Federal Court of Australia

 Gillera v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1396

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| Appeal from: | *Gillera v Minister for Immigration* [2020] FCCA 929 |
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| File number: | QUD 131 of 2020 |
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| Judgment of: | **THOMAS J** |
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| Date of judgment: | 11 November 2021 |
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| Catchwords: | **MIGRATION** – appeal from the Federal Circuit Court of Australia – where appellant purports that withdrawal of visa application was not valid - Where Federal Circuit Court found that it did not have jurisdiction to determine application and, in any event, found that withdrawal was valid – whether Federal Circuit Court had jurisdiction under the Migration Act 1958 (Cth) to determine application – consideration of whether withdrawal of visa application was a “migration decision” – consideration of whether visa application was validly withdrawn – appeal dismissed.  |
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| Legislation: | *Customs Act 1901* (Cth)*Judiciary Act 1903* (Cth): s 39B*Migration Act 1958* (Cth): ss 5, 5E, 47, 49, 474, 476  |
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| Cases cited: | *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117*Griffith University v Tang* (2005) 221 CLR 99*Kogolo v State of Western Australia* [2011] FCA 1481*Minister for Immigration and Border Protection v Kim* (2014) 221 FCR 523*NACO v Minister for Immigration and Multicultural Affairs* [2002] FCA 474*R v GAM (No 2)* (2004) 9 VR 640*Raru v Minister of Immigration Local Government and Ethnic Affairs* (1993) 46 FCR 453*SZASD v Minister for Immigration* [2004] FMCA 472 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189*Uniden Australia Pty Ltd v Collector of Customs* (1997) 74 FCR 190*Whim Creek Consolidated NL v Coglan* (1991) 31 FCR 469  |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 79 |
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| Date of last submissions: | 22 February 2021 |
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| Date of hearing: | 18 February 2021  |
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| Counsel for the Appellant: | Mr M Black |
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| Solicitor for the Appellant: | Fisher Dore Lawyers |
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| Counsel for the Respondent: | Ms E L Hoiberg |
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| Solicitor for the Respondent: | MinterEllison |

ORDERS

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|  | QUD 131 of 2020 |
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| BETWEEN: | ROSELYN GRACE GILLERAAppellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSRespondent |

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| order made by: | THOMAS J |
| DATE OF ORDER: | 11 November 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THOMAS J:

# introduction

1. This is an appeal from a judgment of the **Federal Circuit Court** of Australia handed down on 24 April 2020, which dismissed the appellant’s application for judicial review. The appellant sought judicial review of a purported “decision” made by the **respondent** (or **Minister**) to not consider whether her visa application was validly withdrawn pursuant to s 49 of the ***Migration Act*** 1958 (Cth).

# Background

1. The appellant is a citizen of the Republic of the Philippines and was married to an Australian citizen.
2. On 8 December 2017, the appellant applied for a Partner (Temporary) (**Class UK**, Subclass 820) **Visa** and Partner (Residence) (Class BS subclass 801) Visa (collectively, the **Visa Application**). On 2 August 2018, a delegate of the respondent granted the appellant the Class UK Visa.
3. On 26 August 2019, the respondent sent a letter to the appellant advising it had received information that her relationship with her partner (who was the sponsor of the Visa Application) had ended. Amongst other things, the letter sent to the appellant also advised that she could withdraw her Visa Application by notifying the respondent in writing. A blank “**Form** 1446 - Withdrawal of a visa application” form was enclosed. The accompanying information to the Form stated that no further action will be taken on a visa application that has been withdrawn and any bridging visa granted as part of the withdrawn application will cease to be in effect 35 calendar days after the date of the withdrawal.
4. On 26 August 2019, the appellant completed and returned the Form to the respondent.
5. On 28 August 2019, the respondent advised the appellant in writing that her Visa Application had been withdrawn.
6. On 29 September 2019, the appellant’s migration agent wrote to the respondent asking them to reconsider their acceptance of the appellant’s withdrawal form on the basis that she had signed and returned the form without knowing the real consequences. There was no response from the respondent.
7. On 2 October 2019, the appellant applied to the Federal Circuit Court for a declaration that her Visa Application had not been validly withdrawn and for a writ of mandamus to require the respondent to consider her application. An amended application for review was filed with the Federal Circuit Court on 19 February 2020.
8. The appellant gave unchallenged evidence (by way of affidavit filed with the Federal Circuit Court) of the circumstances surrounding the submission of the form and declaration, including that she did not realise the filing of the Form meant she was withdrawing her Visa Application: Affidavit of Roselyn Grace Gillera, Appeal Book (**AB**) p 9.
9. On 24 April 2020, the primary judge dismissed the application for review and found that:
10. the appellant’s Visa Application was validly withdrawn; and
11. in any event, the Federal Circuit Court had no jurisdiction to hear the appellant’s application.

# the statutory framework

1. Section 47 of the Migration Act provides that:

(1) The Minister is to consider a valid application for a Visa.

(2) The requirement to consider an application for a Visa continues until:

(a) the application is withdrawn; or

 …

(3) To avoid doubt, the Minister is not to consider an application that is not a valid application.

(4) To avoid doubt, a decision by the Minister that an application is not valid and cannot be considered is not a decision to refuse to grant the Visa.

1. A visa applicant may withdraw a visa application pursuant to s 49 of the Migration Act, which states that:

(1) An applicant for a visa may, by written notice given to the Minister, withdraw the application.

(2) An application that is withdrawn is taken to have been disposed of.

(3) For the purposes of sections 48 and 48A, the Minister is not taken to have refused to grant the Visa if the application is withdrawn before the refusal.

(4) Subject to the regulations, fees payable in respect of an application that is withdrawn are not refundable.

1. With respect to the Federal Circuit Court’s jurisdiction vis-à-vis matters arising under the Migration Act, s 476 of the Migration Act states that:

(1) Subject to this section, the Federal Circuit Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution.

1. A “migration decision” is defined in s 5 of the Migration Act as follows:

***migration decision*** means:

(a) a privative clause decision; or

(b) a purported privative clause decision; or

(c) a non-privative clause decision; or

(d) an AAT Act migration decision

1. A “privative clause decision” is relevantly defined to be “a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act”: s 474(2) of the Migration Act.
2. A “purported privative clause decision” is a decision that would have been a privative clause decision had there not been either a failure to exercise, or excess of, jurisdiction when making such decision: s 5E of the Migration Act.

# The Federal Circuit Court’s Decision

1. Before the primary judge, the appellant argued that she did not withdraw her application because:
2. she did not intend to withdraw her application as she did not understand, or was mistaken about, the effect of the withdrawal notice; and
3. she was misled by a third party as to the purpose of the withdrawal notice.
4. With respect to the first argument, the primary judge concluded that there was nothing in the wording of either ss 47 or 49 of the Migration Act which suggests that the act of withdrawing a visa application was dependent upon the exercise of a genuine intention to withdraw by the person concerned. The primary judge noted that the language of those sections was clear and unambiguous and the clear legislative intention was to bring to an end the consideration of an as yet undecided visa application in the event of a withdrawal of such application.
5. As to the argument that the appellant was misled by a third party, the primary judge referred to the decision in *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 where the High Court noted, at [53], that “a person whose conduct before an administrative tribunal has been affected, to the detriment of that person, by bad or negligent advice or some other mishap should not be heard to complain that the detriment vitiates the decision made.” On that basis, the primary judge found there was no merit in this argument.
6. The primary judge also found that there was no relevant decision made by the respondent which enabled the appellant to invoke the jurisdiction of the Federal Circuit Court. His Honour found that receipt and acknowledgement of the withdrawal automatically lead to the Visa Application being withdrawn and, as such, there was no decision that could have attracted the Federal Circuit Court’s jurisdiction to entertain the amended application for review.

# the issues in these proceedings

1. By notice of appeal dated 7 May 2020, the appellant raised two grounds of appeal. In summary, the issues in these proceedings are whether the Federal Circuit Court erred in:
2. finding that it had no jurisdiction to review the respondent’s decision; and
3. failing to find that the appellant did not validly withdraw her Visa Application when she submitted a written withdrawal notice to the respondent on 26 August 2019.

# discussion

## First Ground of Appeal – Jurisdiction of the Federal Circuit Court

1. As noted above, the Federal Circuit Court’s jurisdiction with respect to matters arising from the Migration Act is confined to a “migration decision”: s 476(1) of the Migration Act. As relevant to this appeal, the term “migration decision” includes (a) a privative clause decision; and (b) a purported privative clause decision. As a starting point, there must be a “decision” made; what constitutes a “decision” under the Migration Act is broad and includes “doing or refusing to do any other act or thing”: s 474(3) of the Migration Act.
2. Section 49(1) of the Migration Act provides that an applicant for a visa may, by written notice given to the respondent, withdraw the application. An application that is withdrawn is taken to have been disposed of: s 49(2) of the Migration Act. The respondent must consider a valid application for a visa, and that requirement continues until the application is withdrawn: ss 47(1) and (2)(a) of the Migration Act.
3. The appellant identified two “decisions” made by the respondent which were said to be “migration decisions”, namely:
4. the respondent’s “decision” that the Visa Application had been withdrawn; and
5. the respondent’s failure or refusal to consider the appellant’s Visa Application as required by s 47 of the Act.
6. The appellant further submitted that there was a “decision” taken by the respondent, which could be characterised in alternative ways:
7. the respondent’s failure or refusal to consider what the appellant asserted was a valid visa application was a decision, because a decision includes refusing to do an act or thing.
8. the respondent’s conclusion that the visa application had been withdrawn was a decision, because it was a positive act of doing something (i.e. reaching a view about the status of the withdrawal notice and the application).
9. The appellant contended that the term “migration decision” as defined in s 5(1) of the Migration Act adopted the meaning of “decision” as described in *Griffith University v Tang* (2005) 221 CLR 99 in which the High Court noted (at [89]) that a decision under an enactment “must be expressly or impliedly required or authorised by the enactment; and… must itself confer, alter or otherwise affect legal rights and obligations”.
10. The appellant submitted that the respondent’s “decision” was “expressly or impliedly required or authorised” by the Migration Act. As to that, the appellant submitted that:
11. section 47(1) requires the respondent to consider a valid visa application which continues “until the application is withdrawn” or the visa is granted or refused.
12. in compliance with s 47 the delegate must consider a visa application until it is withdrawn. As to whether the application has been withdrawn, the delegate must be satisfied that there is a document purporting to be a notice of withdrawal, the notice has been given to the respondent, and the notice relates to the application in question. This impliedly requires or authorises the making of a decision about whether there has been a withdrawal.
13. implicit in s 47 is that the respondent must not consider an application that has been withdrawn – so the respondent must be satisfied that the application has been withdrawn.
14. The appellant suggested that the respondent’s “decision” itself “confers, alters or otherwise affects legal rights or obligations” in that the withdrawal “decision” resulted in the appellant no longer having a right for her Visa Application to be determined. The appellant also pointed to the fact that the respondent’s “decision” would have determined her right to be in Australia.
15. The arguments advanced by the appellant relied, for their force, on the existence of a “decision”. Whether those arguments are correct depends upon the way in which the sections of the Migration Act operate to effect the withdrawal and consequent disposal of the Visa Application. The question is whether the process operated to bring about the result (the withdrawal and disposal) by operation of the Migration Act, or whether the process outlined required a decision to be taken by the respondent.
16. The respondent submitted that the Federal Circuit Court had no jurisdiction to hear the appellant’s amended application for review on the basis that there was no “decision” as s 49 prescribes the consequences of the withdrawal of an application, with the result that there was nothing for the respondent to “decide”.
17. In this case, in my view, it is the application of s 49 of the Migration Act to the facts which led to the result that the application was withdrawn and taken to have been disposed of rather than any administrative decision on the part of the respondent. The language used in that section makes this clear. The way in which an application is withdrawn is clearly prescribed. An application that is withdrawn “is taken to have been disposed of”. Those words do not suggest that the exercise of any discretion by the respondent is involved. Rather, it is by the force of the statute that the result follows.
18. The respondent makes no “decision” about whether there has been a withdrawal. The withdrawal occurs by operation of s 49 of the Migration Act and is not dependent upon a decision of the respondent in order for the withdrawal to take effect.
19. In relation to the second “decision” contended by the appellant, a decision cannot be made by the respondent to refuse to consider a visa application in circumstances where the application had been withdrawn by operation of s 49. Section 47 expressly provides that the respondent’s requirement to consider an application continues until the application is withdrawn.
20. This position is consistent with earlier cases noted by the respondent which dealt with forfeiture under the *Customs Act 1901* (Cth) and which consider the position where an outcome arose by force of statute rather than as a result of an administrative decision. In *Sandery v Commissioner of Police* (1986) 65 ALR 181, Jackson J observed (at 184) “all that occurs is that *by the operation of the Customs Act*, if moneys in fact fall within the description referred to in s 229A(2)(a)(i) , they are deemed, by virtue of s 229A(6) to be “forfeited goods” … It is that act, and not any conduct thereunder, which determines that the money is “forfeited goods”.” In *Whim Creek Consolidated NL v Coglan* (1991) 31 FCR 469 O’Loughlin J (with whom Spender and French JJ agreed) said (at 476) “the concept of forfeiture does not evolve out of any administrative decision … On the contrary, it arises by force of statute upon the happening of certain prior events”.
21. Those decisions were considered in the migration context in *NACO v Minister for Immigration and Multicultural Affairs* [2002] FCA 474 where Hely J applied the principle to a visa application under the Migration Act. His Honour referred (at [18]) to the earlier cases as being where the “outcome arises by the application of the law to the facts, rather than an outcome which evolves from administrative decision”. In that particular case, it was held that it was the application of the relevant sections of the Migration Act to the facts which produced the outcome that the respondent was precluded from considering the application for a visa, rather than any administrative decision on the part of the respondent’s delegate.
22. Justice Hely observed that if the conclusion that the application was invalid were wrong, and the application was one which, in point of law, the respondent was obliged to consider, then mandamus would lie under s 39B of the *Judiciary Act 1903* (Cth) to compel the respondent to determine the application according to law.
23. The appellant referred to the decision in ***Raru*** *v Minister of Immigration Local Government and Ethnic Affairs* (1993) 46 FCR 453 submitting that whilst the question of whether there was a decision under the Migration Act did not appear to have been contested, there was at least an assumption by the Court that there was such a decision.
24. At the time of that decision, there was no express provision (such as s 49) in the Migration Act providing for the withdrawal of a visa application. As said earlier, the outcome in this case turns on the effect of the language used in s 49. The decision is not of assistance in considering whether a withdrawal under s 49 requires a decision being made by the respondent.
25. During the hearing of this appeal, the appellant also referred to the decision of the Full Court in *Minister for Immigration and Border Protection v* ***Kim*** (2014) 221 FCR 523. Leave was granted for the parties to file written submissions on that case after the hearing.
26. In *Kim*, the applicant applied for a student visa and, later, was informed by the delegate that her application for the visa was invalid. At the time, s 47 of the Migration Act provided (as it still does) that the respondent was to consider a valid visa application, the validity of which was (and still is) prescribed by s 46. The Minister submitted that the validity of the visa application was an objective question and not a matter to be determined administratively.
27. The Court in *Kim* noted (at 529, [28]) that the question of whether the visa application was a decision under an enactment was “not the present question”. In other words, it was not before the Court and did not arise for determination. On that basis, *Kim* is not directly on point.
28. The Court in *Kim* concluded (at 528, [26]) that:

the issue is the *validity* under the Act of the visa application. The factors or criteria by reference to which an application for a visa is valid in section 46 are stated objectively and do not rest in the Minister’s or an officer’s discretion or opinion. Further, section 47 imposes obligations on the Minister, as opposed to conferring a discretion on him or her. These considerations point in favour of validity being an objective question for the Court and we so find.

1. The Court continued and noted (at 528, [27]) that:

…the validity of the visa application is a question which the court should decide… We accept the appellant Ministers submission that an application for a visa is valid or not regardless of the Minister’s view, or any officer’s view, about the matter. We also accept the appellant Minister’s submission that a person who has made a valid visa application complying with the statutory requirements is at least prima facie entitled to mandamus to require the Minister to consider it.

1. The appellant submits that the decision in *Kim* indicates that the Federal Circuit Court does have jurisdiction to decide for itself whether a visa application is valid. In the appellant’s submission, this supports the conclusion that, in the current case, the Federal Circuit Court also had jurisdiction to decide for itself whether the purported withdrawal was valid and, if it was not valid, to grant mandamus (or an appropriate declaration).
2. The respondent submits, as I believe is correct, that, insofar as *Kim* is of relevance, it supports the respondent’s submission that an application will (or will not) be withdrawn under s 49 by virtue of statute, regardless of the respondent’s view about the withdrawal, and that where a visa application has not been validly withdrawn, the appropriate remedy will be mandamus to compel the respondent to consider the application.
3. For the reasons above, I conclude that the Federal Circuit Court had no jurisdiction to hear the amended application for review as there was no relevant “migration decision” regarding withdrawal of a visa application made under the Migration Act; no “decision”, whether actual or purported, regarding the withdrawal of the appellant’s Visa Application was, or could have been, made by the respondent.
4. This ground of appeal should be dismissed. My conclusion about this ground of appeal effectively disposes of this appeal as I have found that the Federal Circuit Court had no jurisdiction to deal with the application.

## Second Ground of Appeal – Valid withdrawal of Visa Application?

1. Whilst my finding above that the Federal Circuit Court had no jurisdiction to entertain the amended application for review disposes of this appeal, I will, although not necessary for the disposition of this appeal, consider the second ground of appeal advanced by the appellant.
2. The true construction of s 49(1) of the Migration Act is central to the consideration of this question and ground of appeal.
3. The meaning of s 49(1) has not been judicially considered. The customary principles of statutory interpretation apply which include consideration of the text of the statute and its context and purpose.
4. The appellant asserted that the withdrawal of a visa application will be invalid and ineffective if there was no genuine intention to withdraw the application. The appellant submitted it was “implicit” in the phrase “may…withdraw the application” that there must be a genuine intention to actually withdraw the application for such withdrawal to be effective.
5. The appellant referred to dictionary definitions of the word “withdraw” as being to “take back” or “to retract or recall” each of which, it was submitted, describe a purposive or intentional act.
6. The appellant submitted that the requirement for the notice of withdrawal to be “given” implies an intentional act by a visa applicant.
7. The respondent submitted that there is nothing in the language of s 49 of the Migration Act which indicates that the act of withdrawal is predicated on the visa applicant holding a genuine intention and there is no basis in the language to read into it a qualification which does not appear in the text. The only requirement is that the withdrawal be by written notice given to the respondent.
8. It is necessary to consider the subsection as a whole. The appellant submitted that the qualification urged would be implied. The qualification does not appear on the face of the subsection. I do not think the qualification flows from the phrase “may… withdraw the application”. The words omitted from that quotation are “by written notice given to the Minister”. Those words outline the requirement (and define the methodology) which enlivens the operation of the section, namely, that the withdrawal occurs by written notice given to the respondent. The focus of the section is the use of a notice which must be written and given to the Minister. The words are prescriptive of what is required. That is what is required on the face of the subsection and operates without the need to imply any additional requirements.
9. The dictionary definitions referred to do not take the matter further. When read as a whole, the subsection provides that the “taking back” or “retracting or recalling” occurs by written notice to the Minister, which is, of course, a deliberate and intentional act.
10. The use of the word “given” refers to the written notice in that the written notice must be given to the Minister. The intentional act is the giving of the written notice to the Minister. The use of this verb (given) does not infer the qualification asserted.
11. The words used in the subsection do not support the implication of the qualification asserted by the appellant. The way in which the subsection operates is clear from the words used – the section comes into operation upon the giving of the written notice to the Minister.
12. The appellant referred to the context in which s 49(1) of the Migration Act appears, namely the serious consequences which flow from a withdrawal, in submitting that the Parliament ought not be presumed to have intended that an application could be withdrawn and treated as disposed of accidentally, that is in the absence of a genuine intention to do so. As was submitted by the respondent, the requirement for written notice provided to the Minister guards against the possibility of “accidental” withdrawals. The context does not form a basis on which the qualification suggested would be implied.
13. The appellant submitted that the necessity for there to be a genuine intention finds support in the decision of *Raru*. In that case, the applicant provided a statutory declaration withdrawing the application but, before the declaration was provided to the Minister, indicated that she no longer wished to withdraw her application. The appellant, whilst conceding that *Raru* was not directly on point, submitted that its reasoning supports a conclusion that the act of withdrawal is dependent upon the exercise of a genuine intention on behalf of the person effecting the withdrawal. The appellant contended that this can be seen from the fact that, once the appellant no longer intended to withdraw her application, it was no longer a valid withdrawal.
14. The question in *Raru* was described by Burchett J as whether the handing of a document to an investigations officer, with the understanding that he would transmit it to those to whom he would be reporting, amounted then and there to a completed act of withdrawal of the application addressed to the Minister. The Court concluded that until the withdrawal reached the Minister (or relevant delegate) the withdrawal could not be regarded as complete. The issue was not whether the applicant had a relevant intention to withdraw but rather at which point the withdrawal was complete.
15. The reasoning in *Raru* does not support a conclusion that the act of withdrawal is dependent upon the existence of a genuine intention.
16. The appellant noted that the Court in *Raru*, being aware that the case was decided before the insertion of s 49(1), observed (at 458) that “a recent statute does make express provision for withdrawal of an application, and in doing so, adopts the course which I would imply in the present statutory context”. That reference referred to by the appellant should be read in conjunction with another observation made by the Court (at 458) as follows: “there would be considerable inconvenience and uncertainty if the Act and Regulations were construed as providing that the application could lose its force before communication of its withdrawal to the Minister or delegate responsible for determining it.” The observations made by the Court in *Raru* seem to be referring to the requirement in s 49(1) to give written notice to the Minister. The observation is consistent with the conclusion that the requirements of the subsection focus on the giving of notice to the Minister.
17. The respondent argued that the appellant’s interpretation was inconsistent with legislative intention in that the interpretation proffered by the appellant was inconsistent with providing greater certainty as contemplated by the Explanatory Memorandum to the Migration Reform Bill 1992 and Migration (Delayed Visa Applications) Tax Bill 1992 (Cth), which inserted s 26Q, the previous iteration of s 49. The respondent submitted that this uncertainty would arise because its department would not know if it could treat a withdrawal as valid on its face without potentially making further inquiries.
18. The Explanatory Memorandum (at 22, [47]) is in these terms:

To provide greater certainty in dealing with applications, this section expressly allows for the applicant to withdraw a Visa application and makes it clear that following the withdrawal application is taken to have been disposed of but not refused for the purpose of s 26P...

1. As the respondent submitted, the greater certainty provided by the legislation was likely achieved by inclusion of an express right to withdraw which had not been available previously. However, there is also an element which relates to certainty as to the fact that withdrawal has occurred which is achieved by requirement for written notice given to the Minister.
2. In *Raru,* Burchett J said “the avoidance of uncertainty in the administration of claims by a department of government was held to be a good ground for preferring a particular construction of legislation dealing with the formalities of an application”: *Raru* at 458, referring to *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117 at 123–124*.*
3. I agree that the terms of the Explanatory Memorandum support the interpretation advanced by the respondent. The respondent’s interpretation also tends to avoid uncertainty in the administration of claims and so is to be preferred.
4. The appellant submitted that the proposition that a withdrawal under s 49(1) of the Migration Act depends upon a genuine intention to withdraw which finds support in analogous cases.
5. The appellant referred to four cases where the effect of a withdrawal of an application (or abandonment or discontinuance of proceedings in two of those cases) was discussed in the context of some act (fraud, misrepresentation or mistake) which might have rendered the withdrawal ineffective or the abandonment or discontinuance a nullity.
6. At the hearing of this appeal, the appellant asserted no more than that she was mistaken: see Transcript, p 21, lines 5-15. At this time, there was no submission based upon either fraud or misrepresentation.
7. Two of the cases, *R v GAM (No 2)* (2004) 9 VR 640 and *Kogolo v State of Western Australia* [2011] FCA 1481 involve the exercise of judicial power to set aside a notice of abandonment or discontinuance in court proceedings by reason of fraud or mistake rendering the discontinuance a nullity. The outcome in these cases rested upon the court’s inherent jurisdiction. The observations must be understood in that context in which they were made. The effect of the provisions in the Migration Act is to be found in the words used in the section.
8. The other two authorities were ***SZASD*** *v Minister for Immigration* [2004] FMCA 472 and ***Uniden*** *Australia Pty Ltd v Collector of Customs* (1997) 74 FCR 190. Relevantly, at the time of those decisions, neither the Migration Act nor the Customs Act contained provisions expressly dealing with a right to withdraw a claim. Neither decision was, therefore, against the background of the express provision which is relevant to these proceedings. Absent any express provision, the question was whether, in the factual context, there was an effective withdrawal.
9. *SZASD* was a decision of the then Federal Magistrates Court which did not contain any detailed analysis of the issue relevant to these proceedings.
10. The issue was not before the Court in *Uniden*. Foster J observed (at 202), by way of obiter, “although one can envisage circumstances where a submission based upon a withdrawal of a claim being ineffective through its being vitiated by some factor such as fraud or misrepresentation might be successfully raised, I have come to the conclusion that such a submission is not open in the present case”. No detailed consideration was given to the issue and no concluded view was reached as the issue did not arise for consideration.
11. As already observed, neither of these decisions was in the context of the express provision under consideration in these proceedings. As the parties agreed, the outcome in these proceedings turns upon the construction of s 49(1) of the Migration Act.
12. In the circumstances, I conclude that the application was withdrawn by the appellant by way of the written notice to the respondent on 26 August 2019 which was given pursuant to the requirements of s 49(1) of the Migration Act. The consequence which followed from that was, by operation of s 49(2), the Visa Application was taken to have been disposed of.
13. As I said at the outset of the discussion in relation to this ground, my conclusion in relation the first ground disposes of this appeal. However, as is obvious this ground would also have been dismissed.

# Conclusion

1. I have concluded that the Federal Circuit Court had no jurisdiction. The appeal must therefore be dismissed. There is no reason why costs should not follow the event.

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| I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Thomas. |

Associate:

Dated: 11 November 2021