HIGH COURT OF AUSTRALIA

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Details of Filing

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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 PLAINTIFF

Part I: Certification

1. This document is in a form suitable for publication on the internet.

Part II: Argument

2. The questions of law stated for the opinion of the Full Court (SCB, tab 5, p.79 [108]) will be addressed by the Plaintiff in the following order:

   (a) Question 1(a) - validity under s 51(xix);

   (b) Question 1(e) – implied limitation associated with *Lim*;

   (c) Question 1(c) – implied limitation concerning disqualification from the franchise;

   (d) Question 1(b) – implied limitation concerning deprivation of citizenship.

Question 1(a): Validity under s 51(xix)

3. Section 36B of the *Australian **Citizenship Act** 2007* (Cth) takes its character from the rights and liabilities etc which it modifies or destroys, being the rights depending upon the status of citizenship created or recognised by the *Constitution*, the common law, and State and Federal laws: PS [15].

4. *First,* s 36B of the Citizenship Act is invalid because s 51(xix) does not confer legislative power to regulate or destroy the rights of persons who have never been aliens. Certain *obiter dicta* stating that s 51(xix) empowers the Parliament to determine the conditions on which citizenship can be acquired ***and lost*** are, upon close analysis, concerned with the naturalisation aspect of the power. The decision in ***Love*** *v Commonwealth* (2020) 270 CLR 152 is inconsistent with the "topic of juristic classification"[1] approach, which the Defendants propound in this case (DS [30]). Even that approach does not preclude limits deriving from the subject-matter of the power: "aliens" (a status) and "naturalisation" (the process by which that status is *lost*). An implication arises from the omission of the opposite status ("citizenship") and the opposite process ("denationalisation"): PS [30].

5. *Second,* s 36B of the Citizenship Act contravenes the so-called "*Pochi*[2] qualification", which has commanded almost unanimous support in this Court. A citizen by birth "could not possibly answer the description of 'aliens' in the ordinary understanding of the word", which "is not and never has been appropriate to describe within any part of the territory

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1 *Love* (2020) 270 CLR 152 at 194 [86] (Gageler J).

2 ***Pochi*** *v Macphee* (1982) 151 CLR 101 at 109 (Gibbs CJ).

… of a single sovereign State the status of a person who is one of the subjects of that particular State."[3]

Question 1(e): The *Lim* Principle

6. *First*, involuntary denationalisation is intrinsically penal or punitive in character: that is so both as a matter of history and of principle.

7. *Secondly*, because it is penal or punitive in character, Ch III of the Constitution will not suffer it to be inflicted upon a citizen otherwise than by a court. The Defendants' two answers to this are wrong. It is wrong to say that *Lim* states a rule about detention alone; it states a rule about punishment, of which detention is but one example. It is also wrong to rely on the non-judicial aspects of the way the Minister is required to act under s 36B: that is to import *Alinta*-type reasoning into the different context of *Lim* incompatibility. If it were right, the executive could detain at will, provided they were required to act in an administrative manner, rather than judicially, in doing so.

8. *Thirdly*, *Lim* does not apply where executive use of the punishment in question is the subject of a historically recognised exception: eg. for detention, those exceptions include quarantine detention and pre-trial custody. No such exception has been relied upon by the Defendants in the case of denationalisation as here.

Question 1(c): implied limitation concerning disqualification from the franchise

9. Section 36B of the Citizenship Act confers a power to disenfranchise a group of people. Subject to revocation (ss 36H, 36J, 36K), the disenfranchisement is permanent (s 36L).

10. Section 36B will therefore be invalid unless supported by a substantial reason.[4] The submission that *Roach* and *Rowe* are confined to a law "with respect to the franchise" (DS [56]) should be rejected. The effect of the reasoning in *Roach* was correctly summarised by Kiefel J: "legislative power which burdens the franchise is to be justified."[5]

11. The Defendants have not identified an "end" pursued by s 36B of the Citizenship Act which is consistent or compatible with the maintenance of representative government. The "end" pursued by s 36B of the Citizenship Act is expulsion of undesirable citizens. That "end" is inconsistent and incompatible with representative government.

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3 ***Nolan*** *v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184 (Mason CJ, Wilson, Brennan Deane, Dawson and Toohey JJ).

4 ***Roach*** *v Electoral Commissioner* (2007) 233 CLR 162 and ***Rowe*** *v Electoral Commissioner* (2010) 243 CLR 1.

5 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at [63] (Kiefel J).

12. Alternatively, s 36B of the Citizenship Act is disproportionate to any (as yet unidentified) legitimate "end" which it pursues. It is "arbitrary"[6] for three reasons:

    (a) *first*, it is over-inclusive because it requires no assessment of culpability;

    (b) *secondly*, subject to revocation, it is permanent (PS [63]);

    (c) *thirdly*, it is unnecessary, given other counter-terrorism laws (PS [22], [65]).

Question 1(b): implied limitation concerning denationalisation

13. If the Court finds that *Roach* and *Rowe* are confined to a law "with respect to the franchise" (DS [56]), then an analogous limitation should be recognised to protect the status of the "people of the Commonwealth" from arbitrary[7] deprivation of citizenship.[8]

14. Constitutional protection of citizenship is indispensable to representative government. The protection of rights through the democratic process is rationally defensible only if the democratic process *itself* is adequately protected (PS [68]-[70]; PR [33]). If there is no protection of the status of "the people", other protections can be sterilised and deprived of their protective force. Given the source of the limitation inter alia in ss 7 and 24 (PS [42]-[46]), it is harmonious to adopt the "substantial reasons" principle propounded in *Roach*.

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[6] ***Roach*** (2007) 233 CLR 162 at [24] (Gleeson CJ) and [85] (Gummow, Kirby and Crennan JJ).
[7] In the sense used in ***Roach*** (2007) 233 CLR 162 at [24] (Gleeson CJ) and [85] (Gummow, Kirby and Crennan JJ).
[8] See eg *Love* (2020) 270 CLR 152 at [101] (Gageler J).