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
BRISBANE REGISTRY
BETWEEN:

B47 of 2022

PHYLLIP JOHN JONES
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR HOME AFFAIRS
Second Defendant

MINISTER FOR IMMIGRATION, CITIENSHIP AND MULTICULTURAL AFFAIRS
Third Defendant

PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. The Plaintiff certifies that this outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF ARGUMENT

Question 1(b): Chapter III challenge[1]

2. The Plaintiff adopts the oral outline of the Applicant in *Benbrika* at [4], [5]-[8].

3. Section 34(2)(b)(ii) is not reasonably capable of being seen as necessary to any non-punitive purpose: *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 33 **[vol 4, p.1090]**; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [27]-[29] **[vol 5, p.1453-1454]**; ***Alexander*** *v Minister for Home Affairs* (2022) 96 ALJR 560 at [106] **[vol 11, p.3988]**. This is because:

   a. the discretion in s 34(2)(c), and the matters to be considered in its exercise, is overbroad, and would permit the discretion to be exercised for punitive purposes;

   b. the absence of any time limit on the use of the power after the date of the conviction breaks the connection of necessity between the measure and the identified purpose, making a convicted person permanently at jeopardy of denaturalization;

   c. the protective purpose attributed by the Defendants to s 34(2)(b)(ii) is amply pursued by other provisions (ss 34(1), 34(2)(b)(i), 34(2)(b)(iii), 34(2)(b)(iv)), each of which is confined in terms to cases of fraud, concealment or dishonesty (in contrast to s 34(2)(b)(ii)), suggesting that s 34(2)(b)(ii) pursues another purpose;

   d. that s 34(2)(b)(ii) is qualitatively different to s 34(2)(b)(i), (iii)-(iv) is reinforced by the fact that s 34(3) applies only in s 34(2)(b)(ii) cases;

   e. that the power in s 34(2)(b)(ii) exists only for one category of naturalized citizen (by conferral), and not for others (by descent or adoption), suggests that it pursues another purpose (cf s 34(1)); and

   f. section 34(2)(b)(ii) is shown to go further than is necessary for the protective purpose by the fact that, alone amongst all of the powers conferred by s 34, it lacks criteria directly to connect the citizen's offending to some irregularity in the process of naturalization.

4. Section 34(2)(b)(ii) is properly characterised as punitive for the foregoing reasons, and also because:

   a. the effect of a determination under s 34(2)(b)(ii) is the same as that under s 36B, namely to destroy the person's status in organized society and the right to enter or

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[1] If convenient to the Court, and given that argument in this matter follows directly after *Benbrika*, the Plaintiff proposes to address Question 1(b) of the Special Case first.

remain in the place which the person regards as home: *Alexander* at [73], [166], [248] (Edelman J). In this case, the Court is afforded with evidential indications of the practical significance of loss of the right to remain to an individual: see **SC, p.40 [93]-[95]**;

b. the absence of a time-limit after the date of conviction has a severe impact upon the citizen, either because the citizen assumes that they have paid the price fixed by the community for their crime, or because the person thereafter lives in fear of alienation;

c. the punitive character of s 34(2)(b)(ii) is confirmed by the circumstance that deprivation is specifically linked with conduct designated by Parliament as "serious offending", for which it might be regarded as punishment: *Alexander* at [165] per Gordon J, see also [252] (Edelman J); and

d. denationalization under s 34(2)(b)(ii) operates in substance as a new and additional punishment for the offence: *Alexander* at [174].

Question 1(a): Head of power challenge

5. The "aliens limb" of s 51(xix) does not support s 34(2)(b)(ii) of the Act in its application to the Plaintiff because, without more, a naturalized citizen is not an "alien" within the ordinary meaning of that word: *Pochi v Macphee* (1982) 151 CLR 101 at 109 **[vol 7, p.2323]**; *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at [12], [136] **[vol 4, p.1006]**; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, [45]-[35], [37] **[vol 7, p.2463]**; *Alexander* at [63], [137], [185], [286] **[vol 11, p.3980]**.

6. The "naturalization limb" of s 51(xix) is limited by the description of its subject-matter: "naturalization" in s 51(xix) describes a process by which a person who was formerly an alien ceases to be an alien: *Alexander* at [138], [228] **[vol 11, p.3993]**. This supports two (possibly overlapping) limitations, either of which is sufficient for the Plaintiff:

a. The power to impose conditions upon naturalization is limited by the requirement that the condition be "reasonable" in the sense that it have a sufficient connection to a process of naturalization which ceases with non-alienage: *Alexander* at [211] **[vol 11, p.4009]**, [291] fn 441 **[vol 11, p.4025]**; compare *Koon Wing Lau v Calwell* (1949) 80 CLR 533 **[vol 5, p.1616]**.

b. Further or alternatively, the power to impose conditions on naturalization does not extend to a person whose engagement in the process can be seen to have completed in the sense that they are not only a naturalized citizen, but also fully absorbed in the Australian community: *Alexander* at [291] **[vol 11, p.4025]** and [142] **[vol 11, p.3994]**; compare *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at [26] **[vol 7, p.2523]**.

7. The "general principle" that "whatever Parliament can do or permit it can undo or recall" (*Alexander* at [38]) holds true of s 51(xix), subject to the foregoing limitations on the "naturalization" limb (which did not arise for consideration in *Alexander*). *Meyer v Poynton* (1920) 27 CLR 436 distinguished as a war-time case involving (supposed) repudiatory conduct, or overruled: see Hansard, House of Representatives, 8 August 1917, p.853; National Archives of Australia item A435, 1944/4/1198 p.11-17; Fischer, *Enemy Aliens* (UQP 1989) p.98-99.

8. Alternatively, s 34(2)(b)(ii) could only be valid under the incidental or ancillary aspect of s 51(xix): *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 321 **[vol 4, 1213 line 11]**, 319 **[vol 4 p.1211 line 31]**; *Spence v Queensland* (2019) 268 CLR 355 at [60] **[vol 9, p.3465]**. This is because the legal criteria of operation of s 34(2)(b)(ii) are inversely related to the subject-matter of the power: (a) it only operates upon persons who are not "aliens", and who have completed the "naturalization" process; (b) there need be no causative relationship between a person's past offending and the naturalization process, nor any irregularity in the naturalization process; (c) it operates upon persons fully absorbed in the Australian community. Section 34(2)(b)(i) is not valid because it is not appropriate or adapted to the purpose of protecting the integrity of the naturalization process: see [3] above.

Dated: 13 June 2023

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