



HIGH COURT OF AUSTRALIA

1 November 2023

BENBRIKA v MINISTER FOR HOME AFFAIRS & ANOR
[2023] HCA 33

Today, the High Court held that s 36D of the *Australian Citizenship Act 2007* (Cth) ("the Act") is invalid on the basis that it purports to repose in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt, contrary to Ch III of the *Constitution*. Section 36D of the Act relevantly provides that the Minister may determine in writing that a person ceases to be an Australian citizen if the person has been convicted of an offence against a provision of Pt 5.3 of the *Criminal Code* (Cth) (terrorism) (subject to certain exceptions) and has been sentenced to a period of imprisonment of at least 3 years in respect of that conviction, and the Minister is satisfied that the conduct to which the conviction relates demonstrates that the person has repudiated their allegiance to Australia and that it would be contrary to the public interest for the person to remain a citizen.

The applicant, Mr Benbrika, is an Algerian citizen who arrived in Australia in 1989 and became an Australian citizen in 1998. In 2008, the applicant was convicted of and sentenced to a term of imprisonment exceeding 3 years for offences under Pt 5.3 of the *Criminal Code*. Following the expiry of the applicant's sentence in November 2020, the Minister determined in writing pursuant to s 36D(1) of the Act that Mr Benbrika cease to be an Australian citizen. By operation of s 35(3) of the *Migration Act 1958* (Cth), Mr Benbrika was granted an ex-citizen visa on the purported cessation of his Australian citizenship.

The respondents, the Minister and the Commonwealth, accepted that s 36D is properly characterised as punitive in accordance with the reasoning of the majority of the Court in *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560; 401 ALR 438. In *Alexander*, a majority of the Court held s 36B of the Act to be invalid on the basis that it purported to repose in the Minister the exclusively judicial function of adjudging and punishing criminal guilt, contrary to Ch III of the *Constitution* and the principle enunciated by the Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. Section 36B purported to authorise the Minister to determine in writing that a person ceases to be an Australian citizen if the Minister was satisfied that the person engaged in specified conduct.

In the present special case, the High Court, by majority, found that the power purportedly conferred on the Minister by s 36D of the Act is indistinguishable from, and has the same purpose as, that purportedly conferred on the Minister by s 36B. Accordingly, s 36D is invalid because it purports to repose in the Minister the exclusively judicial function of punishing criminal guilt, contrary to Ch III of the *Constitution*. The Court held, contrary to the respondents' argument, that Ch III makes punishment of criminal conduct exclusively judicial even if the punishment is separated from the adjudication of that criminal guilt. The Court also rejected the respondents' argument that an exception to the *Lim* principle should be recognised to allow the Executive to deprive a person of citizenship involuntarily as punishment following a conviction.

- *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.*