HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, GORDON, STEWARD AND GLEESON JJ

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

AND

DEANNA LYNLEY MOORCROFT RESPONDENT

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft
[2021] HCA 19
Date of Hearing: 15 April 2021
Date of Judgment: 16 June 2021
B66/2020

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2, 3, 4 and 5 of the orders made by the Federal Court of Australia on 23 March 2020 and, in their place, order that:*

   (a) *order 2 made by the Federal Circuit Court of Australia on 8 March 2019 be set aside; and*

   (b) *the appeal to the Federal Court be otherwise dismissed.*

On appeal from the Federal Court of Australia

Representation

C L Lenehan SC with N M Wood for the appellant (instructed by Australian Government Solicitor)

S J Keim SC with K E Slack for the respondent (instructed by Sentry Law)

CATCHWORDS

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft

Immigration – Visas – Application for special category visa – Where respondent's special category visa purportedly cancelled and respondent required to depart Australia in 2018 – Where purported cancellation decision subsequently quashed – Where respondent returned to Australia and refused a special category visa on the basis she was a "behaviour concern non-citizen" as defined in s 5(1) of *Migration Act 1958* (Cth) ("Act") due to her removal in 2018 – Where s 5(1) of Act defined "behaviour concern non-citizen" in para (d) as a non-citizen who "has been removed or deported from Australia or removed or deported from another country" – Whether respondent was a "behaviour concern non-citizen" within meaning of para (d) – Whether "removed ... from Australia" means removed in fact or removed in accordance with Act.

Words and phrases – "behaviour concern non-citizen", "harsh consequences", "nullity", "removed", "removed or deported from", "theory of the second actor".

Acts Interpretation Act 1901 (Cth), s 18A.
Migration Act 1958 (Cth), ss 5(1), 14, 32(2), Pt 2 Div 8.
Migration Regulations 1994 (Cth), reg 5.15A, Sch 1 item 1219, Sch 2 cl 444.511, Div 444.6.

1 KIEFEL CJ, KEANE, GORDON, STEWARD AND GLEESON JJ. This appeal from a judgment of the Federal Court of Australia concerns the refusal of the respondent's application for a special category visa on 29 January 2019, on the basis that she failed to satisfy the criterion for the visa in s 32(2) of the *Migration Act 1958* (Cth) ("the Act") because she was a "behaviour concern non-citizen" within the meaning of s 5(1) of the Act. The visa was refused because the respondent was found to have fallen within para (d) of the definition of "behaviour concern non-citizen", which refers to a non-citizen who "has been removed or deported from Australia or removed or deported from another country". The respondent had been removed from Australia on 4 January 2018, on the basis (subsequently determined to be incorrect) that the respondent was an "unlawful non-citizen", as defined in the Act, who was required to be removed from Australia as soon as practicable in accordance with Div 8 of Pt 2 of the Act (which concerns removal of unlawful non-citizens).

2 The issue in the appeal is the proper construction of para (d) of the definition of "behaviour concern non-citizen". The question is whether "removed ... from Australia" in para (d) refers to an administrative act of removal otherwise authorised by the Act subject to certain constraints, or only such an administrative act performed in accordance with those constraints. The appellant ("the Minister") contended that the expression "removed ... from Australia" means taken out of the country in fact. The respondent's primary contention was that a non-citizen will not have been removed from Australia within the meaning of para (d) unless that removal was effected in accordance with Div 8 of Pt 2 of the Act. By notice of contention, the respondent argued in the alternative that the word "lawfully" or the word "validly" is implied into para (d) so that a person will not have been removed from Australia within the meaning of para (d) unless their removal was effected lawfully or validly.

3 For the following reasons, the Minister's contention is correct, the respondent's notice of contention should be dismissed and the appeal should be allowed. A non-citizen who has been removed from Australia in fact is a "behaviour concern non-citizen" within the meaning of the Act.

Background to appeal

4 The respondent is a citizen of New Zealand, who previously resided in Australia as the holder of a special category visa. A special category visa is a

temporary visa which allows the visa holder to remain in Australia and to work in Australia while the holder remains a New Zealand citizen[1].

5 While living in Australia, the respondent committed criminal offences and was sentenced to a term of imprisonment, but was not required to serve prison time. On 24 December 2017, she left Australia and travelled to New Zealand. By virtue of s 82(8) of the Act, the respondent's visa ceased to be in effect on her departure from Australia.

6 On 2 January 2018, the respondent returned to Australia and, upon presenting her New Zealand passport, was automatically granted a further special category visa. On 3 January 2018, the visa granted to the respondent the previous day was purportedly cancelled pursuant to s 116(1)(e) of the Act ("the purported cancellation decision")[2]. The respondent was held in immigration detention until early on the morning of 4 January 2018, when she was taken to Brisbane airport and required to depart Australia. The Minister observed that, even though the validity of the visa granted on 2 January 2018 was not affected by the purported cancellation decision, it ceased to be in effect on her removal from Australia, again by virtue of s 82(8) of the Act[3].

7 On 28 June 2018, a judge of the Federal Circuit Court of Australia made an order by consent that a writ of certiorari issue directed to the Minister, quashing the purported cancellation decision ("the quashing order"). The Minister accepted that the effect of the quashing order was that the purported cancellation of the respondent's visa was "retrospectively nullified"[4], her visa did not cease to be in

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1 *Migration Regulations 1994* (Cth), Sch 2 cl 444.511, Div 444.6.

2 Section 116(1)(e) provides that, in certain circumstances, the Minister may cancel a visa if satisfied that "the presence of its holder in Australia is or may be, or would or might be, a risk to: (i) the health, safety or good order of the Australian community or a segment of the Australian community; or (ii) the health or safety of an individual or individuals".

3 See also *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 427 at 437-438 [39].

4 cf *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51] per Gaudron and Gummow JJ, 618 [63] per McHugh J, 646-647 [152] per Hayne J; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; *Hossain v*

effect on 3 January 2018 and the respondent was not an unlawful non-citizen on 4 January 2018 when she left Australia. The Minister also accepted that there was no power to remove the respondent on 4 January 2018.

8 On 29 January 2019, the respondent returned to Australia. As her previous visa had ceased to be in effect, she was required to apply for a new visa. On arrival in Australia, the respondent was informed that her application for a new special category visa, made earlier that day, had been refused.

9 The respondent applied to the Federal Circuit Court for judicial review of the decision to refuse her a special category visa. At first instance, Judge Vasta dismissed her application, finding that the respondent was removed from Australia on 4 January 2018 and that the fact of her removal meant that she was a "behaviour concern non-citizen" within para (d) of the definition of that expression[5].

10 The respondent appealed to the Federal Court, where Collier J allowed the appeal. Her Honour 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' into" para (d) of the definition of "behaviour concern non-citizen"[6]. Even so, her Honour effectively did what she considered would be wrong, implying words into para (d) by concluding that the meaning of "removed" in para (d) meant removed under Div 8 of Pt 2 of the Act[7]. Her Honour considered that this interpretation avoided "arbitrary or capricious refusal of a visa [that] would thwart the purpose of [the Act]"[8]. While her Honour accepted that the respondent was physically removed from Australia on 4 January 2018, she noted

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

5 *Moorcroft v Minister for Home Affairs* [2019] FCCA 772 at [5], [28], [41].

6 *Moorcroft v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 275 FCR 276 at 284 [29].

7 *Moorcroft v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 275 FCR 276 at 284 [31].

8 *Moorcroft v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 275 FCR 276 at 284 [33].

that, as a result of the quashing order, the respondent was not: an unlawful non-citizen at that time; a "removee" under the Act; or removed under Div 8 of Pt 2[9].

11 The appeal judge also concluded that it was incumbent on the Minister's delegate, in considering the respondent's visa application in January 2019, to be satisfied, as a matter of public record, that the respondent had been either deported under Div 9 of Pt 2 or removed under Div 8 of Pt 2 of the Act before finding that she had been "removed or deported from Australia" for the purposes of para (d). There was material before the delegate, in the form of a letter from the respondent's legal representative to the Australian Border Force dated 29 January 2019, stating that the respondent was "purportedly removed from Australia", referring to the quashing order, and contending that, in the circumstances recorded in the letter, the respondent was not removed from Australia and did not fall within the definition of a "behaviour concern non-citizen". Accordingly, her Honour reasoned that the delegate could not have been satisfied that the respondent had been removed from Australia within the meaning of para (d)[10]. Evidently, this aspect of the appeal judge's reasons assumed a requirement that the respondent's removal must have occurred under Div 8 of Pt 2.

Statutory scheme

12 Section 32 specifies the following criterion for a special category visa:

> "(2) A criterion for a special category visa is that the Minister is satisfied the applicant is:
>
> (a) a non-citizen:
>
> (i) who is a New Zealand citizen and holds, and has presented to an officer or an authorised system, a New Zealand passport that is in force; and
>
> (ii) is neither a behaviour concern non-citizen nor a health concern non-citizen; or

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9 *Moorcroft v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 275 FCR 276 at 285 [35].

10 *Moorcroft v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 275 FCR 276 at 285 [38]-[40].

(b) a person declared by the regulations, to be a person for whom a visa of another class would be inappropriate; or

(c) a person in a class of persons declared by the regulations, to be persons for whom a visa of another class would be inappropriate."

13 In s 5(1) of the Act, "behaviour concern non-citizen" in s 32(2)(a)(ii) is defined as follows:

"***behaviour concern non-citizen*** means a non-citizen who:

(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:

(i) any period concurrent with part of a longer period is disregarded; and

(ii) any periods not disregarded that are concurrent with each other are treated as one period;

whether or not:

(iii) the crimes were of the same kind; or

(iv) the crimes were committed at the same time; or

(v) the convictions were at the same time; or

(vi) the sentencings were at the same time; or

(vii) the periods were consecutive; or

(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;

where ***sentenced to imprisonment*** includes ordered to be confined in a corrective institution."

14 Neither "removed" nor "deported" is a defined term in the Act. However, s 5(1) of the Act defines "remove" to mean "remove from Australia" and "deportation" to mean "deportation from Australia". "Removee" is defined in s 5(1) to mean "an unlawful non-citizen removed, or to be removed, under Division 8 of Part 2".

Proper approach to the constructional question

15 Paragraph (d) of the definition of "behaviour concern non-citizen" is to be interpreted by considering the text, having regard to its context and purpose[11]. Contrary to the respondent's submission that the Court need not determine the construction of the phrase "removed ... from another country" in para (d), the proper construction of the words "removed ... from Australia" requires consideration of the meaning of para (d) in its entirety, including whether the proper construction of para (d) is consistent with the language and purpose of the whole of the Act[12].

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11 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; *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; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388-390 [23]-[26] per French CJ and Hayne J; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] per Kiefel CJ, Nettle and Gordon JJ; *Minister for Home Affairs v DMA18* (2020) 95 ALJR 14 at 26 [44]; 385 ALR 16 at 30.

12 *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455 per Isaacs and Rich JJ; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312 per Gibbs CJ, 315 per Mason J, 322 per Deane J; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR

16 On its face, para (d) refers to non-citizens who have been removed or deported, as a matter of fact and without more, from Australia or another country. An interpretation in accordance with the ordinary literal meaning of the text is supported by a consideration of the other limbs of the definition of "behaviour concern non-citizen". Each limb of the definition refers to governmental acts: paras (a) to (c) are concerned with judicial acts (conviction, sentences to death or imprisonment, findings of guilt and acquittal), while paras (d) and (e) are concerned with executive acts. Contrary to what might have been suggested by the appeal judge[13], in context it would be anomalous if the expression "removed or deported" encompassed the acts of private citizens. As the Minister submitted, the governmental acts specified in the definition of "behaviour concern non-citizen" are apparently convenient proxies for identifying individuals of "concern" by reason of their past behaviour. The definition "is in precise terms which do not allow for any evaluative judgments. It is applied by reference to matters essentially of public record."[14]

17 The Minister acknowledged that the legal acts referred to in paras (a) to (c) can be quashed or reversed by a court with the result that there is no decision within the meaning of paras (a) to (c). The respondent submitted that there is no reason to think that Parliament did not intend a similar consequence for para (d), in the case of a removal subsequently found to have been made on the basis of an invalid decision. But to assess whether a decision within the scope of paras (a) to (c) has been quashed is a relatively simple matter, determined by reference to the outcome of an evaluative assessment by a court[15].

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355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at 664 [116] per Kirby J; *Federal Commissioner of Taxation v Jayasinghe* (2017) 260 CLR 400 at 412 [31] per Kiefel CJ, Keane, Gordon and Edelman JJ.

13 *Moorcroft v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 275 FCR 276 at 284-285 [34].

14 *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 427 at 438 [41].

15 cf *HZCP v Minister for Immigration and Border Protection* (2019) 273 FCR 121 at 139-140 [76]-[78] per McKerracher J, 151 [124] per Derrington J, 164 [181]-[182] per Colvin J.

18 Where such decisions are set aside or quashed on appeal or judicial review, it is reasonable to expect that there will be a public record of the later exercise of judicial power. In contrast, the lawfulness of a removal or deportation order can raise issues about the relevant facts and circumstances, the relevant laws or the application of laws to facts and circumstances. The lawfulness of an act may be challenged without relying on a prior judicial decision and a prior judicial decision will not necessarily be determinative of the question. In those circumstances, and taking into account that para (d) refers to events rather than decisions about events, there is no reason to suppose that para (d) is to be read in the manner contended for by the respondent.

19 In this case, there was a public record of the quashing order, but that order did not change the historical fact that the respondent was removed from Australia, which is a separate event from the event of the purported cancellation decision[16]. The respondent did not dispute that the remedy of certiorari was not available to quash the act of her removal from Australia.

20 The perspective identified by the "theory of the second actor" also supports an interpretation in accordance with the ordinary meaning of para (d)[17]. As Gageler J explained in *New South Wales v Kable*[18]:

> "[A] thing done in the purported but invalid exercise of a power conferred by law ... remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a 'nullity' in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences. The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law. The factual existence of the thing might have led to the taking of some other action in fact. The action so taken might then have

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16 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 140 [46] per French CJ, Crennan and Kiefel JJ, 160-161 [113] per Heydon J.

17 See 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) 141 at 146-150; Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 732-733 [10.40].

18 (2013) 252 CLR 118 at 138-139 [52] (footnotes omitted).

> consequences for the creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself. For example, money might be paid in the purported discharge of an invalid statutory obligation in circumstances which make that money irrecoverable, or the exercise of a statutory power might in some circumstances be authorised by statute, even if the repository of the power acted in the mistaken belief that some other, purported but invalid exercise of power is valid."

21 The terms of the definition of "behaviour concern non-citizen" as a whole facilitate what Parliament should be taken to understand would, at least typically, be speedy decision-making by delegates of the Minister at ports, as is reinforced by the terms of s 32(2)(a)(i) of the Act. In this regard, the Minister noted the provisions by which a special category visa will typically be granted or refused to a person in immigration clearance[19]. Immigration clearance is addressed in Div 5 of Pt 2 of the Act. The relevant provisions of that Division do not contemplate that a visa applicant will spend an extended period of time in immigration clearance[20]. The interpretation of "removed ... from Australia" as removed from Australia in fact promotes the statutory purpose of fast and simple decision-making about whether to grant or refuse to grant special category visas.

22 Conversely, as earlier noted, to decide whether a person has been removed from Australia or another country in accordance with any relevant legal constraints upon removal may involve the delegate engaging in a complex and time-consuming evaluative assessment as to the circumstances of the person's removal and, in the case of removal from another country, the application of foreign laws to those circumstances. As the Minister submitted, delegates are likely to be ill-equipped to perform such a task at immigration clearance and it is not readily to be supposed that this was Parliament's intention.

23 The respondent invoked the definitions of "remove" and "removee" in the Act to argue for a reading of para (d) as if it contained additional words, so that it relevantly refers to a non-citizen who has been removed from Australia in accordance with Div 8 of Pt 2 of the Act. The argument must be rejected for the

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19 *Migration Regulations*, Sch 1 item 1219(3); *Migration (LIN 19/058: Arrangements for special category visa applications) Instrument 2019* (Cth), cl 7.

20 *Migration Act 1958* (Cth), ss 166, 167(1), 172(2); see also ss 192(5), 192(7). See *Minister for Immigration and Border Protection v Srouji* (2014) 139 ALD 267 at 273 [21] per Jagot J.

following several reasons. Neither term is used in para (d) (or otherwise in the definition of "behaviour concern non-citizen" or s 32 of the Act). To the contrary, the definition of "remove" arguably supports the Minister's case because, in the absence of any element about the legal basis of removal, it indicates that the fact of removal is a relevant concept in the Act. The word "removee" has a complex definition which incorporates a class of persons (unlawful non-citizens), their relationship to Australia (removed or yet to be removed) and the provisions pursuant to which they were, or will be, removed. An unlawful non-citizen is, by definition, a person in the migration zone[21]. In contrast, the definition of "behaviour concern non-citizen" expressly applies to non-citizens generally, that is, persons who are not Australian citizens, where a person is seeking a visa and is, at least typically, outside the migration zone[22].

24 Section 18A of the *Acts Interpretation Act 1901* (Cth) does not apply in this case. The object of s 18A of the *Acts Interpretation Act* is to promote consistency[23]. It is far from self-evident that "removed" is another part of speech or grammatical form of the word "removee" as defined in the Act, or that consistency would be achieved by an interpretation of "removed" that incorporates some of the elements of the meaning of "removee". In any event, s 18A applies subject to a contrary intention[24]. A contrary intention is indicated by the express identification of the definition of "behaviour concern non-citizen" as applying to non-citizens and not only unlawful non-citizens.

25 The use of the words "removed or deported from" twice in para (d) provides further support for its interpretation according to its ordinary meaning. "It is a 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] That rule has

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21 *Migration Act*, s 14.

22 *Migration Act*, s 5(1), definition of "migration zone".

23 cf *Redland Shire Council v Stradbroke Rutile Pty Ltd* (1974) 133 CLR 641 at 645 per Menzies J.

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

25 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J. See also Pearce, *Statutory Interpretation in Australia*, 9th ed (2019) at 142 [4.7] and the cases cited therein. Cases where the rule was displaced by the relevant context include: *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643-644 per

particular strength where, as here, two identical expressions are collocated in the same paragraph. Further, the two limbs of para (d) are directed to the same statutory object, that is, as a convenient proxy for identifying persons of "behaviour concern" in deciding whether to grant a special category visa.

26 The literal interpretation avoids a result that might otherwise require delegates on occasion to assess claims as to the legality of actions of foreign governments[26]. For example, an applicant might claim that their removal from another country was invalid because the foreign law requiring it was itself invalid. Where a constructional choice is available, the Court should incline against a construction that would require the Executive on occasion, and ultimately Australian courts, to assess the legality of actions of other governments[27]. In particular, as Keane J noted in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*[28]:

> "[I]n *Moti*, this Court noted that there 'will be occasions' when an Australian court must state 'conclusions about the legality of the conduct of a foreign government or persons through whom such a government has acted'. It may be said immediately that implicit in this observation is the recognition that the statement of conclusions about the legality of conduct under the law of a foreign sovereign State may be justified as an exception to the settled principles of judicial restraint and international comity but not as being subversive of them."

27 The literal interpretation is capable of producing harsh consequences, in that New Zealand citizens may be precluded from obtaining a special category visa

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Gibbs J; *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 10 per Gibbs CJ, 15-17 per Mason J; *Murphy v Farmer* (1988) 165 CLR 19 at 27 per Deane, Dawson and Gaudron JJ.

26 In the Federal Court, the respondent contended that: "[t]here is a compelling reason why 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".

27 cf *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 72-73 [48] per French CJ, Kiefel and Nettle JJ, 126-129 [250]-[257] per Keane J, 169 [414] per Gordon J.

28 (2016) 257 CLR 42 at 128 [255] (footnote omitted).

if they were removed from Australia in fact, but not in accordance with Div 8 of Pt 2. The respondent contended that this effect is unjust and is to be avoided where the statutory text does not require that construction[29].

28 The appeal judge referred[30] to the observation of French CJ in *Minister for Immigration and Citizenship v Li*[31], in relation to statutory discretions, that the "area of decisional freedom ... thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense". Seeking to apply a similar approach, her Honour considered that an interpretation that enabled arbitrary or capricious refusal of a visa would thwart the Act's purpose[32]. This reasoning is flawed. An interpretation that "removed ... from Australia" means removed in fact does not enable arbitrary or capricious decision-making: it simply requires the decision-maker to decide whether the visa applicant has been removed from Australia as a matter of fact. Underlying her Honour's reasoning is a presupposition that Parliament could not have intended removal from Australia otherwise than in accordance with the Act (such as removal by an official acting in bad faith) to fall within the scope of para (d). But this presupposition begs the constructional question in issue.

29 Harsh consequences are not an inevitable result of the literal interpretation, although they may occur in some cases. At least with respect to removal or deportation from Australia, a person may apply to a court to enjoin that act before

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29 *Bowtell v Goldsborough, Mort & Co Ltd* (1905) 3 CLR 444 at 456 per Barton J; *Metropolitan Coal Co 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 per Barwick CJ; *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 350 per Gibbs J; *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (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 320-321 per Mason and Wilson JJ.

30 *Moorcroft v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 275 FCR 276 at 284 [32].

31 (2013) 249 CLR 332 at 351 [28].

32 *Moorcroft v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 275 FCR 276 at 284 [33].

it occurs (although, in particular circumstances, the opportunity to make an application may be limited). Section 32(2)(b) and (c) and s 195A (where available) provide mechanisms that may allow harsh results to be avoided. Regulation 5.15A of the *Migration Regulations 1994* (Cth) declares certain classes of persons to be persons for whom a visa of another class would be inappropriate for the purposes of s 32(2)(c) of the Act. In any event, different views can be held about whether the consequence for the respondent is truly anomalous or, rather, reflective of a legitimate policy choice having regard to competing considerations that may have included the administrative burden of evaluative assessments and international comity[33]. Thus, the respondent's argument by reference to the consequences of the literal interpretation does not displace the other matters in favour of that interpretation.

30 The respondent's remaining arguments, by reference to the object of the Act, other provisions of the Act (including s 210 and s 503(2)), extrinsic materials and the principle of legality are rejected. As to the last, the principle of legality does not affect the criteria that Parliament has selected in the exercise of its sole right to decide which non-citizens shall be permitted to enter and remain in Australia[34]. When she returned to Australia on 29 January 2019, the respondent had no right (fundamental or otherwise) to be allowed into Australia. The only relevant right that the respondent possessed was for her application for a further special category visa to be determined lawfully. That right required the proper application of the relevant visa criterion.

Conclusion

31 The appeal should be allowed. Orders 2, 3, 4 and 5 made by the Federal Court on 23 March 2020 should be set aside and, in their place, it be ordered that:

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33 cf *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511 at 519 per Black CJ and Sundberg J (this case was reversed by this Court on other grounds in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49).

34 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 358 [92] per Nettle J, citing *Attorney-General for Canada v Cain* [1906] AC 542 at 546; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29 per Brennan, Deane and Dawson JJ (Mason CJ relevantly agreeing at 10), 44-45 per Toohey J, 64-65 per McHugh J. See also *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310 [313] per Gageler and Keane JJ.

Kiefel CJ
Keane J
Gordon J
Steward J
Gleeson J

(a) order 2 made by the Federal Circuit Court on 8 March 2019 be set aside; and
(b) the appeal to the Federal Court be otherwise dismissed.