HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 14 Jun 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	B47/2022
File Title:	Jones v. Commonwealth of Australia & Ors
Registry:	Brisbane
Document filed:	Form 27F - Outline of oral argument
Filing party:	Defendants
Date filed:	14 Jun 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: **PHYLLIP JOHN JONES**

Plaintiff

AND:

COMMONWEALTH OF AUSTRALIA

First Defendant

MINISTER FOR HOME AFFAIRS

Second Defendant

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Third 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

Question 1(a) – s 34(2)(b)(ii) is supported by s 51(xix) (DS [21]-[44])

Section 51(xix) and citizenship cessation (**DS [21]-[31]**)

2. The "settled understanding" of s 51(xix) is that the head of power has two aspects, namely, "power to determine who is and who is not to have the legal status of an alien and power to attach consequences to that status": *Alexander* (2022) 96 ALJR 560 at [33]-[34], [98] (**Vol 11, Tab 77**); *Chetcuti* (2021) 272 CLR 609 at [12] (**Vol 4, Tab 36**).

3. The first aspect of s 51(xix) is exercised by enacting laws that provide for conferral (including by naturalization) and loss of Australian citizenship. Parliament may define the circumstances in which citizenship may be lost (thereby converting citizens into aliens), provided that the criteria selected do not identify a class of persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word: *Alexander* (2022) 96 ALJR 560 at [35]-[38], [98] (**Vol 11, Tab 77**); *Ex parte Ame* (2005) 222 CLR 439 at [35] (**Vol 7, Tab 62**); *Koroitamana* (2006) 227 CLR 31 at [48] (**Vol 5, Tab 48**).

4. Section 34(2)(b)(ii) does not treat as aliens persons who could not possibly answer that description in the ordinary understanding of the word. That is so for three reasons, any one of which is sufficient to reveal a sufficient connection to s 51(xix).

5. **First**, because it permits revocation of citizenship: (1) that would not have been granted to a person had the Minister known that the person had committed a criminal offence of the relevant kind because, objectively, the person would almost inevitably have failed the character test at the time of the grant; and (2) where a condition was imposed on the grant of citizenship that the person's citizenship could be revoked if they were convicted of serious offending predating their acquisition of citizenship. In that way, it does no more than ensure that citizenship is only retained by those who meet such conditions on the grant of citizenship as the Parliament has thought fit to impose: *Ex parte Te* (2002) 212 CLR 162 at [26] (**Vol 7, Tab 63**).

6. **Second**, alternatively, because it applies only to persons who were once aliens (it generally being within Parliament's legislative power to take away rights it has

granted): *Alexander* (2022) 96 ALJR 560 at [38] (**Vol 11, Tab 77**), citing *Kartinyeri* (1998) 195 CLR 337; see also *Meyer* (1920) 27 CLR 436 at 441 (**Vol 6, Tab 50**).

7. **Third**, alternatively, because it applies only where the Minister is satisfied that the person is a citizen of foreign country (s 34(3)): see *Singh* (2004) 222 CLR 322 at [32], [190], [200], [205] **(Vol 9, Tab 71)**; *Ex parte Ame* (2005) 222 CLR 439 at [35] **(Vol 7, Tab 62)**.

Plaintiff's asserted limits on s 51(xix) must be rejected (**DS [33]-[34], [37], [40]-[44]**)

8. The first implied limit proposed by the plaintiff (that citizenship cessation can occur only in four identified circumstances: **PS [24]-[25]**) is contrary to the established approach to construing heads of power with all the generality which the words used admit; has no foundation in the text of the Constitution; and is irreconcilable with the settled understanding of s 51(xix). Further, in the case of the fourth identified circumstance, the asserted constitutional requirement that conditions imposed upon naturalization must be "reasonable": **PS [22], [25]-[27]**) is both contrary to authority (see, eg, *Robtelmes* (1906) 4 CLR 395 at 402 (**Vol 8, Tab 69**)) and unjustified as a matter of principle.

9. The second proposed limit (that citizenship cessation laws are incapable of applying to persons who are "so deeply connected with the Australian body politic that they have passed beyond the boundary of the power": **PS [36]**) is likewise not supported by the text of the Constitution and is contrary to authority: see, eg, *Pochi* (1982) 151 CLR 101 at 104, 110-111, 113 **(Vol 7, Tab 58)**; *Alexander* (2022) 96 ALJR 560 at [35]-[38] (**Vol 11, Tab 77**); *Ex parte Te* (2002) 212 CLR 162 at [31], [42], [204], [211] (**Vol 7, Tab 63**).

Section 34(2)(b)(ii) – statutory and historical context (**DS [8]-[20]**)

10. Section 34(2)(b)(ii) confers power on the Minister to revoke the citizenship of a person who acquired citizenship by conferral if, before that conferral, they committed a "serious offence" (s 34(5)), for which they were not convicted until after the conferral of citizenship.

11. The provision's broader statutory and historical context includes that:

    (a) For all applicants (except children and stateless persons) the Minister cannot approve a person to become an Australian citizen unless satisfied that the person is "of good character", that being a criterion that has been relevant to eligibility for Australian nationality for at least a century; and

    (b) It is one of a number of provisions in s 34 that permit revocation of citizenship "in circumstances involving criminal offences or fraud" (s 32A), which provisions

pursue the purpose of protecting the integrity of the naturalization process: see, eg, Second Reading Speech, 1984 Amending Act at 3369 **(Vol 14, Tab 113)**.

(Reasonable) conditions validly imposed at point of naturalization (**DS [35], [38]-[39]**)

12. Even if the Court holds that s 51(xix) permits Parliament to impose only "reasonable" conditions on naturalization, s 34(2)(b)(ii) satisfies that requirement. It provides for the present enforcement of two conditions validly imposed at the point of the plaintiff's naturalization, being (1) a good character condition; and (2) a condition that, if, after becoming a citizen, the plaintiff was convicted of a serious offence committed before he became a citizen, his citizenship could be revoked: Citizenship Act 1948, ss 13(1)(f) and 21(1)(a)(ii) (**Vol 1, Tab 4**).

10

Question 1(b) – s 34(2)(b)(ii) is compatible with Ch III (**DS [45]-[55]**)

13. Citizenship cessation pursuant to s 34(2)(b)(ii) does not involve an exercise of exclusively judicial power because that power does not have a punitive purpose: *Falzon* (2018) 262 CLR 333 at [46]-[48] **(Vol 5, Tab 42)**. Instead, it authorises citizenship cessation for the non-punitive purpose of protecting the integrity of the naturalization process. By permitting the revocation of citizenship that would not have been granted to a person had their offending been known about at the time of grant, the provision ensures that citizenship is granted only to people who actually satisfy the conditions that Parliament has decided to impose. It does not authorise citizenship revocation as "punishment": see,

20 by analogy, *Trop v Dulles* (1958) 356 US 86 at 98-99 **(Vol 13, Tab 102)**; *US v Kairys* (1986) 782 F 2d 1374 at 1382 (**Vol 13, Tab 103**); *Fedorenko* (1980) 449 US 490 at 506-507 (**Vol 13, Tab 97**).

14. Further or alternatively, s 34(2)(b)(ii) does not contravene Ch III even if it is held to have a punitive purpose (which is denied), because it is enlivened only if a court has determined the facts upon which its exercise depends in the course of an orthodox exercise of judicial power (for reasons developed in *Benbrika*).

Dated: 14 June 2023

30 Stephen Donaghue Frances Gordon Luca Moretti Arlette Regan