HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S103/2021
File Title:	Delil Alexander (by his litigation guardian Berivan Alexander)
Registry:	Sydney
Document filed:	Form 27F - (Defendants) Outline of oral argument
Filing party:	Defendants
Date filed:	16 Feb 2022

Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **DELIL ALEXANDER**
(BY HIS LITIGATION GUARDIAN BERIVAN ALEXANDER)
Plaintiff

AND: **MINISTER FOR HOME AFFAIRS**
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANTS

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Construction of s 36B of the *Australian Citizenship Act 2007* (Cth) (DS [14]-[27])

2. Section 36B(1) of the *Australian Citizenship Act 2007* (Cth) confers a discretion on the Minister to determine that citizenship should cease if satisfied of three cumulative criteria.

3. ***First***, that the person has "engaged in conduct" specified in s 36B(5) while outside Australia: s 36B(1)(a). On the facts of this case, the only sub-paragraph engaged is s 36B(5)(h) – "engaging in foreign incursions and recruitment", which refers to engaging in conduct to which Div 119 of the *Criminal Code* (Cth) applies: s 36B(6). The applicable provision in Div 119 is s 119.2, which, relevantly makes it an offence for an Australian citizen to enter, or remain in, a declared area in a foreign country.

4. The offence under s 119.2 depends upon an area having been declared under s 119.3. The Foreign Minister can only make a declaration where satisfied that a "listed terrorist organisation" is "engaging in a hostile activity" in the area. Declarations are of limited duration and are subject to scrutiny by Parliament.

   - Revised Explanatory Memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) at [243], [896] (**JBA 14, Tab 90**);
   - Statement of Reasons for declaration of al-Raqqa (**SCB 1 at 169-172**);
   - PJCIS Review of declaration of al-Raqqa (**SCB 1 at 189, 192-193, 195, 197**).

5. The voluntariness requirement in s 4.2(1) of the *Criminal Code* (Cth) and exceptions in s 119.2(3)-(4) remove innocent conduct from the scope of s 36B(5)(h).

   - INSLM Review of ss 119.2-119.3 of the *Criminal Code* at [8.30] (**JBA 13, Tab 76**).

6. ***Second***, that a person's conduct demonstrates that they have repudiated their allegiance to Australia. This criterion draws on language with a long history in the law of nationality and is informed by other provisions in the Citizenship Act: see Preamble, ss 36A, 36B(5).

7. ***Third***, that it would be contrary to the public interest for the person to remain an Australian citizen: see ss 36B(1)(c), 36E(2).

8. Judicial review is possible to ensure that any determination under s 36B complies with all three of those criteria: eg *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42] **(JBA 7, Tab 41)**; cf **Reply [3]-[4], [9], [15], [38]**.

Question 1(a) – Section 36B is within Commonwealth legislative power (DS [28]-[47])

9. The first aspect of the aliens power is the "power to determine who is and who is not to have the legal status of an alien": *Chetcuti* (2021) 95 ALJR 704 at [12] (**JBA 12, Tab 63**). While that power does not allow Parliament to treat as aliens persons who could not possibly answer that description on the ordinary understanding of the word, s 36B does not do so, having regard to: (i) pre-Federation British legislation; (ii) historical Australian laws that have long provided for renunciation and cessation of citizenship in broadly similar circumstances to s 36B; and (iii) the enactment by comparable democracies of statutes depriving foreign fighters of citizenship in circumstances similar to s 36B.

- *Singh* (2004) 222 CLR 322 at [168], [172]-[174], [176]-[177], [183]-[184], [195], [197]; [260] (**JBA 10, Tab 55**);
- *Ex parte Ame* (2005) 222 CLR 439 at [34]-[35] (**JBA 9, Tab 49**);
- *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at [36] (**JBA 12, Tab 66**). See also *Thomas v Mowbray* (2007) 233 CLR 307 at [438] (**JBA 11, Tab 57**); SC [52]-[53], [57]-[58], [61], [64], [77], [78];
- *Naturalization Act 1870* (Imp), ss 4, 6, 10(1) (**JBA 2, Tab 18**); *Nationality and Citizenship Act 1948* (Cth), ss 17, 19, 21(1) (**JBA 2, Tab 14**); *British Nationality Act 1981* (UK), s 40(2) (**JBA 2, Tab 17**); *Nationality Act of 22 July 1913* (Ger), s 28 (**SCB 3 at 1159**); *Nationality Act of 1984* (Netherlands), Art 14(4) (**SCB 3 at 1161**).

10. That conclusion is reinforced by the fact that, by reason of ss 36B(2) and 36K(1)(c), s 36B applies only to persons who are citizens of foreign countries: *Nolan* (1988) 165 CLR 178 at 183 **(JBA 7, Tab 39)**; *Singh* (2004) 222 CLR 322 at [32], [205]; *Love v Commonwealth* (2020) 270 CLR 152 at [172], [316], [322] **(JBA 6, Tab 32)**.

Question 1(b) – Implied limit precluding citizenship cessation (DS [48]-[57])

11. Limitations on Commonwealth legislative power should only be implied to the extent necessary to give effect to the text or structure of the Constitution: *Lange v ABC* (1997) 189 CLR 520 at 567 (**JBA 5, Tab 31**).

12. The plaintiff has abandoned his submission that there is to be implied from the Constitution an absolute limit that prevents the removal of citizenship: **Reply [19]**.

13. The plaintiff presses his argument that there are two implied qualified limitations. The first is that citizenship cessation requires an exercise of judicial power. Such an implication finds no support in the text of the Constitution, in history or in authority. It is contrary to the settled understanding of the first aspect of the aliens power: *Chetcuti* (2021) 95 ALJR 704 at [12].

14. The second qualified limit is said to be that citizenship cessation must be justified by "substantial reasons". That is likewise not supported by the text, and overlooks the reality that laws determining who should be permitted to become or remain a citizen will properly be concerned with broader considerations than statutes regulating the franchise.

- *Love v Commonwealth* (2020) 270 CLR 152 at [94].

Question 1(c) – Substantial reason for disenfranchisement (DS [58]-[62])

15. The "substantial reason" test is irrelevant to the validity of s 36B. Alternatively, if relevant, that test will be satisfied whenever a person loses their right to vote due to s 36B.

- *Roach* (2007) 233 CLR 162 at [82]-[83] (**JBA 9, Tab 52**). See, also *Murphy* (2016) 261 CLR 28 at [42]; [52], [54]-[55]; [84]-[87], [96]; [222]-[224], [227]; [244]; [306]-[307], [321] (**JBA 7, Tab 36**);
- ASIO submissions to the PJCIS review of ss 33AA and 35 (**SCB 1 at 377**).

Question 1(e) – Judicial power (DS [63]-[73])

16. To succeed on this ground – given that: (i) s 36B does not impose detention in custody; and (ii) the historical examples at **PS [76]** do not establish that there is a "default characterisation" that citizenship cessation is penal or punitive – the plaintiff must show that s 36B confers power of an exclusively judicial kind upon the Minister. That has not occurred; rather, the plaintiff has failed to grapple with the following points:

(a) there is nothing inherently judicial about a Minister inflicting involuntary hardship or detriment on a person, or forming a state of satisfaction about whether conduct has occurred (even by reference to an element of a criminal offence); and

(b) a determination under s 36B: (i) requires consideration of the public interest; (ii) will not involve any finding that a criminal offence has been committed, let alone imposition of a punishment; (iii) will not decide a controversy as to the existence of present rights and obligations; (iv) may not even cause the dual national in question to suffer hardship; and (v) produces an outcome (citizenship cessation) that historically has been achieved by exercise of legislative or executive power.

- *Re Woolley* (2004) 225 CLR 1 at [17] (**JBA 9, Tab 51**);
- *Lim* (1992) 176 CLR 1 at 26 (**JBA 4, Tab 25**).

Stephen Donaghue Perry Herzfeld Julia Watson Luca Moretti

16 February 2022