



HIGH COURT OF AUSTRALIA

9 May 2018

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS
PURSUANT TO SECTION 376 OF THE COMMONWEALTH ELECTORAL ACT 1918 (CTH)
CONCERNING SENATOR KATY GALLAGHER
[2018] HCA 17

Today the High Court sitting as the Court of Disputed Returns unanimously answered questions referred to it by the Senate under s 376 of the *Commonwealth Electoral Act* 1918 (Cth) to the effect that Senator Katy Gallagher was "a citizen of a foreign power" and therefore incapable of being chosen or of sitting as a senator by reason of s 44(i) of the Constitution when she nominated for election on 31 May 2016.

Senator Gallagher was a Citizen of the United Kingdom and Colonies by descent. On 20 April 2016 Senator Gallagher provided a declaration of renunciation, copies of identity documents and her credit card details to the Australian Labor Party, which forwarded them to the Home Office of the United Kingdom. The Home Office received the documents on 26 April 2016, and deducted the relevant fee from her credit card on 6 May 2016. On 31 May 2016 Senator Gallagher lodged her nomination as a candidate for election to the Senate in the Federal election to be held on 2 July 2016. On 20 July 2016 Senator Gallagher received a letter from the Home Office requiring further documents, which were provided. On 2 August 2016 Senator Gallagher was returned as a duly elected senator for the Australian Capital Territory. At the time of her nomination and return as a duly elected senator, Senator Gallagher was a foreign citizen. On 16 August 2016 Senator Gallagher's renunciation was registered by the Home Office.

Section 44(i) of the Constitution relevantly operates to disqualify a person who has the status of a foreign citizen from being chosen or sitting as a senator. That disqualifying operation is subject to an implicit qualification that an Australian citizen not be irremediably prevented by foreign law from participation in representative government ("the constitutional imperative"). Senator Gallagher contended that the reason she did not cease to be a British citizen before the date of her nomination lay in matters beyond her control, which were an irremediable impediment to her participation in the 2016 election. She contended that the constitutional imperative was therefore engaged, entitling her to participate in the 2016 election.

The Court held that the constitutional imperative is engaged when both of two circumstances are present. First, the foreign law must operate irremediably to prevent an Australian citizen from participation in representative government. Secondly, that person must have taken all steps reasonably required by the foreign law and within his or her power to free himself or herself of the foreign nationality. The Court further held that British law did not irremediably prevent Senator Gallagher from participation in representative government. The procedure provided for by British law for renunciation of British citizenship was not onerous, and the issue for Senator Gallagher was only ever to be the timing of the registration. The constitutional imperative is not engaged merely because a foreign law presents an obstacle to a particular individual being able to nominate for a particular election. Accordingly, the Court held that there was a vacancy in the representation of the Australian Capital Territory in the Senate for the place for which Senator Gallagher was returned.

- *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.*