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

DEANNE LYNLEY MOORCROFT

Respondent

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APPELLANT'S REPLY

I. SUITABLE FOR PUBLICATION

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

II. REPLY

"Removed or deported from another country"

2. The respondent contends ([3], [43], [53]ff, [63]) that the meaning of the second limb of paragraph (d) of the expression BCNC ("removed … from another country")
20 "does not fall for determination in these proceedings" and that, in any event, it should be read as including the additional word "*lawfully*" or "*validly*" (cf. AS [13]).

3. The first contention is only trivially true, in that the delegate's decision was not based on the respondent having been removed from "another country". However, the second limb of paragraph (d), expressed in identical language, obviously bears on the construction of the first. If the second limb is not sensibly construed as if it contained the additional word "*lawfully*" etc, then the "sound rule of construction" addressed at AS [47] would strongly suggest that the first limb is likewise not so construed. Also, the respondent's second contention contradicts her concession in the Court below (see AS [20.2] and fn 12), represented by the same solicitor.

4. The issue is not whether, consistently with the act of state doctrine, a court can "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" (cf. RS [54] ff). (There will be occasions when an Australian court must do so in order to determine a proceeding before it.[1]) The issue, instead, is one of construction. One of the reasons for not construing the second limb of paragraph (d) of the definition of BCNC as if it contained the additional word "*lawfully*" etc. is that that construction would require the Minister on occasion to come to such a conclusion (and a court on occasion to review that conclusion), and that considerations of international comity militate against requiring this, where a constructional choice is available.[2]

5. Furthermore, the second limb of paragraph (d) must have a single meaning. Accordingly, it is distracting for the respondent to evoke a supposedly "easy case", akin to the present, where a court record is produced indicating that a removal was unlawful (cf. RS [58], see also [51]). The Minister does not "assum[e] that foreign governmental acts are always complex" (RS [62]). But the respondent's construction must be tested against the possibility of any claims of illegality that might be made. It is not fanciful, for example, to suppose an applicant claiming that their removal from another country was unlawful because the law requiring it was itself invalid. It should not readily be supposed that Parliament intended that the Minister would be called on to assess such a claim, having regard to principles of international comity, as well as the difficulty of such assessments being made in the circumstances in which such visa decisions are at least typically made[3] (cf. RS [63]).

Definitions of "remove" and "removee"

6. To the extent that the definition of "remove" in section 5(1) is relevant (cf. RS [15]), it supports the Minister's case. The definition only identifies the act of removal from Australia; it says nothing as to legality. And the fact that the word "remove" where it appears in the second limb of paragraph (d) of the definition of BCNC obviously

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1 *Moti v The Queen* (2011) 245 CLR 456 at [51].

2 Cf. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [250]-[252] (Keane J).

3 As to RS [48], it may be accepted that the Act does not exclude the possibility of an applicant for a special category visa already holding another kind of visa – for example, a special purpose visa: see regulation 2.40 for the prescription of certain categories of persons with a prescribed status for the purpose of section 33 of the Act. But the proper interpretation of the definition of BCNC is more sensibly tested by reference to what may be recognised as the typical situation: that the visa applicant does not already have a visa.

cannot pick up the legal constraints in Division 8 of Part 2 (cf. definition of "removee"), suggests that it refers to all acts and not only to those acts performed within inapplicable (Div 8 of Pt 2) or otherwise unidentified legal constraints.[4] The word "removee" (see RS [19] and see also *J* [31], [34], [35]) does not appear in section 32 or the definition of BCNC.[5]

7. More generally, the respondent's arguments based on the definitions of these words add little of assistance to the constructional question framed by the Minister at AS [29]-[31]. The respondent's assertion that her "physical removal did not constitute removal within the meaning of the Act" ([RS [18], see also [26]) begs the question. Elsewhere, the respondent unhelpfully sidesteps (RS [23]) the Minister's submissions on the correct approach to the question, merely on the basis that the statutory context in *Brian Lawlor* differed (as the Minister recognised at AS [31]).

Object of the Act expressed in section 4

8. The object of the Act – expressed at the extreme level of generality that it is in section 4(1)[6] – does not assist the respondent. That the Act provides for the removal of non-citizens (section 4(4)) says nothing as to content of particular criteria by which the Act in various provisions regulates "the coming into, and presence in, Australia of non-citizens" (section 4(1)) (cf. RS [25]). It is common cause that the respondent required a visa to remain in Australia on her return, irrespective of the fact that she was a lawful non-citizen when she was removed (RS fn 21).

Paragraphs (a) to (c)

9. The respondent argues that paragraphs (a) to (c) of the definition of BCNC include acts (convictions etc) of foreign courts and, on that premise, argues that Parliament

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4 That diminishes the force of the respondent's contextual reliance on section 210, dealing with liability for the costs of removal (and deportation) from Australia. As to that section, it is "framed on the assumption" that, "ordinarily", a removal or deportation from Australia will have been lawfully conducted: cf. *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [45]. But Parliament is also to be taken to have understood that, if a person could not lawfully be removed, the person may take action to invoke a federal court's jurisdiction to enjoin such removal. It is not absurd to construe the Act as imposing liability on a person for the cost (in fact) of their removal (in fact), if they fail to enjoin it. Of course, the Commonwealth might also, in appropriate circumstances, exercise its discretion not to enforce a person's liability.

5 Rather, it is used in a number of offence provisions (e.g., sections 232 and 233E) and provisions conferring certain powers on officers (e.g., sections 249 and 251).

6 See Herzfeld & Prince, *Interpretation* (2nd ed., 2020) at [7.90], and the cases cited therin.

must have contemplated that the Minister would on occasion be required to make assessments of the legality of foreign governmental acts (RS [38], [57], [60]).

10. However, there are significant differences between paragraphs (a) to (c) (on the one hand) and paragraphs (d) (on the other). Paragraphs (a) to (c) deal with non-physical legal actions or events; whereas removal or deportation involves a physical action (albeit that the performance of that action may be subject to legal constraints). While a judgment may be quashed,[7] and a "judgement reversed is the same as no judgment",[8] that is not so of a physical act of removal or deportation. As the Minister has previously explained (AS [15]), a physical act cannot be quashed.

10 11. Accordingly, while paragraphs (a) to (c) may on occasion involve the Minister assessing whether there is an operative conviction or sentence of the relevant kind, that is a relatively simple task: to assess whether a subsequent judgment of a foreign court has *reversed* the conviction. Importantly, in that respect, paragraphs (a) to (c) would only involve the Minister recognising that the foreign government *itself* (i.e., by its judicial arm) had reversed its original decision (i.e., by quashing a convction). Paragraphs (a) to (c) would not require the Minister, for himself or herself, to sit in judgment of the legality of the action performed in fact by another government.

Paragraph (e)

12. Paragraph (e) of the definition of BCNC provides no contextual support for the
20 suggestion that Parliament intended that the Minister may be required to make assessments of the validity of foreign governmental action (cf. RS [50]). It merely allows for the prescription of circumstances in which a person has been excluded (in fact) from another country. Regulation 5.15 was also made after 1992 Reform Act was made and could not control its meaning. Also, the regulation does not require assessments of the legality of conduct of foreign governments.

Legislative history

13. The legislative history provides no meaningful guidance on the constructional question raised by this appeal. It is wrong in principle to seek to construe paragraph

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7 Compare, for example, section 501(10)(a), which expressly contemplates that a conviction or sentence (including a foreign conviction or sentence: see 501(6)(e)) is to be disregarded if the conviction has been quashed or otherwise nullified.

8 *Commissioner for Railways (NSW) v Cavanough* (1953) 53 CLR 220 at 225.

(d) of the Act, inserted by the 1992 Reform Act, from an explanatory memorandum accompanying a later Act (cf. RS [31]). In any event, nothing in the cited passage from that explanatory memorandum – which indicates that the BCNC definition excludes "inhabitants with serious health problems or criminal records", but says nothing of paragraph (d) – supports the respondent's construction.

Principle of legality

14. The respondent's submission fails to identify with precision any "fundamental right [or] freedom at common law" which the Minister's construction of paragraph (d) of the definition of BCNC is said to "override" (cf. RS [70]-[76]). None exists, for the reasons explained by the Minister at AS [49]-[52].

15. No unlawful non-citizen (as the respondent was when she arrived in Australia on 29 January 2019) has a right to have their "character assessed" in any particular way (see AS [50]). In any event, the respondent's "character" was not "assessed", and certainly not in any way that has any consequence except for the grant of a visa (to which she had no right independent of the construction of the criterion).

Dated: 5 February 2021

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