



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

**MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**

Appellant

10

and

DEANNA LYNLEY MOORCROFT

Respondent

**RESPONDENT'S
OUTLINE OF ORAL SUBMISSIONS**

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PART I: INTERNET PUBLICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. The following propositions support the Respondent’s submission that the words “has been removed or deported from Australia” in sub-paragraph (d) of the definition of “behaviour concern non-citizen” (BCNC) in s 5 of the *Migration Act 1958* (Cth) (the Act) means taken out of Australia *validly or lawfully*.

10 **The text, context and purpose of the Act support the Respondent’s interpretation**

3. The objects of the Act (s 4(1), (2) and (4)) demonstrate that the Act is directed at, and provides for, the removal or deportation of unlawful non-citizens only: RS [25].
4. The words “remove” and “removee” are defined in s 5 of the Act. The definition of “removee” (that is, “an unlawful non-citizen removed, or to be removed, under Division 8 of Part 2”) applies to other grammatical forms of that word (*Acts Interpretation Act* s 18A), including “removed”. This is, in itself, sufficient to determine this matter: RS [15], [19]-[20].
5. The definition of BCNC and what is now s 32 of the Act were introduced by the *Migration Reform Act 1992* (Cth). Paragraphs [5], [13], [18], [53], [54] and [55] of the Explanatory Memorandum to that Act (the **1992 EM**) indicate that removal of
20 unlawful non-citizens was limited to their lawful removal: RS [29], [34].
6. The definition of “allowed inhabitant of the protected Zone” also indicates an intention to denote lawfulness and there is no reason to treat the sub-paragraph (d) definition of BCNC differently: RS [30]-[32].
7. Authority has long supported the principle that the quashing of a criminal conviction, similarly to the setting aside of an administrative decision for invalidity, has the effect that the person cannot be considered ever to have been convicted:
Commissioner for Railways (NSW) v Cavanough (1935) 53 CLR 220.
8. Contrary to the Full Court’s statement in *Hicks v Minister for Immigration and
30 Multicultural and Indigenous Affairs* (2005) 146 FCR 427 at 438 [39], evaluative judgments, in applying the sub-paragraph (d) definition of BCNC, are permissible. To the treat the observations of the Full Court of the Federal Court as to the distinction between s 501 and s 32(1) of the Act is to treat a judicial observation as akin to the words of a statute. In any event, the Court was not required to explore the

interstices of meaning contained in the sub-paragraph (d) definition. Further, the sub-paragraph (e) definition of BCNC and reg. 5.15 of the *Migration Regulations 1994* (Cth) indicate that evaluative judgments are permissible: RS [45]-[52]. More generally, the Appellant overstates the administrative inconvenience of giving effect to a construction that does not render injustice to would be New Zealand visitors whose behaviour has not, in fact, been of any concern: RS [63].

9. Similar words to those used in the sub-paragraph (d) definition of BCNC are used in s 503(2) of the Act. The context of the words “removed or deported from Australia” in s 503(2) is a reference to removed or deported in accordance with the Act: see ss 14(1), 198 and 503 of the Act. The phrases used in sub-paragraph (d) of the definition of BCNC and in s 503(2) of the Act are not only almost identical but they serve a similar purpose. In both cases, the correct interpretation of the phrase is that which treats the adverse acts of officials as lawful acts made in pursuance of the jurisdiction bestowed on those officials by the provisions of the Act.
10. The 1992 EM at [47] and [56] indicates that only unlawful non-citizens are intended to pay for their own removal. The analogy between the language used in s 210 and the sub-paragraph (d) definition of BCNC is close: RS [35]-[37].
11. It follows from the text, context and purpose of the Act that “removed”, as that word is used in the opening words of sub-paragraph (d) definition of BCNC, means “removed from Australia under Division 8 of Part 2 of the Act”.

Notice of Contention – the words “lawful” or “valid” are to be read into the definition

12. Alternatively, the context and purpose of the sub-paragraph (d) definition of BCNC would be thwarted if it were not read as containing the word “lawful” or “valid” immediately preceding the phrase: RS [38]-[39].

Cancellation of the Respondent’s visa in January 2018 was void ab initio

13. The consequence of the Federal Circuit Court decision quashing the delegate’s decision is that it was void ab initio and of no effect: RS [18]; *Taylor v The Owners – Strata Plan no 11564* (2014) 253 CLR 531 at 548 [37]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76]; *Park Oh Ho v Minister for State of Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 643, 645.
14. The Applicant’s reliance on *Collector of Customs v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 is inapt: RS [23].

It was not necessary for the act of removal to be quashed

15. The Appellant’s submission that it was necessary for the act of removal to be quashed is a distraction. The issue before the Court is one of statutory interpretation: RS [18]. The construction choice is between “lawful removal” or any kind of action by governments irrespective of how unlawful the action is or unjust the impact on the victim of that decision making. Further, the unrealistic nature of expecting a layperson in immigration detention to bring an injunction preventing her removal can be seen from the respondent’s own experience: RS *ft* 13 (see also, affidavit of Deanna Lynley Moorcroft sworn 6 February 2018 at Appellant’s Book of Further Material, page 100: [38]-[72]).

The Respondent’s construction accords with principles of statutory interpretation

16. The Appellant relies on the dictum that the same words appearing in different parts of the same statute should, generally, be given the same meaning. However, this principle must yield to the requirements of context: RS [54], [64] *ft* 44.

17. A construction which appears irrational or unjust is to be avoided where the statutory text does not require that construction: RS [65]-[67].

18. The legality principle applies and the sub-paragraph (d) definition of BCNC ought to be construed in accordance with it: RS [69]-[76].

“removed or deported from another country”

19. This case does not require the Court to determine the proper construction of the phrase “removed or deported from another country”: RS [53]. In any event, that phrase connotes lawful removal, deportation or expulsion from that country in accordance with that country’s laws: [54]-[64].

20. An Australian court can come to a conclusion about the legality of a foreign governmental act where it is necessary to determine an issue in a case and, international law has moved away from giving uncritical effect to foreign acts of state where those actions involve breaches of human rights: RS [54]-[64].

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Stephen Keim


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15 April 2021