HIGH COURT OF AUSTRALIA

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File Number:	B47/2022
File Title:	Jones v. Commonwealth of Australia & Ors
Registry:	Brisbane
Document filed:	Submissions of the Defendants
Filing party:	Defendants
Date filed:	02 May 2023

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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

SUBMISSIONS OF THE DEFENDANTS

PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The issues in this proceeding are whether s 34(2)(b)(ii) of the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**): (i) is supported by the head of power in s 51(xix) of the Constitution; or (ii) infringes Ch III of the Constitution (**SCB 30 [28]**).

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth). The defendants do not consider that any further notice is required.

PART IV MATERIAL FACTS

4. The facts by reference to which the questions of law are to be answered are set out in the special case filed 4 April 2023 (**SCB 25-30 [3]-[27]**). Those facts are summarized in the plaintiff's submissions (**PS [4]-[5]**). The defendants take issue with that summary only to the extent that: (i) contrary to **PS [4]**, the plaintiff became an Australian citizen on 21 December 1988; he was granted a "certificate of Australian citizenship" at an earlier date but did not become a citizen until making an oath of allegiance or taking the pledge of allegiance on that date (see **SC [5], SCB 26**) and s 15(1)(a)(i) of the *Australian Citizenship Act 1948* (Cth) (**1948 Act**) as at that date); (ii) the plaintiff was convicted of two counts of indecent treatment of a girl under 16 years with circumstances of aggravation that occurred entirely before he became an Australian citizen and two counts of indecent assault that occurred partially before that date and partially after it (see **SC [6]-[7], SCB 26**; cf **PS [5]**).

PART V ARGUMENT

A. SUMMARY

5. Section 34(2)(b)(ii) prescribes conditions on which citizenship acquired through a process of naturalization may be lost. Those conditions include: (i) that, at a time after the person has applied for citizenship, they were convicted of a serious offence that was committed before they became a citizen; and (ii) that the Minister for Home Affairs (**Minister**) is satisfied that revocation of the person's Australian citizenship is in the public interest and would not result in the person becoming a person who is not a national or citizen of any country.

6. The head of power challenge should be dismissed because s 51(xix) of the Constitution empowers Parliament to prescribe the conditions on which citizenship may be acquired and lost. At the time when the plaintiff applied for citizenship, the 1948 Act made it a condition of the grant of citizenship that the Minister be satisfied that an applicant was of good character. It also conferred upon the Minister power to revoke a grant of citizenship if it was subsequently revealed that that requirement was not met (being a power equivalent to s 34(2)(b)(ii)). On the settled understanding of s 51(xix), such laws have a sufficient connection to both naturalization and aliens. Settled and unchallenged authority also establishes that a person cannot move beyond the reach of s 51(xix) by absorption into the community.

7. The Ch III challenge should be dismissed because s 34(2)(b)(ii) does not authorise citizenship cessation as a punishment. The plaintiff's conviction for very serious offences that occurred before he became a citizen having demonstrated that he was not a person of good character at the time he was granted citizenship, s 34(2)(b)(ii) authorised the cessation of his citizenship to protect the integrity of the naturalization process. Section 34(2)(b)(ii) has the legitimate non-punitive purpose of authorising the withdrawal of citizenship that would not have been granted had all the relevant facts been known. That purpose is "protective in a constitutionally meaningful sense".[1] In the alternative, s 34(2)(b)(ii) is consistent with Ch III for the same reasons as are advanced in the respondents' submissions in *Benbrika v Minister for Home Affairs* (M90/2022) (***Benbrika***) (at [20]-[49] and [52]-[56]). Those submissions are adopted.

B. TEXT, PURPOSE AND CONTEXT OF THE STATUTORY PROVISIONS

(a) Section 34(2)(b)(ii)

8. Section 34 of the Citizenship Act is concerned with the revocation of citizenship "in circumstances involving criminal offences or fraud".[2] Section 34(1) and (2) confer on the Minister power to revoke the citizenship of persons who: (i) applied to become Australian citizens in circumstances where they were eligible to do so because they claim descent from an Australian citizen[3] or because they have been adopted by an Australian citizen;[4] or (ii) have acquired citizenship by conferral.[5]

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1 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 (***Alexander***) at [108] (Gageler J).
2 See Citizenship Act, s 32A.
3 See Subdiv A of Div 2 of the Citizenship Act.
4 See Subdiv AA of Div 2 of the Citizenship Act.
5 See Subdiv B of Div 2 of the Citizenship Act.

9. Section 34(2)(b)(ii) forms part of a set of provisions in s 34 that permit citizenship revocation by the Minister where a person has acquired Australian citizenship in circumstances where there has been a conviction for an offence related to the naturalization process. The relevant convictions include, for example, the making of a false representation or concealment of a material circumstance by the person for a purpose of or in relation to the Citizenship Act (contrary to s 50 of that Act);[6] and the giving of false or misleading information or production of false or misleading documents by the person (contrary to s 137.1 or s 137.2 of the *Criminal Code* (Cth)), in relation to their application to become an Australian citizen.[7]

10. ***Timing of conviction and imprisonment.*** Section 34(2)(b)(ii) states that the Minister has power to revoke the citizenship of a person who acquired it by conferral where they have, "at any time after making the application to become an Australian citizen", been convicted of a "serious offence".[8] Under s 34(5), a person will have been "convicted of a serious offence" when: (i) they have been convicted of an offence against an Australian law or a foreign law for which they (relevantly) received a sentence of imprisonment of at least 12 months; and (ii) they committed the offence at any time "before [they] became an Australian citizen".[9] Unlike the other sub-sections in s 34, the revocation power conferred by s 34(2)(b)(ii) may be enlivened even if the relevant offending is not directly causative of a person's acquisition of Australian citizenship. Instead, the connection between the offending and the person's acquisition of citizenship is that the offence must have been committed before they became a citizen, but the conviction must have occurred after they became a citizen, meaning that, by definition, the conviction could not have been taken into account in the decision whether or not to grant citizenship.

11. ***Public interest.*** The second condition for s 34(2)(b)(ii) is that the Minister must be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.[10] In assessing the public interest, the Minister is not required to

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6 See Citizenship Act, s 34(1)(b)(i) and (2)(b)(i).
7 See Citizenship Act, s 34(1)(b)(i) and (2)(b)(i).
8 As explained at **PS [7]-[8]**, s 34(2)(b)(ii) also applies to persons (like the plaintiff) who acquired citizenship under the 1948 Act, provided that they have been convicted of an offence referred to in s 21(1)(a)(ii) of that Act (ie an offence for which they have been sentenced to at least 12 months' imprisonment and which they committed before being granted a certificate of Australian citizenship): see Citizenship Act, ss 2(1), 3, 4(1)(b); *Australian Citizenship (Transitionals and Consequential) Act 2007* (Cth), s 2(1) and items 2(1)-(2), 6(1), (3) of Sch 3.
9 See the definition of "serious prison sentence" in s 3 of the Citizenship Act.
10 Citizenship Act, s 34(2)(c).

take into account specified matters.[11] The public interest test "classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable'."[12] The application of that test will "require a balancing of competing interests and [will] be … a question of fact and degree",[13] which would permissibly include consideration of whether the person would have been granted citizenship had the offending been known about when they applied for citizenship.

12. ***Dual citizenship.*** In addition to the two conditions described in the preceding paragraphs, the Minister cannot decide to revoke a person's Australian citizenship pursuant to s 34(2)(b)(ii) if the Minister is satisfied that the person would thus become a person who is not a national or citizen of any country. In other words, the Minister's power to revoke a person's citizenship is only available if the Minister is satisfied that the person is a citizen of a foreign country (and thus will not be rendered stateless).

13. ***Merits and judicial review.*** The Minister is required to notify a person whose citizenship has been revoked under s 34(2). That notice must include reasons for the Minister's decision.[14] An application may be made for merits review by the Administrative Appeals Tribunal of a citizenship revocation decision under s 34 of the Citizenship Act.[15] Additionally, a revocation decision may be subject to judicial review pursuant to s 75(v) of the Constitution; s 39B of the *Judiciary Act 1903* (Cth); or the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

(b) The broader statutory scheme: citizenship by conferral

14. A person becomes a citizen by conferral pursuant to Subdiv B of Div 2 of the Citizenship Act. The process involves two steps (see s 20). ***First***, an application must be made to the Minister under s 21(1). ***Second***, if the application is approved, the person is ordinarily required to make a pledge of commitment, at which point they become a citizen (see s 28(1)). Under s 24(1A), the Minister must not approve a person to become a citizen unless they satisfy the eligibility criteria in s 21(2)-(8).

15. The applicable criteria vary depending on the applicant's characteristics. However, for all applicants (except children and stateless persons[16]) the Minister cannot approve

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11 Cf the list of factors in s 36E(2), which inform the meaning of s 36D(1)(d) of the Citizenship Act.
12 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).
13 *Hogan v Hinch* (2011) 243 CLR 506 at [32] (French CJ). See also [69].
14 Citizenship Act, s 47(1) and (3).
15 Citizenship Act, s 52(1)(f).
16 Citizenship Act, s 21(5), (6)(d) and (8).

a person to become an Australian citizen unless satisfied that the person is "of good character at the time of the Minister's decision on the application".[17] There is no definition that specifies when a person will be "of good character". This suggests that "Parliament intended the term [good character] to be used in a broad way" that "allows the decision-maker to consider a range of events and conduct".[18] The inquiry requires consideration of the "enduring moral qualities of a person".[19] Unsurprisingly, criminal convictions are important to that assessment.[20]

16. Additionally, the Minister must not approve a person's application when (inter alia) criminal proceedings are pending in relation to that person; while a person is confined to a prison in Australia; or during the period of two years after a person has been in prison by reason of a sentence of more than 12 months.[21] Furthermore, if, between approving an application and the making of the pledge of commitment, the Minister becomes satisfied that a person is not of good character, the Minister may cancel the approval, with the result that the person will not become an Australian citizen.[22]

17. Good character (and thus criminal convictions or the absence of them) has been relevant to eligibility to become an Australian national for at least a century. Thus, a "good character" eligibility criterion applied to applicants for naturalization under s 7(1)(b) of the *Nationality Act 1920* (Cth) (**1920 Act**), and also to applicants for citizenship by registration under the 1948 Act.[23]

18. At the time that the plaintiff became an Australian citizen in 1988, under the 1948 Act as then in force the Minister could only grant a certificate of Australian citizenship[24] if satisfied that a person was of good character (s 13(1)(f)). There were also restrictions (similar to the present restrictions) on granting a certificate of Australian citizenship for persons who faced pending prosecution, were imprisoned, or had been released from prison, having been sentenced to imprisonment for 12 months or more, in the last

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17 See Citizenship Act, s 21(2)(h), (3)(f), (4)(f), 6(d), (7)(d).

18 *VFWQ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 230 at [32] (Banks-Smith J), citing *Grass v Minister for Immigration and Border Protection* (2015) 231 FCR 128 at [60] (the Court). See also *BOY19 v Minister for Immigration and Border Protection* (2019) 165 ALD 39 (***BOY19***) at [46] (O'Bryan J).

19 *BOY19* (2019) 165 ALD 39 at [49]-[51], citing *Irving v Minister of State for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422 at 431 (Lee J); *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321 at [8] (the Court).

20 *BOY19* (2019) 165 ALD 39 at [47], [52].

21 Citizenship Act, s 24(6)(a)-(c).

22 Citizenship Act, s 25(1), (2)(b)(iii) and (5).

23 See *Nationality and Citizenship Act 1948* (Cth) (as enacted), s 12(1)(c).

24 Which entitled a person to become a citizen upon making an oath or affirmation of allegiance: see s 15(1).

two years.[25] Further, the Minister had a power to revoke citizenship akin to s 34(2)(b)(ii) of the Citizenship Act in s 21(1)(a)(ii).

(c) Purpose and effect of s 34(2)(b)(ii)

19. Section 34(2)(b)(ii) operates so that the Minister has an opportunity to consider whether crimes committed before the grant of citizenship, but that did not result in convictions until after the time of grant, mean that citizenship should be revoked.[26] In this way, the provision: (i) ensures that accidents of timing do not allow applicants for citizenship to escape having the relevance of their offending to the grant of citizenship considered (as has long been required by the statutory framework described above); and (ii) ensures that there is not a perverse incentive for persons to conceal their criminal conduct (or to rush to secure citizenship before offending is revealed) safe in the knowledge that, once they become Australian citizens, their earlier conduct can never result in loss of a status that they would not have obtained had their conduct come to light sooner.

20. That s 34(2)(b)(ii) was intended, like other sub-sections in s 34, to protect the integrity of the naturalization process is confirmed by the second reading speech for the *Australian Citizenship Amendment Act 1984* (Cth), which introduced the direct precursor to s 34(2)(b)(ii) into the 1948 Act (s 21(1)(a)(ii)). The then Minister for Immigration and Ethnic Affairs stated:[27]

> In the case of a person obtaining Australian citizenship by fraud, deceit, the concealment of information or any other dishonest means, the Minister will have discretion to deprive that person of citizenship. This discretion also extends to a person convicted of a major offence committed, but not known about, before that grant of citizenship. I stress that deprivation of Australian citizenship could only occur for offences committed before the grant of citizenship. Moreover, it will occur only if the responsible Minister, after careful consideration of all the facts, is satisfied that it is in the public interest for a person not to remain an Australian citizen. The law will not allow a person to be deprived of citizenship if it has been obtained properly and honestly.

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25 1948 Act, s 13(11).

26 Cf provisions that expressly permit reconsideration of the exercise of a statutory power or the performance of a statutory function: *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)* (1991) 32 FCR 219 at 225; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 409-410; *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 at [5]-[6]; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211, 218-219.

27 Hansard, House of Representatives (7 December 1983) at 3369 (emphasis added).

C. QUESTION 1(A) – SECTION 51(XIX)

(a) Section 51(xix): general principles

21. Section 51(xix) is a "wide"[28] power to be construed "with all the generality which the words used admit".[29] It confers power with respect to both naturalization and aliens. As Gleeson CJ said in *Ex parte Te* "[a]lienage is a legal status" while "[n]aturalisation is the act in the law by which a person who was formerly an alien ceases to be one".[30]

22. In *Alexander*, six members of the Court held that the citizenship cessation provision in issue in that case – s 36B – was supported by s 51(xix).[31] The plurality (Kiefel CJ, Keane and Gleeson JJ, with whom Gageler J relevantly agreed[32]) re-affirmed that s 51(xix) of the Constitution:[33]

> … empowers the Parliament to "create and define the concept of Australian citizenship",[34] to select or adopt the criteria for citizenship or alienage[35] and to attribute to any person who lacks the qualifications prescribed for citizenship "the status of alien".[36]

23. That statement reflects the "settled understanding"[37] that the aliens 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".[38] While it is true that the Court "has not spoken with one voice about the constitutional meaning of 'aliens'" (**PS [12]**), it has spoken with a clear majority voice, including in *Shaw*, *Chetcuti* and *Alexander*. The *sui generis* exception recognised in *Love* aside, those cases reject the notion that "alien" has an "essential meaning" that can be applied by a court to

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28 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at [25] (Gleeson CJ); *Koroitamana v Commonwealth* (2006) 227 CLR 31 (***Koroitamana***) at [11] (Gleeson CJ and Heydon J). See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (***Lim***) at 44 (Toohey J).

29 *Singh v Commonwealth* (2004) 222 CLR 322 (***Singh***) at [155] (Gummow, Hayne and Heydon JJ); see also *Love v Commonwealth* (2020) 270 CLR 152 (***Love***) at [131] (Gageler J), [168] (Keane J), [236], [244] (Nettle J).

30 (2002) 212 CLR 162 at [24].

31 Justice Gordon found it unnecessary to decide the question: *Alexander* (2022) 96 ALJR 560 at [132]; see also [153]-[156], [175].

32 *Alexander* (2022) 96 ALJR 560 at [98] (agreeing with the substance of the plurality's reasons).

33 *Alexander* (2022) 96 ALJR 560 at [33].

34 *Koroitamana* (2006) 227 CLR 31 at [48], citing *Ex parte Te* (2002) 212 CLR 162 at [31], [58], [90], [108]-[109], [193]-[194], [210]-[211], [229].

35 *Singh* (2004) 222 CLR 322 at [197]; *Koroitamana* (2006) 227 CLR 31 at [9], [50], [62].

36 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***) at [2] (Gleeson CJ, Gummow and Hayne JJ).

37 *Chetcuti v Commonwealth* (2021) 272 CLR 609 (***Chetcuti***) at [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

38 *Chetcuti* (2021) 272 CLR 609 at [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ), quoted in *Alexander* (2022) 96 ALJR 560 at [33] (Kiefel CJ, Keane and Gleeson JJ). See also *Shaw* (2003) 218 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ).

ascertain status as an alien independently of the common law as modified by relevant legislation. They therefore rejected the starting point for the plaintiff's analysis (**PS [13], [38]**). The authority of those decisions cannot simply be set aside because minority views were also expressed in those cases, or on the basis of the *sui generis* exception recognised in *Love* (which was discussed in both *Chetcuti* and *Alexander*, evidently without altering the majority's acceptance of the settled understanding).

24. The first aspect of the aliens power is subject to the qualification identified by Gibbs CJ in *Pochi v Macphee* that "the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word".[39] The limit so expressed recognises that there are a range of available criteria for "alienage" from which the Parliament can select, and that the criteria actually selected by the Parliament will be determinative provided that they are not criteria that on no possible view could identify an "alien" according to the ordinary understanding of the word. The *Pochi* qualification provides no support for the proposition that, within that limit, the Court can identify and apply criteria for alienage in place of criteria legislated by the Parliament (cf **PS [13], [37]-[38]**).

25. The first aspect of the aliens power is exercised by laws that provide for the conferral and loss of Australian citizenship. As the plurality expressly held in *Alexander*:[40]

> … Parliament has the power under s 51(xix) to attribute the constitutional status of alien to a person who has lost the statutory status of citizenship. By the same power, Parliament can define the circumstances in which that occurs.

26. The above passage is a recent statement in a majority decision that is directly contrary to the plaintiff's submission that s 34(2)(b)(ii) is not supported by s 51(xix). The plaintiff has advanced no good reason why the Court would depart from that statement. That is particularly true given that the proposition that s 51(xix) encompasses power for Parliament "to prescribe the conditions on which … citizenship may be acquired and lost" is also supported by many other authorities.[41] Of particular note, in *Nolan*,

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39 (1982) 151 CLR 101 (***Pochi***) at 109. See also *Ex parte Te* (2002) 212 CLR 162 at [31], [39] (Gleeson CJ), [159] (Kirby J); *Love* (2020) 270 CLR 152 at [7] (Kiefel CJ), [50], [64] (Bell J), [168] (Keane J), [236], [244] (Nettle J), [326] (Gordon J), [433] (Edelman J); *Alexander* (2022) 96 ALJR 560 at [35] (Kiefel CJ, Keane and Gleeson JJ), [133] (Gordon J), [202] (Edelman J).

40 *Alexander* (2022) 96 ALJR 560 at [35] (emphasis added).

41 *Alexander* (2022) 96 ALJR 560 at [36], quoting *Ex parte Te* (2002) 212 CLR 162 at [31] (Gleeson CJ) (emphasis added). See also [63]; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 (***Nolan***) at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Singh* (2004) 222 CLR 322 at [4] (Gleeson CJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 (***Ex parte Ame***) at [35]

six Justices held that s 51(xix) extends to legislating for "an act or process of denaturalization",[42] the result of such a process being that people who were formerly Australian citizens become aliens.[43] As the plurality put it in *Alexander*, "it is open to the Parliament under s 51(xix) to create a status of citizenship that allows for the exclusion of persons from membership of the body politic".[44]

27. While the authorities commonly focus upon the aliens limb of s 51(xix), that head of power also includes power with respect to naturalization. The naturalization limb empowers the Parliament to: (i) provide for a procedure for persons to become citizens; and (ii) to pass laws that will protect that process.[45] The naturalization limb confirms that Parliament may pass laws providing for denaturalization because, as Starke J said in *Meyer v Poynton* (***Poynton***),[46] if a law "to admit to Australian citizenship is within the power to make laws with respect to naturalization, so must authority to withdraw that citizenship on specified conditions be also within that power". Despite the plaintiff's attack on that decision (**PS [29]**), Starke J's reasoning is simply a manifestation of the principle, reaffirmed in *Alexander*, that generally "[w]hatever the Federal Parliament can do or permit, it can undo or recall".[47]

28. Parliament has long provided for the withdrawal of citizenship to protect the integrity of the naturalization process.

28.1. Section 11 of the *Naturalization Act 1903* (Cth) gave the Governor-General discretion to revoke naturalization certificates if he or she was satisfied that they "ha[d] been obtained by any untrue statement of fact or intention".

28.2. Section 7 of the *Naturalization Act 1917* (Cth) amended the above provision to grant the Governor-General an additional discretion to revoke any certificate of

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(Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Hwang v Commonwealth* (2005) 80 ALJR 125 at [18] (McHugh J); *Koroitamana* (2006) 227 CLR 31 at [48] (Kirby J).

42 (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), endorsed in *Lim* (1992) 176 CLR 1 at 25 (Brennan, Deane and Dawson JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) at 375 (Toohey J); *Shaw* (2003) 218 CLR 28 at [7] (Gleeson CJ, Gummow and Hayne JJ).

43 *Alexander* (2022) 96 ALJR 560 at [37].

44 *Alexander* (2022) 96 ALJR 560 at [63].

45 See *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 195 (Stephen J), 205-206 (Mason J); *Cunliffe* (1994) 182 CLR 272 at 295 (Mason CJ), 316 (Brennan J), 334 (Deane J), 374 (Toohey J), 394 (McHugh J); *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at [198] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *Alexander* (2022) 96 ALJR 560 at [145].

46 (1920) 27 CLR 436 at 441 endorsed in *Ex parte Walsh; In re Yates* (1925) 37 CLR 36 at 88.

47 *Ex parte Walsh; In re Yates* (1925) 37 CLR 36 at 87 (Isaacs J). See *Alexander* (2022) 96 ALJR 560 at [38], citing *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [12]-[14], [57].

naturalization if he or she was satisfied "for any reason" that it should be revoked. It is that provision which was unsuccessfully challenged in *Poynton*.[48]

28.3. Section 12(1) of the 1920 Act authorized the Governor-General to revoke a naturalization certificate if satisfied that it was "obtained by false representation or fraud, or by concealment of material circumstances".[49]

28.4. Additionally, s 12(2)(b)-(c) of the 1920 Act required the Governor-General to revoke a naturalization certificate if satisfied[50] that:

(a). the person to whom it had been granted: (A) had "within five years of the date of the grant of the certificate been sentenced by any court in His Majesty's dominions to imprisonment for a term of not less than twelve months, or to a term of penal servitude, or to a fine of not less than One hundred pounds"; or (B) "was not of good character at the date of the grant of the certificate"; and

(b). the "continuance of the certificate is not conducive to the public good".

Thus, not only has "good character" been a requirement of naturalization for more than a century (see [17] above), the applicable legislation had a clear analogue to s 34(2)(b)(ii) for that same period.

28.5. Section 21(1)(c)-(e) and (2) of the 1948 Act (as enacted[51]) provided that the relevant Minister had a discretion to revoke the citizenship of citizens by registration or naturalized persons if satisfied of matters broadly the same as those identified in s 12(1) and (2)(b)-(c) of the 1920 Act.[52]

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48 (1920) 27 CLR 436 at 440-441.

49 Laws providing for revocation of citizenship obtained by fraud have remained in place in different forms ever since: see, eg, 1948 Act, s 21(1)(c); Citizenship Act, s 34(2)(b)(i) and (iii).

50 Note that s 12(4)-(6) provided that before making an order under s 12, the Governor-General had a discretion to refer the case for an inquiry by a committee presided over by a current or former judicial officer, or by the High Court itself. Where it was contemplated that a person's certificate of naturalization would be revoked on the grounds that they were not of good character at the date of the grant of the certificate, the person was entitled to require such an inquiry.

51 These provisions were repealed by s 7 of the *Nationality and Citizenship Act 1958* (Cth). Between 1958 and 1984, ss 21 and 50 of the 1948 Act as then in force permitted the cancellation of a certificate of registration or naturalization if: (a) a person was convicted of making, causing or permitting to be made a representation which was, to his knowledge, false in a material particular, or concealing, or causing or permitting to be concealed, a material circumstance in an application for citizenship; and (b) the Minister was satisfied that it would be contrary to the public interest for the person to continue to be an Australian citizen.

52 A person who was to be the subject of an order made under s 21(1)(a)-(d) could request that the Minister refer "the question whether the order should be made" to a committee of inquiry overseen by a current or former judge or a lawyer: 1948 Act, s 21(3)-(5).

29. Section 34(2)(b)(ii) of the Citizenship Act is the direct descendent of the above provisions. It is protective of the integrity of the naturalization process because it permits the withdrawal of citizenship that would not have been granted had all the relevant facts been known at the time of grant. Relevantly, it allows the Minister to reconsider the citizenship status of persons who acquired citizenship notwithstanding that, at the time that it was granted, they had already committed criminal offences that meant that they objectively failed the character requirements, but who were nevertheless granted citizenship because of the happenstance of when their offending was detected and prosecuted. A law of that kind obviously does not treat as an alien a person who could not possibly answer that description.

30. The fact that s 34(2)(b)(ii) only applies where the Minister is satisfied that the person in question is a national or citizen of a foreign power reinforces the conclusion that the provision applies only to persons who can possibly answer the description of "aliens" on the ordinary understanding of the word.[53]

31. For the above reasons, on settled authority (including recent authority) of this Court, s 34(2)(b)(ii) is supported by s 51(xix) of the Constitution. The plaintiff does not challenge that authority.[54] His head of power challenge must therefore fail. His specific arguments must also fail for the additional reasons discussed below.

(b) The Plaintiff's purported limitations on s 51(xix)

32. The plaintiff contends that s 51(xix) is subject to two distinct limits, being:

32.1. ***First***, that it permits Parliament to enact a law providing for cessation of citizenship in four circumstances only (see **PS [22]-[35]**).

32.2. ***Second***, that it does not support a law insofar as it purports to revoke the citizenship of a person who has "developed bonds of deep connection or attachment to the Australian political community" (see **PS [36]-[38]**).

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53 See *Nolan* (1988) 165 CLR 178 at 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Ex parte Ame* (2005) 222 CLR 439 at [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Singh* (2004) 222 CLR 322 at [32] (Gleeson CJ), [190], [200], [205] (Gummow, Hayne and Heydon JJ). See also *Love* (2020) 270 CLR 152 at [16] (Kiefel CJ), [89] (Gageler J), [170] (Keane J), [245] (Nettle J), [316] (Gordon J).

54 While the plaintiff acknowledges (at **PS [28]-[29]**) that his proposed limits on s 51(xix) are inconsistent with the reasoning in *Poynton* (1920) 27 CLR 436, what is left unexplained is how these limits can be reconciled with the other authorities cited above.

(i) First proposed limit: s 51(xix) permits citizenship cessation in four circumstances

33. The plaintiff contends that Australian citizenship may only be revoked where a person has demonstrated repudiation of allegiance; there are changes in sovereign identity or territory; there is renunciation of allegiance; or there is breach of a condition validly imposed on a person's naturalization (**PS [22]-[25]**[55]).

34. The proposition that s 51(xix) supports laws providing for citizenship cessation only in the four circumstances identified above has no foundation in the text of the Constitution, and plainly does not involve reading s 51(xix) with all the generality that the words admit. The submission is distinctly at odds with the approach to the construction of Commonwealth heads of power that has been settled since *Engineers*.[56] It urges an approach to s 51(xix) that has never been embraced by a majority of this Court,[57] and that is directly inconsistent with *Poynton* (see [27] above).[58] It is also irreconcilable with the "settled understanding" described at [23] above.

35. In the alternative (as this issue should not be reached), even if s 51(xix) were to be held to be limited to laws that provide for the revocation of citizenship in the four circumstances described at [33] above, then s 34(2)(b)(ii) would be valid. That follows because s 34(2)(b)(ii) does provide for citizenship revocation upon breach of a condition imposed at the point of naturalization (being the condition that the applicant be of good character). The grant of citizenship to the plaintiff was subject to such a condition because, as outlined at [18] above, at the time when the plaintiff became an Australian citizen in 1988, the 1948 Act: (i) conditioned the grant of a certificate of Australian citizenship on the Minister being satisfied that the applicant was of good character (s 13(1)(f); cf **PS [33]**); and (ii) provided that, if a person was convicted of an offence that they committed prior to making that application and was sentenced to not less than 12 months' imprisonment, the Minister could revoke their citizenship if he or she considered it to be in the public interest (s 21(1)(a)(ii)).

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55 Drawing on *Alexander* (2022) 96 ALJR 560 at [137]-[143] (Gordon J), [211], [228]-[229] (Edelman J).

56 *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* (1920) 28 CLR 129.

57 In *Alexander* (2022) 96 ALJR 560 at [143], Gordon J referred to the reasons of Gaudron J in *Nolan* (1988) 165 CLR 178 at 192; *Lim* (1992) 176 CLR 1 at 54; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (***Re Patterson***) at [47]; *Ex parte Te* (2002) 212 CLR 162 at [54]. No other member of the Court endorsed Gaudron J's reasoning on this point; notably, her Honour dissented in *Nolan* and *Re Patterson* was later overturned in *Shaw* (2003) 218 CLR 28.

58 (1920) 27 CLR 436.

36. The requirement imposed by s 13(1)(f) of the 1948 Act was a "condition" of the grant of citizenship in the sense that it was a criterion to be satisfied when the certificate of Australian citizenship was granted. The power conferred by s 21(1)(a)(ii) of the 1948 Act (being equivalent to that now found in s 34(2)(b)(ii)) permitted reconsideration by the Minister of a person's citizenship status in cases where a conviction after the grant of citizenship suggested that the person may not in fact have satisfied the good character condition at the time of grant. Thus, the grant of citizenship to the plaintiff was subject to a condition that, if the plaintiff was subsequently convicted of an offence committed before he became a citizen, then the grant of citizenship might be revoked.

37. The plaintiff contends (**PS [25]**) that not only are laws revoking a grant of citizenship relevantly limited to those where "there is breach of a condition validly imposed on a person's naturalization", but also that such a condition must be "reasonable".[59] That would be an entirely novel and unjustifiable limitation on a head of legislative power, for it would be a constitutional limit that would necessarily require the courts to trench upon matters of "legislative choice".[60] There is no textual or other justification for implying such a novel limit on s 51(xix). As a sovereign State, Australia has power "to determine who shall be allowed to come within its dominions, share in its privileges, take part in its government".[61] At a minimum, that must mean that Parliament can prescribe the conditions upon which citizenship can be acquired. There are no justiciable criteria by which the Court could decide whether such conditions are unreasonable.[62] The fact that there might be some limits in relation to the laws that can provide for cessation of citizenship provides no basis to limit the sovereign right to impose conditions on the acquisition of citizenship in the first place.[63]

38. In the further alternative, even if a "reasonableness" limit on the conditions that can be imposed on the grant of citizenship were to be recognised, it would be satisfied here. The plaintiff implicitly recognizes that protecting the integrity of the

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59 Cf *Alexander* (2022) 96 ALJR 560 at [211], [228]-[229] (Edelman J).

60 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Leask v Commonwealth* (1996) 187 CLR 579 at 602, 605 (Dawson J), 616 (Toohey J).

61 *Robtelmes v Brenan* (1906) 4 CLR 395 at 401 (Griffith CJ); see also at 402-403, quoting *Nishimura Ekiu v United States* (1892) 142 US 651 at 639 "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe". See also *Robtelmes v Brenan* (1906) 4 CLR 395 at 413 (Barton J), quoting *Fong Yue Ting v United States* (1893) 149 US 698.

62 *Ex parte Te* (2002) 212 CLR 162 at [24], [26], [31], [39] (Gleeson CJ), [55]-[56] (Gaudron J), [109]; *Shaw* (2003) 218 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ).

63 *Ex parte Te* (2002) 212 CLR 162 at [55] (Gaudron J).

naturalization process may justify revocation of citizenship, when he acknowledges that a requirement "that a person not engage in fraud or similar criminal conduct in relation to their application to become an Australian citizen" would be a permissible condition on naturalization (**PS [26]**). It is not explained why that concession is inapplicable here. Further, once the nature of the condition imposed by s 34(2)(b)(ii) is appreciated, the plaintiff's complaint that this condition is not time-bounded loses all force (see **PS [34]**). The provision places no ongoing constraints on the conduct of naturalized citizens. It focuses only on conduct that occurred before the grant of citizenship that would, if known, have meant they would not have obtained citizenship.

10 That feature of s 34(2)(b)(ii) is reasonable because, as the plaintiff's case illustrates (see **SC [6], SCB 26**), serious offending may not come to light until many years after the grant of citizenship. It is not unreasonable to deprive a person of citizenship they never should have acquired, even if that occurs well after they became a citizen.[64]

39. Contrary to **PS [35]**, s 34(2)(b)(ii) is not unreasonable because it only affects naturalized citizens. Unlike those who acquire citizenship automatically, naturalized citizens only achieve that status after the Minister has had regard to whether they are of good character.[65] The differential operation of s 34(2)(b)(ii) on naturalized citizens is thus appropriate and adapted to the attainment of a proper objective, being protection of the integrity of the naturalization process.[66]

20 ***(ii) Second proposed limit: cessation of absorbed persons' citizenship not permitted***

40. The second limit relied on by the plaintiff asserts that s 51(xix) does not support a law removing the citizenship of a person who "is so deeply connected with the Australian body politic that [he has] passed beyond the boundary of the power" (**PS [36]**).

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64 See, eg, *Costello v United States* (1961) 365 US 265 at 283-285. That case concerned a petitioner who became a citizen in 1925. Proceedings were instituted in 1952 to revoke his citizenship because it had been found that his occupation at the time he obtained his citizenship was bootlegging, and not "real estate", as he had stated on his application form. The Court affirmed the revocation of his citizenship. Brennan J (who delivered the opinion of the Court), said: "[w]e cannot say, moreover, that the delay denied the petitioner fundamental fairness. He suffered no prejudice from his inability to prove his defences. Rather, the harm he suffers lies in the harsh consequences which may attend his loss of citizenship. He has been a resident of the United States for over 65 years, since the age of four… But Congress has not enacted a time bar applicable to proceedings to revoke citizenship procured by fraud. On this record, the petitioner never had a right to his citizenship. Depriving him of his fraudulently acquired privilege, even after the lapse of many years, is not so unreasonable as to constitute a denial of due process".

65 See *Austin v Commonwealth* (2003) 215 CLR 185 at [118] (Gaudron, Gummow and Hayne JJ).

66 See *Austin v Commonwealth* (2003) 215 CLR 185 at [118]; *Bayside City Council v Telstra Corp Ltd* (2004) 216 CLR 595 at [40] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

41. This limit asserts that "a like application, and like limits" apply to s 51(xix) as are applicable to the immigration power in s 51(xxvii).[67] That would mean that, where a person has become "fully integrated, in other words unconditionally absorbed, into the Australian community" then the person thereafter cannot be classified as an alien.[68]

42. The proposition that a person can cease to be an alien within the reach of s 51(xix) by a process of "absorption" into the community was definitively rejected in *Pochi*, where Gibbs CJ (with whom Mason and Wilson JJ agreed) said that it was "impossible to maintain". His Honour explained that it "was well settled at common law" that a person's status as an alien (or otherwise) can only be changed by statute through the process of naturalization.[69] Furthermore, "[t]here are strong reasons" why achievement of formal membership of the Australian body politic "should be marked by a formal act, and by an acknowledgement of allegiance".[70] In this respect, whether a person has the status of alienage is a fundamentally different question to whether they are no longer engaged in the "activity"[71] of immigration by reason of "length of residence or … an intention permanently to remain".[72]

43. This clear rejection of the proposition that a person can cease to be an alien by absorption has been reaffirmed by this Court on several occasions.[73] The plaintiff has not challenged these cases. Had he done so, there would be no basis to re-open them. Not only was the position settled over a series of cases, with no relevant differences in the majority reasoning, but the Parliament has relied upon these cases.[74] Most obviously, it did so when it shifted the constitutional foundation for the entire *Migration Act 1958* (Cth) (**Migration Act**) from the immigration power in s 51(xxvii)

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67 (2022) 96 ALJR 560 at [206] (Edelman J, with Steward J agreeing at [291]).
68 *Alexander* (2022) 96 ALJR 560 at [205] (Edelman J); see also [207], [216], [219].
69 *Pochi* (1982) 151 CLR 101 at 111 (Gibbs CJ; with whom Mason and Wilson JJ agreed). See also 113 (Murphy J); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 (***Falzon***) at [37] (Kiefel CJ, Bell, Keane and Edelman JJ).
70 *Pochi* (1982) 151 CLR 101 at 111.
71 *Ex parte Te* (2002) 212 CLR 162 at [25] (Gleeson CJ), [107], [109] (Gummow and Hayne JJ).
72 *Pochi* (1982) 151 CLR 101 at 111.
73 *Cunliffe* (1994) 182 CLR 272 at 295 (Mason CJ); *Ex parte Te* (2002) 212 CLR 162 at [17]-[18], [24]-[26], [41]-[42] (Gleeson CJ), [55]-[59], [69] (Gaudron J), [89], [91]-[92] (McHugh J), [107]-[109], [117]-[119] (Gummow J), [204] (Kirby J), [210]-[211] (Hayne J); see also [229] (Callinan J); *Re Patterson* (2001) 207 CLR 391 at [247] (Gummow and Hayne JJ); *Shaw* (2003) 218 CLR 28 at [31] (Gleeson CJ, Gummow and Hayne, Heydon J agreeing at [190]); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [147]-[148] (Gummow J); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 (***Nystrom***) at [140] (Heydon and Crennan JJ); *Falzon* (2018) 262 CLR 333 at [37] (Kiefel CJ, Bell, Keane and Edelman JJ); *Chetcuti* (2020) 272 CLR 457 at [39] (Nettle J); *Love* (2020) 270 CLR 152 at [19] (Kiefel CJ), [257]-[258] (Nettle J).
74 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 (the Court).

to the aliens power in s 51(xix) in 1984,[75] in part to avoid the uncertainty as to the reach of the constitutional power that was inherent in the proposition that absorption into the community could take a person beyond the reach of the immigration power. To re-open the settled understanding that absorption is irrelevant to the reach of the aliens power would undermine the orderly operation of the Migration Act by creating uncertainty at the border (as some people may be entitled to entry even if not citizens or visa holders[76]) and would put untold administrative decisions at risk of challenge.

44. As the proposed second limit is contrary to authority which is not challenged, and should not in any event be re-opened, the factual question of whether the plaintiff has been absorbed need not and should not be determined (cf **PS [38]**).[77] If, however, the Court decides to address that issue, it may be noted that the principle of absorption for which the plaintiff advocates – which requires that a person not only have "developed bonds of deep connection or attachment to the Australian political community" but also have become a citizen (**PS [37]**) – is novel,[78] and highlights a fundamental confusion in the argument. The plaintiff contends that, regardless of his current status as a non-citizen, he falls outside the constitutional "essential meaning" (**PS [13]**) of alienage because he has been absorbed and is thus a "belonger" (**PS [38]**). That argument presumes (contrary to the recent decision of four Justices in *Alexander*[79]) that there is no citizen/alien dichotomy and that citizenship is purely a statutory status without constitutional significance.[80] What is left unexplained is why, if citizenship is purely statutory, the Constitution would require it to be restored to the plaintiff. In other words, how can a law revoking the plaintiff's citizenship (particularly one that he accepts is, on this argument, generally within power – see **PS [36]**) be invalid in its application to him, if that same law did not actually convert him into an alien?[81] In this way, the plaintiff's submissions seek to transmogrify the *Pochi* qualification so that it renders statutory citizenship simultaneously both constitutionally insignificant

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75 See *Migration Amendment Act 1983* (Cth). See also *Nystrom* (2006) 228 CLR 566 at [10], [13] (Gummow and Hayne JJ); *Chetcuti* (2021) 95 ALJR 704 at [11] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Thoms v Commonwealth* (2022) 96 ALJR 635 at [23] (Kiefel CJ, Keane and Gleeson JJ), [59] (Gordon and Edelman JJ), [87] (Steward J).

76 See *Love* (2020) 270 CLR 152 at [139]-[140] (Gageler J).

77 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [7] (Kiefel CJ, Gageler and Gleeson JJ).

78 Absorption and naturalization are ordinarily conceived of as alternative paths to membership of a community "either as a matter of fact or as a matter of law": *Alexander* (2022) 96 ALJR 560 at [209] (Edelman J).

79 (2022) 96 ALJR 560 at [35].

80 See *Chetcuti* (2021) 272 CLR 609 at [105] (Steward J); *Love* (2020) 270 CLR 152 at [280] (Nettle J), [292], [294], [299], [305]-[306], [389] (Gordon J).

81 Cf *Alexander* (2022) 96 ALJR 560 at [142], [144] (Gordon J).

and constitutionally guaranteed. For that reason, even if the second limit on s 51(xix) posited by the plaintiff exists and even if he falls within its terms, it would not entitle him to the relief he seeks.

D. QUESTION 1(B) – CHAPTER III

45. The issue raised by Question 1(b) of the special case is whether s 34(2)(b)(ii) is contrary to Ch III on the ground that it reposes in the Minister an exclusively judicial function. The relevant principles regarding the exclusively judicial function of adjudging and punishing criminal guilt and the Court's reasoning in *Alexander* are discussed in the respondents' submissions in *Benbrika* (at [20]-[46]).

10 46. One aspect of the majority's reasoning in *Alexander* is of particular present significance and bears repeating. The majority proceeded on the basis that, by analogy with *Lim*, in some cases deprivation of citizenship could "legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power".[82] It is implicit in the majority's reasoning that a provision providing for the deprivation of citizenship the principal purpose of which is "protective" would qualify as "non-punitive" and "exceptional".[83] The plaintiff's submissions seemingly overlook this, suggesting instead that involuntary denaturalization is "inescapably punitive" (**PS [45]**; see also **[44], [46]**) or "fundamentally punitive in nature" irrespective of its purpose (**PS [53]**). That is not what was decided in *Alexander*.

20 47. For the reasons explained below, citizenship cessation pursuant to s 34(2)(b)(ii) is non-punitive. That is sufficient to support the conclusion that it does not confer exclusively judicial power upon the Minister. Alternatively, s 34(2)(b)(ii) is consistent with Ch III for the more general reasons advanced in *Benbrika* with respect to s 36D.

(a) Section 34(2)(b)(ii) is non-punitive

48. For the reasons addressed in [25] and [26] above, s 51(xix) empowers the Parliament to make laws to prescribe the conditions on which … citizenship may be acquired and lost". Section 34(2)(b)(ii) is a provision of that kind.

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82 Cf *Lim* (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ); see also 71 (McHugh J). See also *Alexander* (2022) 96 ALJR 560 at [72], [75] (Kiefel CJ, Keane and Gleeson JJ), [98], [106]-[107], [111] (Gageler J), [164] (Gordon J), [247] (Edelman J).

83 *Alexander* (2022) 96 ALJR 560 at [75] (Kiefel CJ, Keane and Gleeson JJ), [98], [106]-[107], [111] (Gageler J), [164] (Gordon J), [247] (Edelman J). See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [41] (Kiefel CJ, Bell, Keane and Steward JJ): "This Court has consistently held, and most recently in *Fardon*, that detention that has as its purpose the protection of the community is not punishment" (footnote omitted); see also [36].

49. The Parliament having mandated that an alien is only eligible to become a citizen if the Minister is satisfied that they are of good character,[84] s 34(2)(b)(ii) (like its predecessor[85]) ensures that the Minister has power to revoke citizenship if it is revealed that this condition was not met because the person had committed a serious offence before becoming a citizen (albeit resulting in conviction after the grant of citizenship).

50. Section 34(2)(b)(ii) pursues a legitimate non-punitive purpose of protecting the integrity of the naturalization process,[86] which is "protective in a constitutionally meaningful sense".[87] By enabling the Minister to deprive naturalized persons of citizenship that would never have been bestowed upon them if their offending had been known, it enables the correction of the mistake of granting citizenship. It also discourages concealment of prior criminal offending by persons seeking naturalization. It follows that deprivation of citizenship under s 34(2)(b)(ii) is not imposed to penalize or punish (cf **PS [51]**). Justice Gordon left open precisely this possibility in *Alexander*,[88] observing that certain laws dealing with denaturalization (for example, where citizenship was obtained by making false statements or engaging in fraud) "might be more properly characterised as the consequence of breaching a condition imposed on the person's entry into the community, rather than punishment".

51. The non-punitive character of s 34(2)(b)(ii) is no different to laws that provide for the revocation of citizenship obtained by fraud, false representation or concealment of material circumstances. Laws of that kind have existed in Australia for over a century,[89] and are prevalent throughout the world.[90] They are a necessary part of regulating the naturalization of aliens.

52. Consistently with the above, in the United States, 8 USC § 1451 provides for revocation of naturalization on the ground that naturalization was "illegally procured" or "procured by concealment of a material fact or by wilful misrepresentation". Recognising that "there must be strict compliance with all the congressionally imposed

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84 1948 Act, s 13(1)(f).
85 1948 Act, s 21(1)(a)(ii).
86 See Hansard, House of Representatives (7 December 1983) at 3369.
87 *Alexander* (2022) 96 ALJR 560 at [108] (Gageler J).
88 (2022) 96 ALJR 560 at [174], citing *Trop v Dulles* (1958) 356 US 86 at 98-99 (Warren CJ).
89 See, eg, *Naturalization Act 1903* (Cth), s 11; *Nationality Act 1920* (Cth), s 12(1).
90 See, eg, *British Nationality Act 1981* (UK), s 40(3); *Irish Nationality and Citizenship Act 1956* (Ireland), s 19(1)(a); *Canadian Citizenship Act*, SC 1985, c 29, s 10.1(1); *Citizenship Act 1977* (NZ), s 17(2); 8 USC § 1451(a) and (e). See also de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union* (Centre for European Policy Studies Paper No 75, December 2014) at 8, observing that 25 out of the 28 countries surveyed had legislation providing that "fraud in the procedure of the acquisition of citizenship may be a reason for the revocation of the acquisition"; see also 11-14.

prerequisites to the acquisition of citizenship", the Supreme Court has held that failure to comply with any such conditions "renders the certificate of citizenship 'illegally procured'" and, therefore, liable to be set aside.[91] The requirements for naturalization relevantly include that the person must have been "of good moral character" for a period of five years preceding their naturalization application.[92]

53. The Supreme Court has long held that the revocation of citizenship where naturalization was procured unlawfully or by fraud does not constitute a penalty or punishment.[93] Denaturalization in this context has been held to "protect[] the integrity of the naturalization process", on the basis that "depriv[ing] the naturalized citizen of a privilege that should never have been bestowed" gives effect to the intention of Congress "that only those qualified may become and remain citizens".[94] Put differently, denaturalization may be characterised as a "restorative or remedial action" – withdrawing a privilege that should not have been bestowed in the first place – "not an action that seeks to punish".[95] That is so even where a person is denaturalized because they were not "of good moral character" at the time of their application by reason of previous criminal offending.[96]

(b) Conviction and sentence are factums that enliven the power

54. The fact that the power under s 34(2)(b)(ii) is enlivened only where a person has been convicted of an offence and received a sentence of a particular severity does not mean that deprivation of citizenship is an additional punishment for the conduct to which the conviction and sentence related (cf **PS [51]-[52]**). Conviction and sentence are simply factums upon which the exercise of the power depends,[97] no different to provisions that provide that the Minister must refuse an application for citizenship if a person has

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91 *Fedorenko v United States* (1980) 449 US 490 at 506 (Marshall J). See also *Baumgartner v United States* (1943) 233 US 665 at 672 (Frankfurter); *United States v Ginsberg* (1917) 243 US 472 at 475 (McReynolds J).

92 8 USC § 1427(a). See also 8 USC § 1101 regarding certain persons barred from being found to be of "good moral character".

93 See *Johannessan v United States* (1912) 225 CLR 227 at 241-242 (Pitney J); *Schneiderman v United States* (1943) 320 US 118 at 122 (Murphy J); *Knauer v United States* (1946) 328 US 654 at 673 (Douglas J); *Trop v Dulles* (1958) 356 US 86 at 98-99 (Warren CJ).

94 *United States v Kairys* (1986) 782 F 2d 1374 at 1382-1383 (Cummings CJ). See also *Fedorenko v United States* (1980) 449 US 490 at 506-507 (Marshall J); *United States v Dhanoa* (2019) 402 F Supp 3d 296 at 299 (Cain J); *United States v Phattey* (2019) 943 F 3d 1277 at 1281, 1283.

95 *United State v Hongyan Li* (2015) 619 Fed Appx 298. See also *United States v Rahman* (2020) WL 5236931; *United States v Donkor* (2020) 507 F Supp 3d 423.

96 See, eg, *United States v Nunez-Garcia* (2003) 262 F Supp 2d 1073; *United States v Campos* (2016) WL 8678885. See also *United States v Bogacki* (2012) 925 F Supp 2d 1288 at 1292.

97 Compare *Falzon* (2018) 262 CLR 333 at [46]-[48] (Kiefel CJ, Bell, Keane and Edelman JJ), [89] (Gageler and Gordon JJ), [93] (Nettle J).

been convicted of a specified offence.[98] If s 21 of the Citizenship Act were slightly modified so that, where an applicant for citizenship has been convicted of an offence, the Minister is permitted to refuse their application if satisfied that it is not in the public interest for citizenship to be conferred on them, it could not plausibly be said that the Minister would there be exercising a power to impose additional punishment on the applicant for that conviction. That is so even though such a decision would be a serious matter, denying to the applicant all the rights of citizenship. That being so, the revocation of those same rights, by reference to the same public interest considerations following a conviction for identical offending, cannot reasonably be described as punishing the offending where the conviction post-dates the grant of citizenship. That submission is only reinforced by the fact that the plaintiff's citizenship has, since its grant, been susceptible to revocation following a conviction for pre-grant conduct (by reason of s 21(1)(a)(ii) of the 1948 Act and s 34(2)(b)(ii) of the Citizenship Act).

55. Contrary to **PS [51(b)]**, s 34(2)(b)(ii) in no way "hinges upon the Minister's satisfaction that the person has engaged in conduct capable of attracting criminal sanction". Section 34(2)(b)(ii) does not contemplate a "process of ministerial fact finding",[99] let alone adjudgment of criminal guilt. Only actual convictions and sentences enliven the power. Like s 36D, s 34(2)(b)(ii) "contemplates an orthodox exercise of judicial power as a necessary precondition"[100] for the exercise of the power.

E. ANSWERS TO SPECIAL CASE QUESTIONS

56. The questions in the special case should be answered as follows: Question 1(a): No. Question 1(b): No. Question 2: None. Question 3: The plaintiff.

PART VI ESTIMATED TIME

57. The defendants estimate that they will require up to 2 hours for the presentation of oral argument.

Dated: 2 May 2023

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98 See, eg, Citizenship Act, s 17(4A), 19D(6), 24(4A), 24(6)(c), 30(5).
99 *Alexander* (2022) 96 ALJR 560 at [87]; see also [96] (Kiefel CJ, Keane and Gleeson JJ).
100 *Alexander* (2022) 96 ALJR 560 at [93] (Kiefel CJ, Keane and Gleeson JJ).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **PHYLLIP JOHN JONES**
Plaintiff

AND:

COMMONWEALTH OF AUSTRALIA
First Respondent

10

MINISTER FOR HOME AFFAIRS
Second Defendant

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE DEFENDANTS

20 Pursuant to Practice Direction No 1 of 2019, the Defendants set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current (Compilation No. 6, 29 July 1977 – present)	ss 51(xix), (xxvii), Ch III, s 75(v)
Statutory provisions			
2.	*Administrative Decisions (Judicial Review) Act 1977*	Current (Compilation No. 118, 22 June 2022 – present)	
3.	*Australian Citizenship Act 2007* (Cth)	Current (Compilation No. 29, 18 September 2020 – present)	ss 2, 3, 4, Pt 2 Div 2 Subdivs A, AA, B, ss 17, 19, 21, 24, 25, 28, 30, 32A, 34, 36B, 36D, 36E, 47, 50, 52

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No.	Description	Version	Provisions
4.	*Australian Citizenship Act 1948* (Cth)	As at 2 September 1988 (18 December 1987 – 19 December 1989)	ss 12, 15, 21
5.	*Australian Citizenship Amendment Act 1984* (Cth)	As made (25 October 1984)	s 21
6.	*Australian Citizenship (Transitionals and Consequential) Act 2007* (Cth)	As made (15 March 2007)	s 2, Sch 3, items 2, 6
7.	*Criminal Code* (Cth)	Current (Compilation No. 145, 10 November 2022 – present)	ss 137.1, 137.2
8.	*Judiciary Act 1903* (Cth)	Current (Compilation No. 49, 18 February 2022 – present)	ss 39B, 78B
9.	*Migration Act 1958* (Cth)	Current (Compilation No. 153, 17 February 2023 – present)	
10.	*Nationality Act 1920* (Cth)	As made (2 December 1920)	ss 7, 12
11.	*Nationality and Citizenship Act 1948* (Cth)	As made (21 December 1948)	ss 12, 13, 15, 21, 50
12.	*Nationality and Citizenship Act 1958* (Cth)	As made (8 October 1958)	s 7
13.	*Naturalization Act 1903* (Cth)	As made (13 October 1903)	s 11
14.	*Naturalization Act 1917* (Cth)	As made (20 September 1917)	s 7
15.	*Migration Amendment Act 1983* (Cth)	As made (13 December 1983)	
Foreign			
16.	*British Nationality Act 1981* (UK)	Current (23 November 2022 – present)	s 40
17.	*Canadian Citizenship Act*, SC 1985, c 29	Current (23 November 2021 – present)	s 10.1
18.	*Citizenship Act 1977* (NZ)	Current (1 December 2020 – present)	s 17
19.	*Irish Nationality and Citizenship Act 1956* (Ireland)	Current (20 April 2023 – present)	s 19
20.	United States Code, Title 8 (Aliens and Nationality)	Current (3 January 2022 – present)	§ 1101, 1427, 1451