with serious health problems or criminal records, which is the effect of the existing definition*, the new definition creates a discretion to exclude such persons by means of a ministerial declaration under section 17."

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16 1992 EM at 2 [8], 3 [13].
17 See s 2(3) of the Reform Act.
18 See s 2(3) of the 1994 Act.
19 1994 EM at 5.

32. Consistent with the submissions made earlier, the 1994 EM would suggest that Parliament intended that a person convicted of a criminal offence which has subsequently been quashed – at least prior to any decision being made on the visa application – is not a BCNC (for want of a serious criminal record). It is then but a short step to take to say that, by analogy, a person whose removal from Australia was not effected in accordance with the Act was not somebody who was "removed … from Australia".

33. It is also significant that subpara (d) of the definition of BCNC uses the term "removed" from Australia and not merely, for example, "l[eft] Australia" (*cf* s 82(8)) involuntarily consequent upon cancellation, or purported cancellation, of his or her visa.

34. Returning to the 1992 EM, it should be noted that it made clear that amendments made with respect to "the regulation of entry to and stay in Australia as well as the detention and removal of non-citizens here unlawfully"[20] were only for the purpose of conferring power on the Executive to remove unlawful non-citizens from Australia.[21]

35. Further, the 1992 EM suggests, by analogy, that the word "remove", when used in the context of regulating the removal of unlawful non-citizens, is limited to "lawful removal". For example, s 66A (now s 210 of the Act) provided that, subject to s 66D, a non-citizen who was removed or deported was liable to pay the Commonwealth the costs of his or her removal or deportation. Section 210 uses the same language.

36. The word "non-citizen", where it first appears in s 210, is not preceded by the word "unlawful" and the section does not provide that it is only non-citizens lawfully removed from Australia that are liable to pay the Commonwealth for the costs of their removal. The section is as broad as is subpara (d) the definition of BCNC. Yet, the 1992 EM

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20 1992 EM at 2 [5].

21 See, in particular, 1992 EM at:

- 4 [18]: "… the Reform Bill will provide that a person in Australia will have one of two statuses – lawful non-citizen (ie a person in the Migration Zone who holds a valid visa) or unlawful non-citizen (i.e. a person in the Migration Zone who does not hold a valid visa)";
- 10[53]: "… The power to deport illegal entrants will be replaced by a power to remove unlawful non-citizens (see section 54ZF). This is essentially a change in terminology, to reflect an appropriate distinction between 'deportation', as the ultimate sanction for non-citizens who commit serious crimes or are a threat to national security, and 'removal' of persons who have no legal entitlement to remain in Australia";
- 10 [54]: "… A person will become subject to removal as soon as he or she becomes unlawful …"; and
- 10 [55]: "The aim of these amendments is to simplify the removal process so that all persons unlawfully in Australia will be subject to removal from the country."

makes clear that it was only intended for the costs of removal to be paid by "unlawful non-citizens".[22]

37. Both the definition of BCNC and s 210 of the Act attach legal consequences to a person's removal from Australia. The clarification in the 1992 EM that the general words "non-citizen who is removed" in s 210 applies only to unlawful non-citizens so removed fortifies the proposition that removal from Australia in the definition of BCNC refers only to non-citizens so removed as is consonant with the authority to remove conferred on officers of the Commonwealth under Division 8 of Part 2 of the Act.

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Alternative construction: notice of contention[23]

38. If, contrary to the respondent's principal argument, the ordinary sense of the phrase "removed … from Australia" connotes nothing more than physical removal from Australia, the context and purpose of the definition, and the object of the Act, would be thwarted if subpara (d) of the definition of BCNC were not read as containing the word "lawful" or "valid" immediately preceding the phrase. This implication would also bring subpara (d) in line with subparas (a)-(c) (which could not bite if, for example, the non-citizen's conviction were quashed prior to making a valid application for a special category visa) and avoid the types of harsh and absurd outcomes described below. The
20 implication is not too large a step which is at variance with the words used by the Parliament[24] and does not give to subpara (d) an unnatural meaning.[25]

39. In so far as the Federal Court rejected the respondent's submission to this effect at J [29] (CAB 41), it erred.

The need for evaluative judgments to be performed does not militate against the respondent's construction

40. At AS [38]-[45], the Minister submits that he and his delegates are not required to make evaluative judgments in assessing whether a person is a BCNC, contrary to the
30 conclusion reached by the Federal Court. This submission is made on two grounds.

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22 1992 EM at 9 [47], 10 [56].

23 The respondent will file an application seeking leave to rely upon a notice of contention and an affidavit in support.

24 *Taylor* at 548 [38] per French CJ, Crennan and Bell JJ; *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at 233-234 [104] per Nettle J; *HFM043 v Republic of Nauru* (2018) 92 ALJR 817 at 820 [24] per Kiefel CJ, Gageler and Nettle JJ.

25 *Taylor* at 557 [66] per Gageler and Keane JJ; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 375 [38] per Gageler J.

41. *First*, no evaluative judgments are required to be made at all having regard to the judgment of the Full Federal Court in *Hicks*.

42. *Secondly*, for practical reasons that relate to how ill-equipped he and his delegates are to make evaluative judgments (AS [40]-[41]). The Minister contends that the phrase "removed or deported from another country" in subpara (d) of the definition of BCNC should not be construed in such a way as to require the Minister to evaluate the validity or legality of the acts of a foreign government.

43. The bulk of the Minister's submissions at AS [38]-[45] pertains to the second part of subpara (d) of the definition of BCNC: "removed or deported from another country". The facts of the present case do not call for this Court to undertake the task of construing those words.

44. In any event, neither of the grounds relied upon by the Minister has force, and neither militates against the respondent's construction of the words "removed … from Australia".

Hicks is inapt

45. At AS [37], the Minister seizes upon the following observation of the Full Court in *Hicks* (at 438 [41]):

> "The definition of "behaviour concern non-citizen" is in precise terms which do not allow for any evaluative judgments. It is applied by reference to matters essentially of public record."

46. The relevant question that fell for consideration in *Hicks*, however, was whether the discretionary power to refuse the grant of a visa on character grounds in s 501(1) of the Act was available in the face of s 32. Mr Hicks argued that it was not but the Full Federal Court disagreed. The Court sought to juxtapose s 32 with s 501(1), the former involving the application of rigid criteria for the grant of a special category visa and the latter involving matters of discretion. It was in that context that the observation quoted in the preceding paragraph was made. *Hicks* does not address the issue presently falling for determination, namely, whether a non-citizen will come within subpara (d) of the definition of BCNC if his or her removal from Australia was effected consequent upon a decision to cancel his or her visa that is affected by jurisdictional error such that the person was not, at the time that he or she was purportedly removed from Australia, an unlawful non-citizen.

47. It may be accepted that the criteria for the grant of a special category visa in s 32(2) do not involve matters of discretion (*cf* s 501(1)) but that is not to say that application of the criterion in s 32(2)(a)(ii) (read with the definition of BCNC) does not call for evaluation by a decision-maker as to whether or not a person has been removed from Australia in accordance with Division 8 of Part 2 of the Act; whether his or her conviction has been quashed; whether his or her sentence of imprisonment has been reduced on appeal to a period less than 12 months; et cetera. As with any visa application, it is for the special category visa applicant to make arguments and furnish evidence in support of his or her application and for the decision-maker to consider that information in accordance with his or her duty in s 47(1) of the Act.[26] Consideration of a visa application will, of course, involve evaluating the information presented and assessing it against the criteria for the grant of the visa (*cf* AS [37], [38.1], [40]).

48. Contrary to AS [38], the location of an applicant for a special category visa at the time of application or time of decision has no bearing upon the construction of para (d) of the definition of BCNC. In any event, items 1219(3)(a) and (b) of Sch 1 to the *Migration Regulations 1994* (Cth) (**Regulations**) contemplate that the visa applicant may already hold a special purpose visa[27] or a temporary visa. If he or she were the holder of such a visa, a decision on his or her application for a special category visa could be made sometime after he or she has been immigration cleared and entered the Australian community.[28] The decision-maker would, then, have ample time to make the types of inquiries contemplated by para (d) of the definition of BCNC.

49. However, even if that were not so and the decision-maker is required to make a decision while the applicant is in immigration clearance or in immigration detention, being a delegate of the Minister he or she would be, it may be presumed, well-equipped to ascertain whether or not the applicant was ever removed or deported from Australia in accordance with the Act. If the applicant fails to present arguments and adduce evidence to show that he or she was not removed from Australia in accordance with the Act and the decision-maker is armed with prima facie evidence of removal, the decision-maker could act upon that evidence. If there were any controversy about the matter, a court on judicial review could, as was the case here, quell it.

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26 *cf Abebe v Commonwealth* (1999) 197 CLR 510 (***Abebe***) at 576 [187] per Gummow and Hayne JJ.

27 See s 33 of the Act and reg 2.40 of the Regulations.

28 The fact that the visa applicant will need to present to an "officer" or "authorised system" his or her New Zealand passport does not exclude this possibility. Where an application is made using an authorised system, the applicant will not need to present to an officer or a clearance authority a New Zealand passport held by him or her that is in force: see item 1219(3)(b) of Sch 1 to the Regulations.

50. Further, para (e) of the definition of BCNC, read with reg 5.15 of the Regulations, contemplates evaluative judgments having to be made by decision-makers. Regulation 5.15(a) refers to the person refusing or failing to present a passport on request by the competent authorities of a country other than Australia "in which it would be *unreasonable* to refuse or fail to do so"; reg 5.15(b) requires the decision-maker to assess whether the applicant presented to those authorities a "bogus document" (a concept which, under the Act, involves matters of judgment: see s 5(1)); reg 5.15(c) refers to an applicant having been "*reasonably* refused entry to that country on the ground that the person was not a *genuine* visitor"; and reg 5.15(d) refers to the authorities of the other country considering the person to be "a threat to the national security of the country" [emphasis added]. These are not rigid, binary criteria. Each of the four prescribed circumstances involves events that may or may not be matters of public record. The prescribed circumstances may require evaluation of factual matters arising in countries other than Australia.

51. In any event, the setting aside of the decision to cancel the respondent's special category visa was "a matter of public record"[29] and so no "evaluative judgment" (if that expression is to be understood as something other than ascertaining whether the respondent's removal was effected in accordance with Division 8 of Part 2 of the Act) had to be made by the Minister's delegate.[30] Indeed, the invalidity of the cancellation was sufficiently clear that the Minister's lawyers were instructed to consent to the order of the Federal Circuit Court quashing the cancellation decision.[31]

52. The Federal Court was correct to conclude, at J [39]-[40] (CAB 43), that the Minister's delegate should have, but failed to, take into account the fact that the respondent had not been removed from Australia in accordance with the Act in that the decision to cancel her visa in consequence of which she was purportedly removed was affected by jurisdictional error. However, the Federal Court's 'second reason' for upholding the appeal does not stand independently of the first – and the Federal Court did not suggest otherwise (*cf* AS [33]).

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29 AFM at pp 60-71.

30 It is not in dispute that the respondent declared that she had been previously removed from Australia and provided a letter prepared by her solicitor which explained the circumstances of her removal and enclosed the orders of the Federal Circuit Court quashing the cancellation decision for jurisdictional error. No investigations had to be made and the effect of the Federal Circuit Court's order was clear on its face and in the accompanying solicitor's letter.

31 AFM at 70-71.

Evaluative judgments of foreign governments are permitted and may be required

53. The present case does not involve the construction of the phrase "removed or deported from another country". Accordingly, nothing in the Minister's submissions at AS [38]-[45], in so far as they pertain to the latter part of subpara (d) of the definition of BCNC, detracts from the respondent's construction of the opening words of that subparagraph.

54. In any event, if one were to apply the (rebuttable) presumption that the same meaning is to be given to the same words appearing in different parts of a statute,[32] it follows that the phrase "removed or deported from another country" connotes lawful removal, deportation or expulsion from that country in accordance with that country's laws. While the foreign act of state doctrine dictates that a court will not, in general, adjudicate upon the validity of acts and transactions of a foreign sovereign state within its territory,[33] there is an exception to the rule where a court must come to a conclusion about the legality of a foreign governmental act where it is necessary to the determination of a particular issue in the case.[34]

55. As a majority of this Court held in *Moti* (at 475 [50]), nothing in the *Spycatcher Case*[35] or in the judgment of Fuller CJ of the Supreme Court of the United States in *Underhill v Hernandez* (1897) 168 US 250 at 252 "should be understood as establishing as a general and universally applicable rule that Australian courts may not be required to (or do not have or may not exercise jurisdiction to) form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law". The majority went on to observe, at 475 [51], that "there will be occasions when to decide the issues that must be determined in a matter an Australian court must state its conclusions about the legality of the conduct of a foreign government or persons through whom such a government has acted". *Moti* was such a case.

56. The act of state doctrine was not applied in *Oppenheimer v Cattermole* [1976] AC 249 because the foreign state's actions involved gross breaches of human rights.[36] In *Kuwait*

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32 See, for example, *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J (with whom Barwick CJ and Jacobs J agreed).

33 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (***Plaintiff M68/2015***) at 72-73 [48] per French CJ, Kiefel and Nettle JJ, 127 [251] per Keane J. See also *Nissan v Attorney-General* [1970] AC 179 at 237 per Lord Pearson.

34 *Plaintiff M68/2015* at 72-73 [48] per French CJ, Kiefel and Nettle JJ, 128 [255]-[256] per Keane J, 169 [414] per Gordon J, citing *Moti v The Queen* (2011) 245 CLR 456 (***Moti***) at 475 [51].

35 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd [No 2]* (1988) 165 CLR 30 at 40-41 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ.

36 See also *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354 at 369 [45] per Black CJ and Hill J; *Habib v Commonwealth* (2010) 183 FCR 62 at 65 [1], 66-67 [7] per Black CJ, 96 [114], 101 [134]-[135] per Jagot J.

Airways Corporation v Iraqi Airways Company (Nos 4 and 5) [2002] 2 AC 883, Lord Nicholls of Birkenhead observed, at 1078 [18], that foreign laws may be fundamentally unacceptable for reasons other than human rights violations. More recently, in *Belhaj v Straw* [2017] AC 964, the Supreme Court of the United Kingdom allowed an action to proceed notwithstanding that it called into question the lawfulness of detention by the Libyan state.[37]

57. While the concepts referred to in each of the subparagraphs of the definition of BCNC will, generally, be matters of public record, it does not follow that their application to particular fact scenarios will always be clear. The concepts in subparas (a), (b), (c) and (d) of the definition are all legal concepts whose content and application will vary from one legal system to another.

58. Circumstances analogous to those in the present case, but involving removal or deportation by a foreign state, would, if proceedings were to be instituted in a Chapter III court, involve no foreign act of state issues since all that the Australian court would have to do is to give effect to the foreign judicial decision declaring the foreign government's action invalid.[38]

59. If there were a controversy about the legality of a foreign governmental decision and its determination were necessary for the resolution of a question arising in the Australian proceedings (such as whether a non-citizen was "removed or deported from another country" within the meaning of subpara (d) of the definition of BCNC), a view would need to be formed by the Australian court. More generally, however, the circumstances in which a person may be removed by a foreign government may vary greatly from circumstances involving gross human rights abuses to a model of established cause and due process.

60. The text of the definition of BCNC (particularly subparas (d) and (e)), the context of it being a basis for the refusal of a visa, and the reference in subpara (a) to a person who has been sentenced to death (which is foreign to any Australian federal, state or territory legal system) all indicate that consideration of an application for a special category visa may, in some circumstances, require the Minister or his or her delegates to form a view about the legality of acts performed by, or on behalf of, governments of foreign states.

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37 See at 1164 [262] per Lord Sumption. A recent and detailed discussion of the act of state doctrine by the Supreme Court of Canada appears in *Nevsun Resources Ltd v Araya* [2020] SCC 5, particularly at [34]-[43] per Abella J (Wagner CJ and Karakatsanis, Gascon, and Martin JJ concurring).

38 *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] QB 458 at 494 [87] per Rix LJ.

61. The Minister's appeal to notions of administrative inconvenience at AS [38]-[45] does not withstand scrutiny. Consistent with the propositions that administrative decision-makers under the Act are not under general duties of inquiry[39] and that it is for applicants to provide material in support of their claims, a decision-maker may not need to grapple with questions of foreign law if he or she is armed with evidence that, prima facie, establishes that the visa applicant was removed or deported by the government of a foreign state, and insufficient material (including as to the applicable foreign law) has been presented by the visa applicant to suggest otherwise. The decision-maker might, in those circumstances, satisfy himself or herself that the foreign governmental act is valid. If, however, the visa applicant presented a compelling case as to why the foreign governmental act is not valid (which may involve adducing material as to the relevant foreign law), the decision-maker would, consistent with his or her duties in ss 47(1) and 54(1) of the Act, be required to have regard to the material presented and form a view as to whether the person was removed or deported by the foreign state in accordance with its laws. That a delegate of the Minister might need to turn his or her mind to foreign legal concepts in making decisions under the Act is not a novel proposition.[40] And, as stated above, in the event of a controversy, a court on judicial review would be well-equipped to quell it, including by the application of foreign law (provided that it is proved as a fact by the party wishing to rely upon it).[41]

62. Implicit in the Minister's submissions at AS [38]-[45] is an assumption that foreign governmental acts are always complex. But that is not necessarily so. The question may be as simple as that which was raised by the primary judge at [26] (CAB 18), namely, whether a conviction is a conviction if it has been quashed on appeal. However, they may also be as esoteric as whether the sentence of an ad hoc revolutionary court[42] or a regime not recognised by Australia as the legitimate government of a particular foreign country is a conviction and sentence for the purposes of subpara (a) of the definition of BCNC.

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39 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 999 [43] per Gummow and Hayne JJ.

40 *Tahiri v Minister for Immigration and Citizenship* (2012) 87 ALJR 225 at 230 [21] per French CJ, Bell and Gageler JJ; *Broadbent v Minister for Home Affairs* [2020] FCA 1626 at [67] per SC Derrington J. See also *DKXY v Minister for Home Affairs* [2019] FCA 495 at [41] per Griffiths J (speaking as to the function of the Administrative Appeals Tribunal).

41 Proof of foreign law being a question of fact: *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 370 [115] per Gummow and Hayne JJ.

42 Or, for example, by some judicial arm of the 'governments' of the Sovereign Military Order of Malta, the Wa State of Myanmar, the Rojava in Syria, those controlling the Kurdistan Region of Iraq, the Donetsk People's Republic and Luhamsk People's Republic.

63. That the Minister or his delegates might sometimes need to confront difficult questions of foreign law is not relevant to the proper construction of the definition.[43] Further, in the circumstances of the present case, administrative inconvenience does not demand a construction of the definition of BCNC that severely disadvantages New Zealand passport holders whose visas have been unlawfully cancelled and who have been removed from Australia otherwise than in accordance with the Act.

64. In any event, if, contrary to the foregoing submissions, the phrase "removed or deported from another country" in subpara (d) of the definition of BCNC were understood as referring to removal or deportation in fact, the respondent's construction of the phrase "removed … from Australia" still holds firm (*cf* AS [46]-[47]).[44] For the reasons given above, the text, context and purpose of the definition, as well as the object of the Act, point to the words "removed … from Australia" connoting removal in accordance with Division 8 of Part 2 of the Act, or lawful or valid removal.

The respondent's construction avoids absurd and harsh outcomes

65. Where a particular construction of a statutory provision will do manifest injustice and another construction would avoid that result, the latter should be adopted unless the words of the statute are intractable (which is not the case here).[45] Courts should also strive to avoid a construction of a statute that would have the effect of permitting a wrongdoer to take advantage of his, her or its own wrong.[46]

66. It is plain that the Minister's construction of the definition of BCNC works an injustice on the respondent: even if she were to seek judicial review of the decision to remove her unlawfully from Australia and succeed, she would still fail to satisfy the criterion for the grant of a special category visa in s 32(2)(a)(ii) of the Act. Indeed, she could never satisfy that criterion on the current state of the law. That is a manifestly unjust result, particularly in circumstances where the respondent faces her current predicament

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43 *cf ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 953 [100] per Gordon J.

44 *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643-644 per Gibbs J; *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 10 per Gibbs J, 15 per Mason J; *Murphy v Farmer* (1988) 165 CLR 19 at 27 per Deane, Dawson and Gaudron JJ.

45 See, for example, *Bowtell v Goldsborough, Mort & Co Ltd* (1905) 3 CLR 444 at 456 per Barton J; *Metropolitan Coal Company of Sydney Ltd v Australian Coal and Shale Employees' Federation* (1917) 24 CLR 85 at 99 per Isaacs and Rich JJ; *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 331-332 per Barwick CJ; *Public Transport Commission of New South Wales v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 350 per Gibbs J; *Federal Commissioner of Taxation v Smorgon* (1977) 143 CLR 499 at 508-509 per Stephen J; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 120-121 per Mason and Wilson JJ.

46 *Nelson v Nelson* (1995) 184 CLR 538 at 554 per Deane and Gummow JJ.

as a consequence of unlawful acts – purported cancellation and removal – by officers of the Commonwealth (*cf* AS [55.2]). Other New Zealand passport holders whose visas have been cancelled unlawfully and who have been removed from Australia consequent upon those decisions face the same predicament.

67. Further, a consequence of the Minister's construction is that a decision to remove or deport a New Zealand passport holder in bad faith or for an improper purpose would result in his or her inability to satisfy the criterion in s 32(2)(a)(ii), even if that decision were found by a court on judicial review to be affected by jurisdictional error. That consequence is avoided if the respondent's construction is adopted.

68. Contrary to AS [56], the proposition that regulations can be made for the purposes of ss 32(2)(b) and (c) goes nowhere, for they might not ever be promulgated. It is also unrealistic – and unfair – to expect a New Zealand passport holder, who might not be legally represented, to have the foresight to enjoin his or her removal from Australia lest he or she be prevented from being granted a special category visa in the future because he or she was removed from Australia otherwise than in accordance with the Act (*cf* AS [56]).

Principle of legality

69. Not only does the statutory context support the meaning of the words "removed … from Australia" for which the respondent contends; so does the principle of legality.

70. Where different constructional choices are open, statutes are to be construed so that they do not encroach upon fundamental rights and freedoms at common law. The principle of legality may be expressed as a common law presumption against a parliamentary intention to infringe upon such rights and freedoms.[47] In the absence of clear words or necessary implication, courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms.[48] A rationale for the principle of legality is to require the Parliament to confront squarely, and take responsibility for, what it is doing. Fundamental rights cannot be overridden by general or ambiguous words because too great a risk exists that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.[49]

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47 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 (***City of Adelaide***) at 30-31 [42] per French CJ.

48 *City of Adelaide* at 66 [148] per Heydon J (dissenting in the result).

49 *R v Secretary for Home Department; ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann, cited in *City of Adelaide* at 66 [148] per Heydon J.

71. The principle is based on an assumption that it is highly improbable that the Parliament would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with irresistible clearness.[50] The presumption is not merely a common sense guide to what a parliament in a liberal democracy is likely to have intended; it is a working hypothesis known to Parliament and the courts upon which statutory language will be interpreted.[51]

72. Displacement of the strong[52] presumption of legality has variously been described to require: "clear and unambiguous words",[53] "irresistible clearness",[54] "express words of plain intendment",[55] "clear words or necessary implication"[56] and "clearness which admits of no doubt".[57] In the absence of express language or necessary implication, even the most general words are taken to be subject to the basic rights of the individual.[58]

73. The application of the legality principle is not limited to the protection of rights, freedoms or immunities that are hard-edged, of long standing, or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values. It exists to protect from inadvertent and collateral alteration rights, freedoms, principles and values that are important within our system of representative and responsible government under the rule of law.[59] The right of a visitor to Australia to have her character assessed by reference to valid determinations of her right to hold an existing visa and to have her application to enter Australia, lawfully, determined by valid judgments made in the past, according to law, fall within the broad categories of fundamental rights so identified. To have one's rights determined by reference to determinations made validly according to

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50 *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ, cited with approval in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 (***Electrolux***) at 329 [21] per Gleeson CJ. Gleeson CJ noted that the phraseology is sourced in the reasoning of O'Connor J in *Potter v Minahan* (1908) 7 CLR 277 at 304, in turn citing a passage from *Maxwell on Statutes* (4th ed, 1905) at 122.

51 *Electrolux* at 329 [21] per Gleeson CJ, citing *R v Secretary for the Home Department; Ex parte Pierson* [1998] AC 539 at 587, 589 per Lord Steyn.

52 Presumed by the nature of the words used to describe what is required to displace the presumption.

53 *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 at 349 per Lord Warrington of Clyffe.

54 *Bropho v Western Australia* (1990) 171 CLR 1.

55 *Annetts v McCann* (1990) 170 CLR 596 (***Annetts***) at 598 per Mason CJ, Deane and McHugh JJ.

56 *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 252 per Deane, Dawson, Toohey and Gaudron JJ.

57 *Magrath v Goldsborough, Mort & Co Ltd* (1932) 47 CLR 121 at 128 per Rich J, 134 per Dixon J.

58 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30] per Gleeson CJ, citing *Annetts* at 598 per Mason CJ, Deane and McHugh JJ.

59 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310 [313] per Gageler and Keane JJ.

law is an application of the systemic value on which the instrument of the Constitution is founded: the rule of law.[60]

74. At AS [49]-[52], the Minister is critical of the respondent's reliance on the legality principle. Undoubtedly, the power in s 51(xix) of the *Constitution* is wide[61] but it is not unfettered.[62] As the legality principle dictates, where that wide power is sought to be used to undermine a fundamental right (that is, to have one's eligibility to hold an Australian visa decided by reference to determinations made validly according to law), the statutory power must be described in clear and unambiguous terms. That is not the case here.

75. The Minister's submissions at AS [52] misunderstand how the legality principle, as a canon of construction, supports the interpretation of the definition of BCNC for which the respondent contends. It is not the case that the respondent simply "left" Australia, thereby giving up a "right" to be automatically granted a visa upon her return. The decision to cancel her visa was void for jurisdictional error. There was no basis in law validly to remove the respondent from Australia. These injustices ought not to flow into the decision to deny the respondent a new visa unless clear and unambiguous language requires that result.

76. The principle of legality points against interpreting the words "removed … from Australia" in the definition of BCNC as including the unlawful, purported removal for which the Minister argues. The phrase ought to be read down so that it requires removal from Australia under Division 8 of Part 2 of the Act.

An analogous case

77. This Court's judgment in *Park Oh Ho v Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637 (***Park Oh Ho***) is, in some respects, similar to the present case. There, a deportation order made by a delegate of the Minister against the appellants had been set aside, ab initio, for having been made for an ulterior purpose. This Court held that the phrase in the former s 39(1) of the Act, "where an order for the deportation of a person is in force", did not apply to a deportation order that was void ab initio. It was also held that the word "deportee" in s 39(6) of the Act did not apply to

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60 *Abebe* at 560 [137] per Gummow and Hayne JJ, citing, with approval, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J.

61 *Hwang v Commonwealth* (2005) 80 ALJR 125 at 130 [18] per McHugh J; *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 38 [11] per Gummow, Hayne and Crennan JJ.

62 *Pochi v Macphee* (1982) 151 CLR 101 at 109 per Gibbs CJ.

the appellants whose status as deportees was dependent on there being a valid deportation order in force. As Kirby J observed in *Ruddock v Taylor* (2005) 222 CLR 612 at 657 [164], *Park Oh Ho* "supports the principle that the quashing by a court of an administrative decision that forms the basis for detention has a retrospective effect on the legality of such detention".

78. Similarly, the quashing of the cancellation decision had a retrospective effect on the legality of the respondent's purported removal from Australia. She was never a "removee" (as defined in s 5(1) of the Act) or "removed … from Australia" (within the meaning of the definition of BCNC).

79. For the foregoing reasons, the appeal ought to be dismissed, with costs.

Part VI: Estimate of time for oral argument

80. The respondent anticipates that she will require one-and-a-half hours for the presentation of her oral argument.

Dated 15 January 2021

Stephen Keim SC
Higgins Chambers
(07) 3229 0381
s.keim@higginschambers.com.au

Bora Kaplan
Nine Wentworth Chambers
(02) 8815 9249
bdk@ninewentworth.com.au

Kate Slack
Higgins Chambers
(07) 3112 9230
kslack@qldbar.asn.au

Counsel for the respondent

ANNEXURE – RESPONDENT'S LIST OF LEGISLATIVE PROVISIONS

1. *Acts Interpretation Act 1901* (Cth), s 18A (as at 29 January 2019).

2. *Migration Act 1958* (Cth), ss 4(1), 5(1) (definitions of "behaviour concern non-citizen", "remove" and "removee"), 13(1), 14(1), 15, 32, 33, 47(1), 54(1), 82(8), 198, 210, 474(3)(g), 501(1) (as at 29 January 2019).

3. *Migration Reform Act 1992* (Cth) ss 2, 4, 10.

4. *Migration Regulations 1994* (Cth), regs 2.40, 5.15; Sch 1, item 1219 (as at 29 January 2019).