



## HIGH COURT OF AUSTRALIA

16 June 2021

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND  
MULTICULTURAL AFFAIRS v DEANNA LYNLEY MOORCROFT  
[2021] HCA 19

Today, the High Court unanimously allowed an appeal from the Federal Court of Australia. The appeal concerned the construction of para (d) of the definition of "behaviour concern non-citizen" in s 5(1) of the *Migration Act 1958* (Cth) ("the Act") and in particular whether "removed ... from Australia" in para (d) means taken out of the country in fact or removed in accordance with the Act.

Upon returning to Australia from New Zealand in January 2018, the respondent was automatically granted a special category visa. Her visa was purportedly cancelled the next day and she was taken into immigration detention before being required to depart Australia ("purported cancellation decision"). The purported cancellation decision was subsequently quashed by the Federal Circuit Court of Australia with the result that the cancellation of the respondent's visa was "retrospectively nullified" so that the respondent was not an unlawful non-citizen when she left Australia. When she returned to Australia in January 2019, the respondent's application for a new special category visa was refused on the basis that she was a "behaviour concern non-citizen" due to her removal from Australia in January 2018 ("refusal decision").

The respondent challenged the refusal decision first unsuccessfully in the Federal Circuit Court and then successfully on appeal to the Federal Court. The appellant ("Minister") accepted that there was no power to remove the respondent in January 2018 but contended that this was irrelevant because, as the Federal Circuit Court concluded, "removed" means taken out of Australia in fact. The respondent contended, and the Federal Court agreed, that a non-citizen is not "removed" from Australia unless that removal is effected in accordance with Div 8 of Pt 2 of the Act.

The High Court unanimously overturned the Federal Court's decision and concluded that the Minister's contention was correct: "removed ... from Australia" in para (d) means removed in fact. Accordingly, although the purported cancellation decision was quashed, the Court held that this did not change the historical fact that the respondent had been removed from Australia and was therefore a "behaviour concern non-citizen" within the meaning of the Act. The Court reasoned that this interpretation accords with the ordinary literal meaning of para (d) and is supported by the statutory context and purpose of facilitating fast and simple decision-making about whether to grant special category visas. The Court held the respondent's construction of para (d), that "removed" means lawfully or validly removed, may involve delegates of the Minister engaging in a complex and time-consuming evaluative assessment about the circumstances of a person's removal, a task which delegates are likely to be ill-equipped to perform at immigration clearance. The literal construction avoids a result that would require the Executive, on occasion, and ultimately Australian courts, to assess the legality of actions of other governments. The appeal was therefore allowed, and the Federal Court's orders set aside.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*