ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C15 of 2017

SITTING AS THE COURT OF
DISPUTED RETURNS

RE THE HON BARNABY JOYCE MP
Reference under s 376 of the
Commonwealth Electoral Act 1918 (Cth)

ANNOTATED SUBMISSIONS IN REPLY OF THE HON. BARNABY JOYCE MP

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Filed on behalf of the Hon Barnaby Joyce MP
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Part I: Publication of submissions

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

Part II: Argument in reply

The "second" and "third" limbs of s 44(i)

2. For the reasons given by the amici curiae in their submissions ("**ACS**") at [9], Mr Joyce accepts that there is force in the proposition that s 44(i) of *Constitution* has only two limbs. If that be correct, then the phrase "a subject or a citizen or entitled to the rights or privileges or a subject or a citizen of a foreign power" is a single compound expression. Mr Joyce's argument in chief, with its emphasis upon the exercise of choice, would thus require supplementing so as to recognise that that compound expression describes those who have chosen to adopt or to maintain the status or character of a subject or citizen, or a person entitled to the rights and privileges of a subject or a citizen, of a foreign power under the law of that foreign power.

3. Contrary to ACS [25]-[27], there is nothing "anti-textual" about such a construction. Mr Joyce is simply submitting that the content of a constitutional expression is more limited than its literal meaning might suggest, having regard to its purpose and context. That is precisely the approach that was taken in giving meaning to the expression "benefits to students" in *Williams v The Commonwealth (No 2)*.[1]

4. Two further consequences flow from the preceding two paragraphs. First, the word "is" in s 44(i) is not as significant for present purposes as Mr Windsor submits (Annotated Submissions of Mr Antony Harold Curties Windsor ("**WS**") at [11]). This is because the notion of choice or of a voluntary obtaining, or retention, of the status of a foreign citizen is embedded in the compound expression that follows the word "is". The fact that that word does not itself suggest the doing of any act is beside the point. And secondly, it must be incorrect to say, as Mr Windsor does (WS [30]), that if Mr Joyce was not, as at the date of his nomination, "a subject or a citizen ... of a foreign power" by reason of his lack of knowledge of his New Zealand citizenship, then he must have been a person entitled to the rights and privileges of a New Zealand citizen. That submission erroneously assumes that the so-called "second" and "third" limbs of s 44(i) are alternatives rather than part of the one concept

5. Furthermore, if those so-called limbs are but one limb, then a construction of s 44(i) that does not make any allowance for a candidate's ignorance of foreign law would, in effect, require that candidate, prior to nominating, to make enquiries as to:

   (a) his or her citizenship status under foreign law;

   (b) the rights and privileges that attach to citizenship under that foreign law; and

   (c) whether there is some law of the relevant foreign power that nonetheless confers some or all of those rights and privileges upon him or her, even if he or she were not a citizen.

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[1] (2014) 252 CLR 416 at 458-460 [43]-[48].

6. The first of these may, in certain circumstances, be a simple enquiry, as the amici curiae submit (AWS [33]). The same, however, cannot be so readily said of the second and third matters.

7. It must also be borne in mind that a Court called upon to adjudicate upon the enlarged second limb of s 44(i) would need to address those same three matters. There is simply no basis for suggesting that that would endow s 44(i) with greater certainty of operation than if it were construed in the manner for which the Attorney-General and Mr Joyce contend.

The basis and significance of "the reasonable steps test"

8. The submissions of both Mr Windsor and the amici curiae sit ill alongside the reasoning in *Sykes v Cleary*. In particular, while they accept that the operation of s 44(i) of the *Constitution* is qualified by reference to the taking of reasonable steps to renounce one's foreign citizenship, neither Mr Windsor nor the amici curiae provide an explanation for why that is so that both reflects the reasoning in *Sykes v Cleary* and is consistent with their broader arguments concerning the meaning of s 44(i). Mr Windsor, for example, submits that the taking of reasonable steps to renounce one's foreign nationality engages "an implied exception" to s 44(i) arising out of "public policy or necessity" (WS [9(c)] and [27]). However, the recognition of constitutional implications on the basis of public policy is a technique unknown to the jurisprudence of this Court. And as for necessity, it need only be said that it is neither "logically [nor] practically necessary"[2] for the sensible operation of s 44(i) that it be qualified in the manner suggested in *Sykes v Cleary*. It is true that absent that qualification, s 44(i) would be more draconian in effect, but that alone does not render necessary the provision of some leeway for those who take reasonable steps to renounce their foreign citizenship.

9. Moreover, Mr Windsor's submissions concerning the purpose of s 44(i), with their insistence upon "bright lines" (WS [37]) and the avoidance of factual enquiries, rather invite one to ask why the Court should ever embark upon a factual enquiry as to the taking of reasonable steps to renounce one's foreign citizenship. Especially is this so if, as submitted above, it is incorrect to speak of taking of reasonable steps to renounce one's foreign citizenship as being "an implied exception from public policy and necessity". Thus, despite an attempt to accommodate the reasoning in *Sykes v Cleary*, the logical conclusion of Mr Windsor's case is in fact at odds with it.

10. The extent of the incoherence in the submissions of Mr Windsor is suggested by the difficulty in reconciling his reading of *Sykes v Cleary*, one which treats as irrelevant the knowledge or beliefs of the relevant candidate, with the observation by Mason CJ Toohey and McHugh JJ that "it is relevant to bear in mind that a person who has participated in an Australian naturalization ceremony ... may well believe that, by becoming an Australian citizen, he or she has effectively renounced any foreign nationality".[3] Mr Joyce has sought in chief to address that observation in the context of the conclusion of ineligibility that the Court reached in relation to Mr Kardamitsis, a naturalised Australian, and to explain its significance where the impugned candidate

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[2] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135.
[3] (1992) 176 CLR 77 at 108.

is a natural born Australian. In contrast, Mr Windsor has not advanced a construction of s 44(i) that accounts for their Honours' remark or for Dawson J's reference to "the person's knowledge of his foreign nationality".[4] There is accordingly no substance in the assertion that Mr Joyce's submission involves an attempt to reopen *Sykes v Cleary* (WS [13]-[17]).

11. At the heart of the argument put by the amici curiae (ACS [62]) is the proposition that "the reasonable steps test" "operates by qualifying the recognition of ... foreign law, not by introducing an overriding test of reasonableness for the operation of s 44(i)". It is on this basis that the amici curiae seek to avoid the conclusion that "the reasonable steps test" is "an overriding gloss on the words of s 44(i)" (ACS [75]).

12. Nonetheless, a majority of the Court in *Sykes v Cleary* spoke in terms that indicate that the taking of reasonable steps to renounce one's foreign citizenship forms part of the criteria, not for the non-recognition of a foreign citizenship law, but rather for disqualification from election to the Commonwealth Parliament. For example, Mason CJ, Toohey and McHugh JJ remarked that s 44(i) "could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality".[5] This suggests that "the reasonable steps test" serves to qualify the scope of s 44(i), and not merely the recognition of foreign law. So much also emerges from Dawson J's suggestion that "a person ... will not be incapable of being chosen or sitting as a senator or a member of the House of Representatives if he has taken all steps that could reasonably be taken to renounce [his or her] foreign nationality or citizenship".[6]

13. More importantly, the submission of the amici curiae is predicated upon the suggestion that the rationale of "the reasonable steps test" is that a court "would not recognise a foreign law to the extent that it rendered renunciation impossible or dependent upon the taking of steps that were unreasonable" (ACS [62]). It would follow from that suggestion that what constitutes reasonable steps would depend solely on whether the foreign law requirements for renunciation were reasonably capable of being complied with. However, that is not the law. As Mason CJ, Toohey and McHugh JJ observed in *Sykes v Cleary*,[7] "[w]hat is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extent of the connexion between the individual and foreign State of which he or she is alleged to be a subject or citizen." Dawson J similarly spoke of reasonableness as depending upon a range of circumstances extending beyond the content of the foreign law, including, as noted above, "the person's knowledge of his foreign nationality".[8] The amici curiae are thus incorrect in their submission that because the process of renouncing, say, British citizenship is "remarkably easy", a failure to embark upon that process, irrespective of the knowledge of the relevant individual, necessarily entails a failure to take reasonable steps.

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[4] (1992) 176 CLR 77 at 131.
[5] (1992) 176 CLR 77 at 107.
[6] (1992) 176 CLR 77 at 131.
[7] (1992) 176 CLR 77 at 108.
[8] (1992) 176 CLR 77 at 131.

14. The only coherent account before the Court for the adoption of "the reasonable steps", the account which best explains every facet of the reasoning of a majority of the Justices in *Sykes v Cleary*, is that advanced by the Attorney-General and Mr Joyce. That is, as was developed in chief, the so-called "second limb" of s 44(i) is concerned with a status of subjecthood or citizenship, the adoption or retention of which is the result of a choice, whether or not accompanied by some positive act, on the part of the impugned candidate.

15. It is also worth pausing to observe that Mr Windsor's posited analogy between the reasoning that justifies the apprehended bias doctrine and the need on the part of federal parliamentarians to avoid actual and perceived conflicts of loyalty does not support a construction of s 44(i) that disregards the state of knowledge of the impugned candidate. Central to the apprehended bias doctrine is the notion that there must be some logical connection between that which is said to be capable of leading a decision-maker to determine a question other than on its merits and the possibility of departure from the course of impartial decision-making.[9] Mr Windsor has failed in his submissions to articulate the logical connection between a parliamentarian having a foreign citizenship status of which he or she is unaware and the possibility of some attenuation in that parliamentarian's loyalty or allegiance to the Commonwealth of Australia. In the absence of such a logical connection being articulated, the need to avoid perceived conflicts of loyalty provides no explanation for why, as the amici curiae put it, "the hard-edged construction [of s 44(i)] is appropriate" (ACS [17]).

Rewarding the careless

16. Those contending for the disqualification of Mr Joyce and Senator Nash submit that a construction of s 44(i) that would preserve their eligibility to sit in Parliament would produce a more favourable outcome for those candidates who remain ignorant or "careless" as to their citizenship status under foreign law than for those who choose to investigate the matter prior to nominating for election. (WS [18]; Submissions for Scott Ludlam and Larissa Waters ("**SLLWS**") at [45]). Underpinning this is the suggestion that those who refrain from such investigations are somehow less deserving of the benefit of the doubt.

17. There is, however, no small degree of circularity in this argument. One can only meaningfully speak of a person being "negligent" or "careless" in making inquiries concerning his or her citizenship status under foreign law if that person is obliged or expected to make such inquiries in order to avoid disqualification as a candidate or a member of Parliament. And there can only be such an expectation if, contrary to the submissions of the Attorney-General and of Mr Joyce, a lack of knowledge concerning his or her foreign citizenship does not afford a natural born Australian a basis for resisting disqualification. That being so, the argument advanced by Mr Windsor, Mr Ludlam and Ms Waters assumes the incorrectness of the position against which it contends.

18. In any event, for the reasons already given, the relevant questions for the purposes of s 44(i) are whether the given candidate has, with knowledge of his or her citizenship

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[9] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8]; *Michael Wilson and Partners Ltd v Nicholls* (2011) 244 CLR 427 at 445 [63].

status under foreign law, failed to make a choice renouncing that citizenship, and if such a choice has been made, whether he or she has sufficiently acted on it by taking reasonable steps to effect the renunciation. The amount of effort expended, or the degree of diligence displayed, by a candidate in seeking to investigate his or her foreign citizenship status is irrelevant.

Constructive knowledge

19. A theme common to the submissions of the amici curiae and of Mr Ludlam and Ms Waters is that it is sufficient to fix candidates with constructive knowledge of their foreign citizenship that they are aware of the foreign birth of one or both of their parents (ACS [82]-[84]; SLLWS [6] and [49]). That proposition proceeds upon an unspoken factual premise, namely, that the conferral of citizenship by descent is so common across countries throughout the world and that fact is so notorious to the Australian public that mere knowledge of the foreign birth of one's parent should prompt one, acting reasonably, to ask whether one is a citizen of a foreign power by descent. That factual premise has not been proved by any party before the Court. And its correctness should not be assumed.[10] It follows then that the conclusion that the premise is said to support should not be accepted.

20. It should also be observed that:

    (a) while the amici curiae point to the Attorney-General's failure to explain why only actual knowledge of one's foreign citizenship will suffice to engage s 44(i), they do not address Mr Joyce's submissions on the question of constructive knowledge; and

    (b) Mr Windsor appears not to press any point of constructive knowledge at all.

21. For the reasons outlined above, then, the submissions of Mr Windsor, Mr Ludlam and Ms Waters and the amici curiae do not afford any answer to Mr Joyce's case.

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[10] It is worth noting that under Part 2 Div 2 Subdiv A of the *Australian Citizenship Act 2007* (Cth), being born outside Australia to a parent who is an Australian citizen does not automatically make one an Australian citizen. Rather, those circumstances only entitle an individual to become an Australian citizen upon registration at the discretion of the Minister. Thus, in the absence of any proof of the contents of citizenship or nationality laws worldwide, there is no basis for concluding that the conferral of citizenship by descent is presently a common phenomenon.