HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M90 of 2022

BETWEEN:

ABDUL NACER BENBRIKA
Applicant

and

MINISTER FOR HOME AFFAIRS
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

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APPLICANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: OUTLINE OF ARGUMENT

2. **AS [10]-[17]:** Section 36D of the *Australian Citizenship Act 2007* (Cth) (the **Act**) cannot be materially distinguished from s 36B of the Act. Each provision purports to confer on the Executive an exclusively judicial power to deprive a person of his or her citizenship as a sanction or punishment for proscribed conduct regarded as reprehensible.

   a. Section 36D gives effect to the same policy, and has the same purpose, as section 36B. This includes the statutory purpose expressed in section 36A, which identifies conduct regarded as reprehensible and "incompatible with the shared values of the Australian community".

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   b. Sections 36D(1)(a) and 36D(5) cover a range of specified criminal offences against the *Criminal Code* (Cth) – including offences contained in Subdiv A of Div 72, Part 5.3 and Part 5.5 of the *Criminal Code* (Cth) – which overlap with (but extend beyond) the proscribed conduct that is specified in s 36B(5).

   c. Section 36D(1)(c) involves direct consideration of the conduct of the person to which the convictions relate. This may require factual inquiries by the Minister to ascertain the material facts relating to the criminal conduct. Whatever the scope of such inquiries, they are directed solely to criminal conduct of the person.

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   d. Section 36D(1)(d) is analogous to s 36B(1)(c). The public interest considerations in s 36E include the severity of the conduct that was the basis of the conviction(s) and sentence(s) to which the determination relates.

   e. The rules of natural justice do not apply in relation to a determination made by the Minister under section 36D to deprive a person of his or her citizenship: s 36D(9), compare s 36B(11). Merits review is unavailable: *cf.* s 52(1)(f).

3. **AS [18]-[26], [30]-[34]:** The reasoning of the majority in ***Alexander*** *v Minister for Home Affairs* (2022) 96 ALJR 560 is equally applicable in relation to section 36D.

   a. The effect of a determination under s 36D is the same as that under s 36B, namely to deprive the Applicant of the rights of citizenship, including the right "to be at liberty in this country and to return to it as a safe haven in need".

      - *Alexander* at [74]-[75], [95], [166], [248].
      - Compare *Trop v Dulles*, 356 US 86 (1958) at 101-102.

   b. Historically, exile or banishment for criminal or reprehensible conduct has been regarded as a form of punishment. The total destruction of a person's status within the community by denaturalisation is a modern analogue of banishment.

      - *Alexander* at [72], [75], [77], [167] ff, [250].

   c. There is no material difference in the policy and purpose of ss 36B and 36D respectively. In fact, the punitive purpose of s 36B was revealed more by *comparison* than by contrast with the operation of s 36D – for instance, the consequence imposed under s 36B was no different from "the punishment meted out pursuant to s 36D". No less than s 36B, involuntary denaturalisation under s 36D is in retribution for past criminal conduct, and for associated purposes of denunciation and deterrence of such conduct.

      - *Alexander* at [70], [77], [80]-[84]; see also at [120], [157], [163]-[164], [173], [251].

   d. The fact that the power under s 36D is engaged by a prior conviction does not mean that involuntary denaturalisation has a different purpose. It is still the imposition of punishment, *i.e.* for purposes that include retribution for and deterrence of criminal conduct. The criminal conviction is not a mere "factum" for the exercise of an administrative power for a non-punitive purpose.

      - *Cf. Alexander* at [87], [91], [93], [96]; [174], [252].

4. **AS [24]-[25], [35]-[36]; Reply [2]-[4]:** Contrary to the Respondents' submissions, the principle in ***Chu Kheng Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 is not limited to the conjunction of powers both to adjudge and punish criminal guilt. It covers the purported vesting of "any part" of that function in the Executive. Accordingly, a power to impose punishment for criminal conduct is an exclusively judicial power, even if divorced from the "adjudgment" of criminal guilt.

   - ***Falzon*** *v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [15]-[16]; ***Minogue*** *v Victoria* (2019) 268 CLR 1 at 15 [13], 21 [32], [36], 23 [41]; *Alexander* at [235], [246] (Edelman J).

5. **AS [27]-[29]:** Whether a power is exclusively judicial turns on the proper characterisation of its purpose. In particular, does the law confer power to impose a detriment (in particular, a harsh or extreme consequence) for the purpose of sanctioning proscribed conduct – including as retribution for that conduct, or for specific or general deterrence, or any combination of such objectives? If the purpose of the power is to impose detriment as punishment for conduct that is outside the norms of society set by the criminal law, it will be exclusively judicial and incapable of being conferred on the Executive. This extends beyond powers to detain in custody, and includes (at least) involuntary denationalisation or denaturalisation for punitive purposes.

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- *Alexander* at [72], [75], [80], [82], [95], [107], [120], [159], [163], [236]-[246].

6. The powers conferred by Subdiv C of Div 3 of Pt 2 of the Act, including s 36D, can be distinguished from powers conferred on the Executive to impose a detriment for a legitimate non-punitive purpose. Similarly, different questions arise in relation to the conferral of (judicial or non-judicial) powers on a Chapter III court (*e.g.* whether the power is capable of being exercised judicially, or whether the power substantially impairs the institutional integrity of a State court invested with federal jurisdiction).
   - *Cf.* e.g. *Falzon*; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68; *Thomas v Mowbray* (2007) 233 CLR 307.

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7. However, the existence of "protective" aspects to the power do not in themselves preclude its proper characterisation as the imposition of punishment for proscribed conduct.
   - *Alexander* at [75], [99], [106]-[107], [110], [112], [164], [235], [246]; *Minogue* at 26-27 [47]-[48].

8. **Reply [11]-[12]:** The sovereign right or capacity to determine who should be members of the Australian community, and to exclude persons from the Australian body politic, must be exercised consistently with the Constitutional separation of powers.

Dated: 14 June 2023

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