HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

B66 of 2020

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Appellant

DEANNA LYNLEY MOORCROFT

Respondent

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APPELLANT'S SUBMISSIONS

I. SUITABLE FOR PUBLICATION

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

II. ISSUE

2. The issue posed by this case is whether:

    2.1. As the appellant (the **Minister**) contends, the expression "removed or deported from", where it twice appears in paragraph (d) of the definition of "behaviour concern non-citizen" (**BCNC**) in section 5(1) of the *Migration Act 1958* (the **Act**), means taken out of a country (be it "Australia" or "another country") by or on behalf of a government of that country *in fact*?

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    2.2. The expression "removed or deported from", where it twice appears in paragraph (d), means taken out of a country (be it "Australia" or "another country") by or on behalf of a government of that country *validly* or *lawfully*?

    2.3. As the respondent contended below, the expression "removed or deported" has two different meanings where it twice appears in paragraph (d): in the first limb ("from Australia") it means taken out of Australia *validly* or *lawfully* in accordance with Part 2 Divs 8 and 9 of the Act; and in the second

limb ("from another country") it means taken out of that country by or on behalf of a government of that country *in fact*?

III. SECTION 78B NOTICES

3. The Minister has considered whether notices should be given in compliance with section 78B of the *Judiciary Act 1903*, and is satisfied that that it is not necessary.

IV. REASONS FOR JUDGMENT BELOW

4. There has been no report of the reasons for judgment of either the trial court (the Federal Circuit Court) or the intermediate appellate court (the Federal Court) below. However, the medium neutral citations are, respectively:

10 4.1. *Moorcroft v Minister for Home Affairs* [2019] FCCA 772; and

4.2. *Moorcroft v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 382.

V. FACTS

5. The respondent is a citizen of New Zealand. She resided in Australia as the holder of a special category visa for a period until 24 December 2017, when she returned to New Zealand: *J* [2], [4]. On 2 January 2018, the respondent returned to Australia, and was granted another special category visa (the **Visa**): *J* [5].

6. However, on 3 January 2018, the Visa was purportedly cancelled under section 116(1)(e) of the Act (the **cancellation decision**): *J* [5], [7]. The respondent was
20 detained under section 189(1). Then, on 4 January 2018, the respondent was removed from Australia in purported reliance on the power in section 198(2): *J* [7]. She remained in New Zealand until 29 January 2019: *J* [7], [9].

7. In the meantime, on 7 February 2018, the respondent applied to the Federal Circuit Court for judicial review of the cancellation decision: *J* [8]. On 28 June 2018, by consent of the parties, that Court made an order quashing the cancellation decision: *J* [8].

8. On 29 January 2019, at about 8.45 am, the respondent arrived at Gold Coast Airport and applied for a special category visa: *J* [9].[1]

9. A criterion for a special category visa imposed by section 32(2) of the Act is that the Minister is satisfied that the applicant falls within any of the descriptions in paragraphs (a) to (c). Paragraph (a) describes a non-citizen who, *inter alia*, is not a "behaviour concern non-citizen".

10. The expression "behaviour concern non-citizen" is relevantly defined in section 5(1) of the Act as meaning a non-citizen who (emphasis added):

> (a) has been convicted of a crime and sentenced to death or to imprisonment, for at least one year; or
>
> (b) has been convicted of 2 or more crimes and sentenced to imprisonment, for periods that add up to at least one year if:
>
> …
>
> (c) has been charged with a crime and either:
>
> > (i) found guilty of having committed the crime while of unsound mind; or
> >
> > (ii) acquitted on the ground that the crime was committed while the person was of unsound mind;
>
> (d) has been **removed or deported from Australia** or **removed or deported from another country**; or
>
> (e) has been excluded from another country in prescribed circumstances;

11. At about 11.07 am, the respondent was interviewed by a delegate of the Minister at the airport. She was asked whether she had ever been removed, deported or excluded from entering any country, including Australia. She answered in the affirmative and explained that she had been removed from Australia after her Visa was cancelled on 3 January 2018: *J* [9].[2]

[1] See also affidavit of Mr McComber affirmed 29 January 2019, para [13], at Appellant's Book of Further Material (**AFM**) Tab 2.
[2] See also affidavit of Mr McComber affirmed 29 January 2019, paras [12] and [13], at AFM Tab 2; and "Record of interview – New Zealand citizen with criminal convictions (BCNC)" dated 29 January 2019, questions 25 and 26, at AFM Tab 1.

12. During her interview, the respondent provided the delegate with a copy of a letter that her solicitor, Joel McComber, had previously prepared. That letter explained that the cancellation decision had been quashed by the Federal Circuit Court, attached those orders, and contended that as a consequence the respondent had not been "removed or deported from Australia" within the meaning of paragraph (d) of the definition of BCNC in section 5 of the Act.[3]

13. At about 11.44 am, the delegate refused to grant the respondent a special category visa under section 65(1)(b) of the Act.[4] The delegate was not satisfied that the respondent had not been "removed or deported from Australia" within the first limb of paragraph (d) of the definition of BCNC: *J* [10]. Accordingly, the delegate was not satisfied that the respondent satisfied the criterion in section 32(2) of the Act.

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VI. ARGUMENT

Preliminary points

14. The respondent's Visa did not cease to be in effect when it was purportedly cancelled on 3 January 2018. That is because the cancellation decision was retrospectively nullified by the Federal Circuit Court's order made on 28 June 2018. It follows that the respondent was not an "unlawful non-citizen" when she was removed from Australia on 4 January 2018 in purported reliance on section 198(2).

15. However, 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). Certiorari was never granted with respect to the "act" of removal, being a kind of a "migration decision"[5] as defined[6] in the Act. Certiorari cannot quash a physical act.[7]

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[3] Affidavit of Mr McComber affirmed 29 January 2019, para [13] and annexure JKM04, at AFM Tab 2. See also *J* [38].

[4] Notification of Refusal of application for a Special Category Visa (TY444) dated 29 January 2019, at Core Appeal (**CAB**) Tab 1**.**

[5] See the definition of "migration decision" in section 5(1) of the Act, and the extended definition of "privative clause decision" in section 474(3) including paragraph (g) – "doing or refusing to do any other act or thing".

[6] See, e.g., *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [65], [66] and [68]; *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 at [72]-[73] (Anderson J).

[7] See, e.g., *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [46] (French CJ, Crennan and Kiefel JJ) and [113] (Heydon J), and the cases there cited.

16. Of course, the respondent could have applied to a court to enjoin her removal under section 198(2), before the act was performed. But she did not do so. What might have been enjoined was instead performed; nothing can change that fact.

17. And, as soon as the respondent left Australia, her Visa ceased to be in effect by operation of section 82(8) of the Act. Accordingly, the respondent needed to apply for another visa in order to remain[8] in Australia when she returned on 29 January 2019.[9] In considering the respondent's application, it fell to the delegate to consider whether he was satisfied that the respondent had been "removed or deported from Australia".

10 18. Within the ordinary meaning of that expression in its context, the respondent clearly had been removed from Australia. She had been removed from Australia on 4 January 2018.[10] That was an act performed in fact,[11] notwithstanding that the subsequent quashing of the cancellation decision entailed that the respondent was not an "unlawful non-citizen" when she was removed in fact.

The respondent's construction

19. As noted above, in the Federal Court, the respondent argued that "removed or deported" has two different meanings in paragraph (d) of the definition of BCNC: in the first limb ("from Australia") it means taken out of Australia *validly* or *lawfully* in accordance with Part 2 Divs 8 and 9 of the Act; and in the second limb ("from
20 another country") it means taken out of that country by or on behalf of a government of that country *in fact*.

20. The respondent was driven to urging the adoption of this anomalous construction as a result of her (correct) acceptance of two propositions:

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[8] As a New Zealand citizen, the respondent did not need another visa to *travel* to Australia: see section 42(1) and (2A)(a).
[9] *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 427 at [39] (Full Court).
[10] Consistently, the respondent, in answering the simple question in the visa application interview as to whether she had been removed from Australia or another country in the past, indicated that she *had*.
[11] Cf. *New South Wales v Kable* (2013) 252 CLR 118 at [52] (Gageler J): "a thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact". Gageler J also referred to Forsyth, "The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law", in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) Clarendon Press at 141. At 146, the authors observe: "[T]he law is not omnipotent; it cannot set everything right. Unlawful activity may (and does) have effects which cannot be rectified … For good or ill it is often impossible to return to the *status quo ante*. The law cannot wash away all signs of illegality."

20.1. first, if "removed or deported from Australia" means taken out of Australia by or on behalf of the Government of Australia *in fact*, then that clearly occurred on 4 January 2018 notwithstanding the subsequent quashing by the Federal Circuit Court of the cancellation decision; and

20.2. secondly, "the words 'removed or deported from another country' should not be read as being subject to the lawfulness of the removal or deportation from another country".[12]

21. The respondent's anomalous construction should not be accepted, for the reasons outlined below. However, before dealing with the respondent's construction, it is
10 useful to address the Federal Court's reasoning.

Federal Court's reasoning

22. The Federal Court (Collier J) held that "it would be wrong to contort the language of the statute to give it the effect urged on me by the [respondent], and imply the words 'lawfully' or 'validly' into s 5(d) of the Migration Act" (*J* [29]). However, "whether the [respondent] falls under the definition of 'behaviour concern non-citizen' must depend on whether he or she has been 'removed' from Australia *within the meaning of the Migration Act*" (*J* [30], emphasis in original).

23. The Court held that the word "remove" "has a more confined meaning in the Migration Act than simply physical removal": "The Migration Act requires that a
20 person has been 'removed' – and is therefore a 'removee' – when that removal occurs under Pt 2 Div 8 of the Migration Act. Removal under Pt 2 Div 8 is dependent upon a person being an 'unlawful non-citizen'. This confined meaning must be carried into the definition of 'behaviour concern non-citizen." (*J* [31])

24. Accordingly, the Court held that (*J* [35], emphasis in original):

24.1. although the respondent had been "*physically* removed from Australia" on 4 January 2018, she had not been an "unlawful non-citizen" at that time; and

[12] Notice of appeal to the Federal Court, ground 1(b), at CAB Tab 4. See further ground 1(b)(ii), where the respondent expressly agreed with the Minister that: "Parliament cannot reasonably be taken to have supposed that the Minister (or his delegate) would have any understanding of the diverse legal systems of the world, the content of the municipal laws of all the countries of the world governing removal or deportation, the mode (if any) by which the 'validity' (or even 'legality') of the exercise of such powers may be challenged, or the consequences of such a challenge if successful (e.g., as to whether the consequence is that the removal or deportation is a nullity)".

24.2. consequently, the respondent had not been "removed" from Australia under Part 2 Div 8 of the Act.

25. The Court also identified a "second reason" why the delegate made a jurisdictional error based on the "actual knowledge of the Minister [or his delegate] at the time of the refusal of the [respondent's] visa" (*J* [36], see also [26], [40]). The Court held, purporting to adopt the reasoning of the Full Court in *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 427 at [41], that because the order quashing the cancellation decision was a matter of "public record" (*J* [37]), and that order had been provided to the delegate (*J* [38]), the delegate "should" have taken into account that the respondent was not an "unlawful non-citizen" on 4 January 2018 (*J* [39]). For this reason, the Court was "unable to see how the delegate could have been satisfied that the [respondent] had been 'removed' from Australia for the purposes of s 5(d) of the Migration Act" (*J* [40]).

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Flaws in the Federal Court's reasoning

<u>The "first reason" – construction of the Act</u>

26. As noted above, the Court accepted that "it would be wrong to contort the language of the statute to give it the effect urged on me by the [respondent], and imply the words 'lawfully' or 'validly'" before the words "removed or deported" in paragraph (d) of the definition of "behaviour concern non-citizen" in section 5(1) of the Act." And yet, the Minister respectfully submits, that is effectively what the construction adopted by the Court involved.

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27. It may be accepted that the Act, where it refers in paragraph (d) of the definition of BCNC to removal or deportation "from Australia", is referring to acts that Part 2 Divs 8 and 9 of the Act authorises subject to certain constraints. But there is a difference between an *act* (removal of a person from Australia), and *legal constraints* on the performance of that act (including as imposed by section 198(2) that the person is an "unlawful non-citizen").

28. To conclude, as the Federal Court did, that the expression "removed or deported from Australia" encompasses only such acts that have been performed without breaching applicable legal constraints is, in effect, and notwithstanding the Court's rejection of the respondent's argument, to read the relevant limb of paragraph (d) as if it said "*[lawfully or validly]* removed or deported from Australia".

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29. An act is performed "in fact",[13] even where the act is performed unlawfully. Accordingly, the constructional question here is of a kind with which courts are familiar:[14] is the reference in one part of the Act (the definition of BCNC) to an administrative act otherwise authorised in the Act subject to certain constraints, to be understood as a reference to all such acts "in fact", or only to such acts that were performed in accordance with those constraints? Merely to point out, as the Court below did, that the Act authorises removal and deportation subject to certain constraints begs the question; it does not answer it.

30. For the reasons that Professor Forsyth has convincingly explained, the "focus" in a case such as the present must therefore fall upon the proper construction of the provisions governing the task of the "second actor" (here, the delegate who was called on to assess whether the respondent had been "removed or deported from Australia" within the meaning of paragraph (d) of the definition of BCNC).[15] "It requires the analysis, according to familiar principles, of [a] question[] of law".[16]

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31. In answering that question of law, context is critical, as is the judicious application of applicable principles of construction. Of course, the Minister does not submit that similar contextual considerations that bore on the result in the *Brian Lawlor* line of authority are relevant here: different contextual considerations are relevant. The Court is required, aided by context and applicable principles, to prefer the interpretation that would best achieve the object or purpose of the Act.[17]

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32. The Federal Court also sought to reinforce its primary analysis by adverting to perceived undesirable consequences of the Minister's construction, being that it would enable the "arbitrary or capricious refusal of a [special category] visa" (*J* [32]-[33]). In particular, the Court expressed concern that the Minister's construction would permit the refusal of a special category visa to: (a) a child who had been abducted; or (b) a person who had been "arbitrar[ily] or capricious[ly]" removed by an officer "however unusual such events may be" (*J* [34]). But the

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[13] See footnote 11 above.

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

[15] C Forsyth "The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law", in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) Clarendon Press 141 at 150.

[16] *Ibid*.

[17] *Acts Interpretation Act 1901* (Cth), section 15AA. See also, e.g., *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [46]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [39] (Gageler J).

former concern is misplaced, for the reasons outlined at 34 to 37 below. And the latter concern does not provide a sound basis to construe paragraph (d) otherwise than in accordance with its ordinary meaning in context, as outlined below.

The "second reason" – a matter of "public record"

33. As to the Court's "second reason" for finding that the delegate made a jurisdictional error, if "removed or deported from Australia" in paragraph (d) of the definition of BCNC means removed etc from Australia *in fact*, as compared to removed etc *validly* or *lawfully*, then the fact that the delegate knew that the cancellation decision had been quashed was simply irrelevant. The quashing of the cancellation decision said nothing as to whether the applicant had been removed *in fact*. And the evidence before the delegate unequivocally recorded that she had been removed in fact. Accordingly, the Court's supposed "second reason" for allowing the appeal added nothing to the analysis and cannot stand independently of the first.

Governmental acts as a proxy for identifying individuals of "behaviour concern"

34. The obvious intent of Parliament, by the use of the expression "removed or deported from" a country (be it "Australia" or "another country") in paragraph (d) of the definition of BCNC, is to describe the expulsion of a person by or on behalf of the government of that country as an incident of sovereignty over territory.[18]

35. That is not a "gloss" on the Act (cf. *J* [34]), it simply recognises the significance of statutory context in construing the words "remove" and "deport". Notably:

35.1. the Act itself elsewhere authorises "removal" and "deportation" from Australia by the officers, which informs the meaning of the *acts* described in paragraph (d) as noted above (while not entailing that the reference to those acts is only to such acts that are performed *lawfully*); and

35.2. given that all the other paragraphs of the definition of BCNC describe governmental acts, it would be anomalous if the expression "removed or deported" where twice appearing in paragraph (d) encompassed private acts.

36. Indeed, it would be perverse, and it would serve no discernible purpose, to construe the word "remove" in paragraph (d) of the definition of BCNC so as to encompass

[18] Cf. *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ).

private acts such as that of a parent taking a child out of a country (whether involving "abduction" or otherwise) (cf. *J* [34]).

37. Further, it is apparent that Parliament has elected to fix upon governmental acts (both Australian and foreign) in relation to an individual as a convenient proxy for identifying individuals of "behaviour concern". There may be many good reasons why Parliament elected to fix upon such proxies, rather than seeking directly to define all "behaviour" that is of "concern". These reasons may include the greater certainty and simplicity in focussing on governmental acts that are, as the Full Court observed in *Hicks*, "matters essentially of public record".[19] As the Full Court also observed: "[t]he definition of 'behaviour concern non-citizen' is in precise terms which do not allow for any evaluative judgments".[20]

Minister (or delegate) not required to make evaluative judgments

38. However, if the Federal Court's construction is correct, then the Minister (or more realistically his or her delegate at a port) would in relevant cases be required to make evaluative judgments about the validity or legality of governmental acts:

    38.1. at least *Australian* governmental acts;

    38.2. but also *foreign* governmental acts, if the phrase "removed or deported from" is to be construed consistently where it twice appears in paragraph (d) of the definition of BCNC,

while the visa applicant is in immigration clearance or detention.[21]

39. The Court should be slow to embrace such a construction of the Act. And the Court should be particularly slow to embrace a construction that would require the Minister (or his or her delegate) to evaluate the legality of acts of *foreign* governments.

40. Parliament should be taken to understand that the Minister (and more realistically his or her delegate at a port) is ill-equipped to make evaluative judgments as to the validity or legality of acts or removal or deportation in those circumstances,

[19] *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 427 at [41] (Full Court).
[20] *Ibid*.
[21] See section 32(2)(a)(i) of the Act, which envisages that a visa applicant will present to an "officer" or an "authorised system" a New Zealand passport that is in force.

particularly (but not only) when it is claimed that a removal or deportation in fact from a *foreign country* was invalid or otherwise unlawful.[22]

41. The Minister (and more realistically his or delegate at a port) is distinctly ill-equipped:

 41.1. to ascertain or evaluate contentions about a foreign country's laws (including substantive constitutional and other laws conferring or constraining relevant governmental powers, but also other any other laws bearing on the procedure for and legal consequences of challenges to the exercise of such powers); and

10 41.2. then to apply that foreign law to the relevant facts for the purpose of assessing whether the applicant had been *validly*, or perhaps *lawfully*, removed or deported from that country.

42. Indeed, as this Court observed in *New South Wales v Kable* (2013) 252 CLR 118 at [21], the very concept of *validity* is not "sharply defined". "It is necessary to exercise great care in using words like 'void', 'voidable', 'irregularity' and 'nullity'" ([21]). "The difficulties associated with using words like 'void' and 'voidable' in connection with administrative actions have long been recognised." ([21]) "[T]he legal system provides (and must provide) the rules which govern what legal effect is to be given to the decisions of, and the orders made by, courts". ([22]) The same

20 proposition applies to administrative decisions.

43. And, obviously, the diverse legal systems of the world establish different such rules. Accordingly, it is most improbable that the Parliament intended that the Minister (or more realistically his or her delegate at a port) would be required to grapple with the question of whether the removal or deportation of a visa applicant from another country was *invalid*, in determining an application for a special category visa.

44. Nor does recourse to broader notions of *unlawfulness* or *illegality* assist. In Australia, where the concept of "jurisdictional error" is recognised, the law ascribes different consequences to non-compliance with a legislative rule depending upon

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[22] Even in the domestic context, not in every case would an applicant present clear evidence of illegality, such as a court order, as the respondent did in this case. The fact that, in this case, there existed a "public record" that supports the conclusion that the respondent had not been an unlawful non-citizen at the time of her removal in this case is irrelevant to the construction of the Act (and whether or not "removed or deported" means removed or deported *in fact* or removed or deported *validly* or *lawfully*). Cf *J* [36]-[40].

proper construction.[23] It is not apparent how, or why, the expression "removed or deported from another country" in paragraph (d) of the definition of BCNC should be taken to exclude such removals or deportations that occur in fact but which involve non-compliance with *any* applicable rule (illegality) – regardless of the consequences, if any, prescribed by the foreign legal system of that non-compliance.

45. Furthermore, and in any event, as the respondent accepted in the Federal Court, having regard to principles of international comity, the Court should not construe the Act in such a way that it would require the Minister (or more realistically his or her delegate at a port) to evaluate the validity or legality of the acts of a foreign
10 government.[24]

"Removed or deported" bears the same meaning where it twice appears

46. The Federal Court did not grapple with the difficulties posed by its construction and outlined in paragraphs 38 to 45 above. Nevertheless, as noted above, the respondent sought to avoid the particularly acute difficulties that would arise if paragraph (d) of the definition of BCNC were to be construed as requiring the Minister (or more realistically his or her delegate at a port) to evaluate the validity or legality of acts of foreign governments by contending that the expression "removed or deported" has different meanings where it twice appears in paragraph (d) (see again the respondent's proposed construction outlined at paragraph 19 above).

20 47. However, the respondent's anomalous construction is most improbable. The "sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise"[25] is especially weighty where the same words are collocated in the same paragraph.[26] Of course,

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[23] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [23] (Gummow, Hayne, Heydon and Crennan JJ).
[24] Cf. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [251]-[252] (Keane J).
[25] *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J- Barwick CJ and Jacobs J agreeing at 616 and 621). See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 194 (Gummow J) and *Doughty v Martino Developments Pty Limited* (2010) 27 VR 499 at [19] (Nettle JA – "[p]rima facie, an Act of Parliament is to be construed so as to give the same meaning to the same words throughout the Act").
[26] See also, e.g., *Slazengers (Australia) Pty Ltd v Burnett* [1951] AC 13 at 21, where the Privy Council (per Lord Simonds) observed that "[t]he improbability of the word 'injury' bearing a different meaning in successive paragraphs of the same sub-section is so great that any legitimate interpretation which avoids this result would appear preferable". See also, e.g., *Comcare v Heffernan* (2011) 196 FCR 494 at [52] (Downes J, Marshall and Bromberg JJ agreeing in the result); *Gardner v The Queen* (2003) 39 MVR 308 at [43] (O'Keefe J, Sheller JA and James J agreeing). That is not to say that the context may not point to a different conclusion, it being "well recognised that a word may be used in two different senses in the same section of

that principle of construction readily yields to context which demands a different meaning in one place to another.[27] But no such contextual imperative is apparent here. Paragraph (d) uses identical language to describe governmental acts of Australia and other countries, for the same purpose, and has never been amended.[28]

48. Nor are there any other principles of construction that compel the adoption of the respondent's anomalous construction of paragraph (d) of the definition of BCNC. In particular, contrary to the respondent's argument below,[29] neither the principle of legality nor the "rule of law" compels (or even supports) the respondent's construction.

10 49. The short response to the principle of legality argument is that no "right" exists to engage the application of the principle.

50. The Parliament may, in exercise of Australia's sovereign right, set any criteria for an alien to form part of its community "for whatever reason [it] thinks fit".[30] Accordingly, an alien enjoys no right[31] (whether "fundamental", "important" or otherwise) to be in Australia and to form part of its community.[32] In particular, nothing constrains Parliament, in exercise of Australia's sovereign right, from selecting a convenient proxy for identifying individuals of "behaviour concern", being that a person has not *in fact* been removed or deported from Australia or another country in the past.

20 51. Accordingly, nothing in the Minister's construction, which accords the same meaning to the same expression ("removed or deported") where it twice appears in

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the one Act": *McGraw-Hinds (Aust) Pty Limited v Smith* (1978) 144 CLR 633 at 643-644 (Gibbs J) and *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1 at 15 (Mason J). However, that is not the case here.

[27] *McGraw-Hinds (Aust) Pty Limited v Smith* (1978) 144 CLR 633 at 643-644 (Gibbs J); *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1 at 10 (Gibbs CJ) and 15-16 (Mason J) and *Murphy v Farmer* (1988) 165 CLR 19 at 26-27 (Deane, Dawson and Gaudron JJ) and see also at 24 (Brennan and Toohey JJ - in dissent in the result).

[28] Cf. *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2015) 257 CLR 544 at [27] (French CJ and Kiefel J).

[29] See notice of appeal to the Federal Court, ground 1(a), (c), at CAB Tab 4.

[30] See, e.g., *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [92] (Edelman J), and the cases there cited.

[31] Cf. *Alford v Parliamentary Joint Committee on Corporations and Financial Services* (2018) 264 CLR 289 at [50] (Gordon J): "it is unclear what right the plaintiffs alleged is being abrogated so as to engage the principle of legality".

[32] Compare, e.g., *BMW Australia Ltd v Brewster* (2019) 94 ALJR 51 at [212] (Edelman J); *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at [55] (Edelman J); *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164 at [159] (Nettle, Gordon and Edelman JJ).

paragraph (d) of the definition of BCNC, abrogates or interferes with any relevant right of visa applicants. That is usefully illustrated below by reference to the circumstances of the respondent, although the proposition is universal.

52. By reason of section 82(8) of the Act, the respondent lost the rights associated with her previous Visa when she left Australia. She did not, subsequently, acquire any "right" to obtain another visa from the order of the Federal Circuit Court quashing the decision to cancel her Visa. The only relevant "right" that the respondent possessed, upon her making a valid application for a special category visa when she arrived in Australia on 29 January 2019, was for that application to be determined lawfully. This invites the question, which the principle of legality provides no assistance in answering, as to the content of the criteria that Parliament has selected for the grant of that visa in the exercise of Australia's sovereign power.

53. And insofar as the respondent seeks to rely on the "rule of law", or to any "fundamental principle and value within Australia's system of law" (the nature of which was not identified with precision by the respondent of the Federal Court below),[33] in support of her construction, the argument is elusive.

Unreasonable consequences of the Minister's construction?

54. The Minister accepts that, on certain occasions, governmental acts (Australian or foreign) described in paragraphs (a) to (d) of the definition of BCNC will be performed unlawfully, and that will adversely impact the prospects of affected individuals obtaining a special category visa.

55. But insofar as any reliance is sought to be placed by the respondent, as it may have been by the Court below, on the supposed unreasonable consequences of the Minister's construction,[34] that should be rejected.

55.1. First, given that what section 32 and the definition of BCNC are concerned with is the expression by Parliament of Australia's untrammelled sovereign right to select the criteria for an alien to form part of its community, it is not

[33] Cf. *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at [86] (Gageler J).

[34] Cf. Herzfeld & Prince, *Interpretation* (2nd ed, 2020) at [9.30] and the cases there cited.

apparent how the Court could legitimately prefer one construction over another due to the supposed "unreasonable" consequences of the other.

55.2. Secondly, different views can be held about whether a consequence of the Minister's construction (i.e., that, on occasions, a person will be designated as a BCNC in circumstances where they were removed or deported from Australia or another country unlawfully) is anomalous or unreasonable, rather than an acceptable by-product of the selection of an efficient and workable visa criterion designed to be applied at the border.[35]

56. Furthermore, and in any event, the Minister's construction does not inevitably entail adverse consequences. A person can always seek to enjoin their removal or deportation from Australia before it is performed. Furthermore, even if that does not occur, the Act permits the possibility of regulations being made (for the purposes of sections 32(2)(b) or (c)) that would enable a BCNC to obtain a special category visa.

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VII. ORDERS SOUGHT

57. The Minister seeks the following orders:

57.1. The appeal be allowed.

57.2. Orders 2, 3, 4 and 5 made by the Federal Court of Australia on 23 March 2020 be set aside and, in their place, it be ordered that the appeal to that Court be dismissed.

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[35] Cf. *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511 at 519 (Black CJ and Sundberg J – reversed on other grounds in *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49): "[W]hen different views can be held about whether the consequence is anomalous on the one hand or acceptable or understandable on the other, the Court should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention, and choice, of the Parliament."

VIII. ESTIMATE OF TIME FOR ORAL ARGUMENT

58. The Minister estimates that he requires 1.5 hours for presentation of his oral argument.

Dated: 4 December 2020

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ANNEXURE – APPELLANT'S LIST OF LEGISLATIVE PROVISIONS

1. *Migration Act 1958* (Cth) ss 2A(a), 5(1), 32(2), 42(1), 82(8), 116(1)(e), 189(1), 198(2), 474(3), Part 2 Divs 8 and 9,

2. *Acts Interpretation Act 1901* (Cth), s 15AA.