HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **ABDUL NACER BENBRIKA**
Applicant

AND:

MINISTER FOR HOME AFFAIRS
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

SUBMISSIONS OF THE RESPONDENTS

PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The issue in this proceeding is whether s 36D of the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**) is invalid in its operation in respect of the applicant because it reposes in the Minister for Home Affairs (**Minister**) the exclusively judicial function of punishing criminal guilt (**SC [14]**, **SCB 34**).

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

3. The applicant has given notice under s 78B of the *Judiciary Act 1903* (Cth). The respondents 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 1 March 2023 (**SCB 32-34 [3]-[14]**). The respondents agree with the summary set out by the applicant (**AS [6]-[9]**), save that they note: (i) that he acquired Australian citizenship on 13 January 1998 (not 1988) (**SCB 16; SC [4], SCB 32; cf AS [6]**); and (ii) that the Minister's determination did not relate to a conviction for an offence against s 101.4(1) of the *Criminal Code* (Cth), that conviction having been quashed by the Court of Appeal 10 years prior to the determination being made (**SC [7(a)], SCB 33; cf AS [7]**).

PART V ARGUMENT

A. SUMMARY

5. Section 36D of the Citizenship Act requires an "orthodox exercise of judicial power as a necessary precondition"[1] to citizenship cessation. It does not confer upon the Minister "[t]he power to determine the facts which enliven the power to impose"[2] citizenship cessation. It therefore does not have the vice that caused s 36B to be declared invalid in *Alexander*. Section 36D does not repose an exclusively judicial function in the Minister and its validity should, therefore, be upheld.

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1 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 (***Alexander***) at [93] (Kiefel CJ, Keane and Gleeson JJ).

2 *Alexander* (2022) 96 ALJR 560 at [96] (Kiefel CJ, Keane and Gleeson JJ).

B. SECTION 36D

6. Section 36D is located within Subdiv C of Div 3 of Pt 2 of the Citizenship Act, headed "Citizenship cessation determinations".

7. The provisions in Subdiv C of Div 3 of Pt 2 were introduced into the Citizenship Act in 2020,[3] largely to replace the scheme previously enacted by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (***Allegiance to Australia Act***). Certain changes were made in response to recommendations made by the Independent National Security Legislation Monitor (**INSLM**) in 2019.[4] However, the INSLM did not recommend the repeal or amendment of s 35A, which was the predecessor to (and in largely the same form as) current s 36D.[5] Section 35A had been enacted by the *Allegiance to Australia Act* in 2015.[6]

8. Section 36D(1) confers a power on the Minister, acting personally,[7] to determine, in writing, that a person ceases to be an Australian citizen if four preconditions are met:

   8.1. *first*, the person has been convicted of an offence, or offences, against one or more of the provisions specified in s 36D(5) (s 36D(1)(a));

   8.2. *second*, the person has been sentenced to a period of imprisonment of at least three years (or to periods that total at least three years), in respect of that conviction or convictions (s 36D(1)(b));

   8.3. *third*, the Minister is satisfied that the conduct to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia (s 36D(1)(c)); and

   8.4. *fourth*, the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen (s 36D(1)(d)).

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3 *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) (**2020 Act**), Sch 1, item 9.

4 See Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the Operation, Effectiveness and Implications of Terrorism-related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007* (Report No 7, 2019) (**INSLM Report**); Revised Explanatory Memorandum to the Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 (**Revised 2020 EM**) at 1. See also *Alexander* (2022) 96 ALJR 560 at [19], [90]-[91] (Kiefel CJ, Keane and Gleeson JJ).

5 INSLM Report at [6.18]. The Minister's power under the now repealed s 35A was engaged by a narrower category of offences and only where a person had been sentenced to at least six years' imprisonment.

6 *Allegiance to Australia Act*, Sch 1, item 5.

7 Citizenship Act, s 36D(7).

9. ***Conviction and sentence.*** By reason of the first two preconditions, a person will only come within the reach of s 36D(1) if they have been convicted of a specified offence (or offences) and sentenced to a period (or periods) of imprisonment for that offending of at least three years.[8] An orthodox exercise of judicial power, with all of the ordinary procedures and protections of a criminal trial, therefore lies at the very foundation of s 36D. In that respect, s 36D differs markedly from s 36B. The significance of those differences was emphasised in *Alexander*.

10. The offences specified in s 36D(5) relate to terrorism, treason, sabotage, espionage, foreign interference and foreign incursions and recruitment.[9] These are offences which, of their nature, are "inimical to Australia's interests"[10] or demonstrate "extreme enmity to Australia"[11] and the values which underpin Australian society. That is particularly so because, by reason of the second precondition, the offending must be of a sufficiently serious character to have resulted in a sentence (or sentences) of three or more years' imprisonment.

11. The applicant was convicted of three offences under Pt 5.3 of the *Criminal Code* (falling within s 36D(5)(f)), being: (i) intentionally being a member of a terrorist organisation, knowing that it was a terrorist organisation (Code, s 102.3(1)); (ii) intentionally directing the activities of a terrorist organisation, knowing that it was a terrorist organisation (Code, s 102.2(1)); and (iii) possession of a thing, connected with preparation for a terrorist act, knowing of that connection (Code, s 101.4(1)) (**SC [5], SCB 32-33**). He ultimately received sentences of imprisonment of five years and fifteen years for the first two convictions (**SC [6], SCB 33**). As noted above, the third conviction was quashed by the Victorian Court of Appeal (**SC [7], SCB 33**).

12. ***Repudiation of allegiance.*** The third precondition for the exercise of power under s 36D(1) is that the Minister is satisfied that the person has demonstrated, by the conduct for which they have been convicted, that they have "repudiated their allegiance to Australia". While the consideration of repudiation of allegiance had significant work to do in s 36B (where the conduct that enlivened the cessation power

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8 A determination may be made in relation to conduct that was the subject of a conviction that predates the commencement of s 36D provided that the conviction occurred on or after 29 May 2003 (being the date on which the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) commenced, inserting Pt 5.3 into the *Criminal Code*): see *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth), Sch 1, item 19.

9 All of the offences specified have a maximum penalty of at least 10 years imprisonment: see Revised 2020 EM at [124].

10 *Alexander* (2022) 96 ALJR 560 at [63] (Kiefel CJ, Keane and Gleeson JJ).

11 *Alexander* (2022) 96 ALJR 560 at [35] (Kiefel CJ, Keane and Gleeson JJ).

lacked any mental element), having regard to the nature and seriousness of the offences that engage the power under s 36D(1), ordinarily the Minister can be expected to be satisfied that persons who have been convicted and sentenced to imprisonment for three years or more will have repudiated their allegiance to Australia.[12]

13. The Parliament having made the fact of conviction and sentence the foundation for the exercise of power under s 36D(1), s 36D(1)(c) should be construed as requiring the Minister to have regard to the essential facts upon which the conviction and sentence depend, these being facts from which the Minister cannot depart.[13] Contrary to the applicant's submission, the task of the Minister is not to undertake factual inquiries in relation to the offending conduct, let alone to do so by reference to "matters beyond those presented in evidence or addressed in sentencing" (**cf AS [41(a)]**). Certainly, if a construction that permitted the Minister to undertake such inquiries would be productive of invalidity (as the applicant alleges), such a construction would not be adopted having regard to s 15A of the *Acts Interpretation Act 1901* (Cth).[14]

14. ***Public interest.*** The fourth precondition is that the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen. This "imports a discretionary value judgment",[15] requiring the Minister to balance competing interests.[16] In making that value judgment, the Minister must have regard to the criteria identified in s 36E(2).

15. ***Dual citizens.*** In addition to the four preconditions identified above, s 36D(2) provides that the Minister cannot make a determination under s 36D(1) if satisfied that as a result of doing so the person would become stateless. A determination is automatically revoked if a court finds that the person was not a national or citizen of another country when the determination was made.[17]

16. ***Automatic visa grant.*** Section 35(3) of the *Migration Act 1958* (Cth) (**Migration Act**) provides that a person who, on or after 1 September 1994, ceases to be an Australian

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12 See Revised 2020 EM at [105], [124]. See also INSLM Report at [6.8].

13 Compare *Secretary to the Department of Justice and Regulation v LLF* [2018] VSCA 155 at [42], [44] (the Court), applied in *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202 at [56], [62]-[63] (McKerracher J), [179] (Colvin J).

14 See also *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

15 *Pilbara Infrastructure v Australian Competition Tribunal* (2012) 246 CLR 379 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

16 *Hogan v Hinch* (2011) 243 CLR 506 at [32] (French CJ), [69] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also Revised 2020 EM at [108].

17 Citizenship Act, s 36K(1)(c).

citizen while in the migration zone is taken to have been granted an ex-citizen visa when that citizenship ceases. Accordingly, the cessation of a person's citizenship pursuant to s 36D does not itself lead to detention or removal from Australia.[18] Those steps, if they occur, can occur only in consequence of a decision under the Migration Act to cancel the ex-citizen visa. Viewing the legislative scheme as a whole, the effect of citizenship cessation under s 36D therefore is not accurately characterised as removing a person's right to remain at liberty in Australia. Its effect is, instead, to alter the legal basis for that right (from the right of a citizen, which cannot readily be removed, to that of a lawful non-citizen, which is much more readily removed).

C. CHAPTER III AND CITIZENSHIP CESSATION

17. The only question raised by this proceeding is whether s 36D is contrary to Ch III on the ground that it reposes an exclusively judicial function in the Minister.

18. The applicant does not dispute that s 36D is supported by s 51(xix) of the Constitution, no doubt because in *Alexander* the entire Court accepted that s 51(xix) empowers the Parliament to enact legislation providing for the cessation of the Australian citizenship of persons who have engaged in conduct that demonstrates that they have repudiated their allegiance to Australia.[19] The reasons use a number of different formulations to convey that idea, including "repudiation of the ties of allegiance",[20] repudiation or renunciation of allegiance to Australia,[21] repudiation of "the obligations of citizenship on which membership" of the Australian community depends,[22] and "renunciation" or "abandonment" of membership of the political community.[23] Although it was unnecessary to examine the metes and bounds of the actual conduct that would fall within these various formulations, the reasons suggest it would include (at a minimum) conduct that: is "inimical to Australia's interests";[24] exhibits "extreme enmity to Australia";[25] "seek[s] to destroy or gravely harm the fundamental and basal features of the nation guarded by its Constitution, such as representative democracy and the rule

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18 Cf *Alexander* (2022) 96 ALJR 560 at [26] (Kiefel CJ, Keane and Gleeson JJ), [166] (Gordon J), [258] (Steward J).
19 *Alexander* (2022) 96 ALJR 560 at [35], [42], [46], [49], [63] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J), [137], [139], [143] (Gordon J), [185], [229], [232]-[234] (Edelman J), [286], [289]-[290], [297], [301], [317] (Steward J).
20 *Alexander* (2022) 96 ALJR 560 at [42] (Kiefel CJ, Keane and Gleeson JJ).
21 See, eg, *Alexander* (2022) 96 ALJR 560 at [137], [139] (Gordon J), [297], [317] (Steward J).
22 See, eg, *Alexander* (2022) 96 ALJR 560 at [46] (Kiefel CJ, Keane and Gleeson JJ).
23 See, eg, *Alexander* (2022) 96 ALJR 560 at [229] (Edelman J).
24 *Alexander* (2022) 96 ALJR 560 at [63] (Kiefel CJ, Keane and Gleeson JJ).
25 *Alexander* (2022) 96 ALJR 560 at [35] (Kiefel CJ, Keane and Gleeson JJ).

of law" or is "directed at overthrowing state institutions"[26]. The Court's acceptance that s 51(xix) would support a law providing for citizenship cessation at least in circumstances of the above kind is consistent with Australia's sovereign right "to determine who shall compose its members".[27]

19. The existence of power to enact citizenship cessation laws under s 51(xix) having been recognised, such laws will be valid (at least when they apply in the circumstances identified in the previous paragraph) provided they comply with any applicable restraints derived from Ch III as to the manner of the exercise of that power.

(a) Adjudging and punishing criminal guilt

10 20. It is well established that the Commonwealth Parliament cannot confer any part of the judicial power of the Commonwealth on any person or body that is not a court.[28] As Brennan, Deane and Dawson JJ observed in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (***Lim***),[29] "the adjudgment and punishment of criminal guilt" is the most important of the "functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character". Many subsequent authorities use that formulation, which is conjunctive rather than disjunctive.[30]

21. In *Alexander*, a power reposed in the Executive to deprive a person of their citizenship was held to involve an exclusively judicial function because, in summary:[31]

20 > … the effect of the Minister's determination under s 36B(1) is to deprive Mr Alexander of his entitlement to enter and live at liberty in Australia. That sanction by the Parliament may be imposed only upon satisfaction of the Minister that Mr Alexander engaged in conduct that is so reprehensible as to be deserving of the dire consequence of deprivation of citizenship and the

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26 *Alexander* (2022) 96 ALJR 560 at [289] (Steward J), [233] (Edelman J).

27 *Robtelmes v Brenan* (1906) 4 CLR 395 at 413-414 (Barton J), quoting *Fong Yue Ting v United States* (1893) 149 US 698 at 707 (Gray J). See also *Ah Yin v Christie* (1907) 4 CLR 1428 at 1433 (Barton J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at [39] (Gleeson CJ); *Alexander* (2022) 96 ALJR 560 at [138] (Gordon J).

28 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269-270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

29 (1992) 176 CLR 1 at 27 (emphasis added); see also 10 (Mason CJ) and 53 (Gaudron J); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 (***Falzon***) at [15] (Kiefel CJ, Bell, Keane and Edelman JJ); *Duncan v New South Wales* (2015) 255 CLR 388 (***Duncan***) at [41] (the Court).

30 See, eg, *Magaming v The Queen* (2013) 252 CLR 381 (***Magaming***) at [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ, Keane J agreeing at [100]), [61] (Gageler J); *Kuczborski v Queensland* (2014) 254 CLR 51 at [233] (Crennan, Kiefel, Gageler and Keane JJ); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 (***Today FM***) at [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Duncan* (2015) 255 CLR 388 at [41] (the Court).

31 *Alexander* (2022) 96 ALJR 560 at [96] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added).

> rights, privileges, immunities and duties associated with it. The power to determine the facts which enliven the power to impose such a punishment is one which, in accordance with Ch III of the Constitution, is exercisable exclusively by a court that is part of the federal judicature.

22. Thus, as is discussed in detail in paragraphs [35] to [46] below, it was the conjunction of the Minister's power to find the facts which enliven the power to impose a serious punishment, together with the power actually to impose that punishment, that explains the conclusion in *Alexander* with respect to s 36B.[32] Section 36B was invalid because, where the functions of adjudging and punishing criminal guilt are conferred together, they can validly be conferred only upon the judiciary.

23. For the same reason, Parliament crosses the line into the exercise of exclusively judicial power if it purports both to adjudge and punish criminal guilt. Thus, as the Court observed in *Duncan*:[33]

> Two features are commonly identified as underlying the characterisation of a law as a bill of pains and penalties, and as thereby "a legislative intrusion upon judicial power". One is legislative determination of breach by some person of some antecedent standard of conduct. The other is legislative imposition on that person (alone or in company with other persons) of punishment consequent on that determination of breach.

24. In *Falzon*, the plaintiff sought to "clarify the statement of principle in *Lim*" by submitting that the exclusive power is to "adjudge guilt of, *or* determine punishment for, breach of the law" (original emphasis).[34] The plurality said that "this does not appear to be disputed by the defendant". However, the point did not need to be disputed or decided in *Falzon*, because the provision in question did not impose punishment at all. In those circumstances, *Falzon* is not authority for the proposition that the conjunction can be ignored, such that either adjudging guilt, or imposing any severe detriment susceptive of characterisation as punishment, are necessarily exclusively judicial functions.[35]

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32 *Alexander* (2022) 96 ALJR 560 at [67], [70], [72], [75], [79] (Kiefel CJ, Keane and Gleeson JJ), [98], [106], [120] (Gageler J), [158]-[159] (Gordon J), [235]-[237] (Edelman J). See, similarly, *Victorian Chamber of Manufacturers v Commonwealth* (1943) 67 CLR 413 at 416 (Latham CJ, stating that the regulation in question purported to invest judicial power as it "assumes to empower a Minister to form an opinion that a person has committed an offence by contravening the Regulations and to impose a penalty by closing his premises in respect of such contravention"), 422 (Starke J).

33 *Duncan* (2015) 255 CLR 388 at [43] (the Court).

34 (2018) 262 CLR 333 at [15] (Kiefel CJ, Bell, Keane and Edelman JJ).

35 Cf **AS [25]**. See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [20]-[21], [42] (Kiefel CJ, Gageler and Gleeson JJ), [182] (Edelman J), [310]-[311], [314], [320], [322] (Jagot J).

25. In fact, if the function of "adjudging criminal guilt" means finding that a person has committed a criminal offence, then the Court has previously accepted that this function can validly be conferred on the Executive provided that this is done in a way that is divorced from the imposition of "punishment". In *Today FM*,[36] five Justices said "it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action". While it may be accepted that, as was pointed out in *Alexander*,[37] the consequences of licence revocation are not comparable to citizenship cessation, that point goes to whether the consequence of an adjudgment of guilt is "punishment" so as to render the process as a whole a purported exercise of exclusively judicial power. That does not answer the point that the Court in *Today FM* accepted that Ch III did not prevent the Executive from determining whether a person has engaged in conduct that constitutes a crime, and in that sense from "adjudging criminal guilt", provided that function is not accompanied by the function of imposing punishment.[38]

26. The same is true of the imposition of "punishment".[39] As Gleeson CJ said in *Re Woolley; Ex parte Applicants M276/2003* (***Re Woolley***), "[p]unishment, in the sense of the inflicting of involuntary hardship or detriment by the state, is not an exclusively judicial function".[40] That statement recognises the permissibility of parts of the State other than the judiciary inflicting involuntary hardship or detriment, provided that in doing so they do not impose punishment for criminal guilt. That passage from *Re Woolley* was quoted in *Alexander* without disapproval.[41] Consistently with it, Parliament commonly selects a prior conviction (ie a previous adjudgment of guilt) as the factum that enlivens a power to inflict hardship or detriment upon a person, including by keeping a person detained in a jail,[42] or visa cancellation (with consequent

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36 (2015) 255 CLR 352 at [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis added).

37 *Alexander* (2022) 96 ALJR 560 at [77] (Kiefel CJ, Keane and Gleeson JJ), [108]-[110] (Gageler J), [248] (Edelman J); cf [329] (Steward J, in dissent).

38 See *Alexander* (2022) 96 ALJR 560 at [109] (Gageler J).

39 See *Alexander* (2022) 96 ALJR 560 at [238] (Edelman J); *Al-Kateb v Godwin* (2004) 219 CLR 562 at [265] (Hayne J); Hart, *Punishment and Responsibility* (1968) 4-5.

40 (2004) 225 CLR 1 at [17]. This observation was cited with approval in *Pollentine v Bleijie* (2014) 253 CLR 629 at [70] (Gageler J); *Minogue v Victoria* (2019) 268 CLR 1 at [31] (Gageler J). See also *Duncan* (2015) 255 CLR 388 at [46] (the Court).

41 *Alexander* (2022) 96 ALJR 560 at [68], [76] (Kiefel CJ, Keane and Gleeson JJ), [160], [162] (Gordon J), [239] (Edelman J).

42 See, eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (***Fardon***).

removal from Australia, which may occur for reasons that include, but are not limited to, the protection of the Australian community).[43]

27. None of this is to deny that a power to impose punishment alone can be an exclusively judicial power. *Lim* itself demonstrates that an executive power to impose detriment or hardship may infringe Ch III even if it is conferred in terms that do not involve the adjudgment of criminal guilt. However, in *Lim,* that possibility arose because the provisions in question required "detention in custody", which the Court has recognised as a detriment or hardship of such a kind that there is a "default characterisation" that it is punitive and can, subject to exceptions where the detention is justified for another reason, be imposed only in the exercise of judicial power.[44]

28. Where no such default characterisation applies, then, as McHugh J explained in *Lim*:[45]

> The classification of the exercise of a power as legislative, executive or judicial frequently depends upon a value judgment as to whether the particular power, having regard to the circumstances which call for its exercise, falls into one category rather than another. The application of analytical tests and descriptions does not always determine the correct classification. Historical practice plays an important, sometimes decisive, part in determining whether the exercise of a particular power is legislative, executive or judicial in character.

29. Applying the above approach, when a particular power does not involve both the "adjudgment and punishment of guilt", it falls outside the core case of exclusively judicial power, with the result that a more nuanced inquiry (in which historical practice is important) is required to determine its proper classification.

30. In classifying the power conferred by s 36D, *Alexander* supports the conclusion that it is necessary to take into account the fact that: (i) it involves no adjudgment of guilt; (ii) the sanction or detriment in question is of a kind that has historically not been imposed by courts; and (iii) the power to impose that sanction or detriment can be

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43 *Falzon* (2018) 262 CLR 333. The fact that removal is not limited to the protection of the community suggests that it is not permissible only as an exception to the *Lim* principle, and therefore suggests that the imposition of the sanction, when separated from an adjudgment of guilt, is not judicial power at all: see *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (***Benbrika***) at [36] (Kiefel CJ, Bell, Keane and Steward JJ). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 (***Roach***) at [10]-[11] (Gleeson CJ), [42] (Gummow, Kirby and Crennan JJ), [169]-[171] (Hayne J), rejecting the proposition that the Parliament was punishing individuals for breach of a State law by excluding certain prisoners from voting in federal elections, despite the fact that the law operated upon the factum that a person was serving a sentence of imprisonment.

44 *Benbrika* (2021) 272 CLR 68 at [73] (Gageler J); see also [40] (Kiefel CJ, Bell, Keane and Steward JJ); *Falzon* (2018) 262 CLR 333 at [24]; *Lim* (1992) 176 CLR 1 at 27; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [94], [98] (Gageler J).

45 (1992) 176 CLR 1 at 67.

exercised only after a court has completed the function of adjudging and punishing guilt in accordance with ordinary judicial processes, the conviction and sentence then being the factums that enliven the Minister's power to reach a normative judgment about the consequences of a person's proven criminality for their ongoing membership of the Australian body politic. Those factors together have the result that the power to order citizenship cessation under s 36D is not an exclusively judicial power.

(b) ***Alexander***

Section 36B

31. Section 36B was in many respects similar to s 36D. Like s 36D, s 36B was located within Subdiv C of Div 3 of Pt 2 of the Citizenship Act. It purported to confer a discretion on the Minister to determine that a person would cease to be an Australian citizen if the Minister was satisfied of three criteria.

    31.1. *First*, that the person had engaged in conduct specified in s 36B(5) while outside Australia, or had engaged in conduct specified in any of s 36B(5)(a)-(h) while in Australia and had since left Australia and had not been tried for an offence in relation to the conduct (s 36B(1)(a)). A range of conduct was specified in s 36B(5), largely by reference to the "physical elements" – but not the "fault elements" – of various terrorism-related offences in the *Criminal Code*.[46]

    31.2. *Second*, that the conduct engaged in by the person demonstrated that the person had repudiated their allegiance to Australia (s 36B(1)(b)).

    31.3. *Third*, that it would be contrary to the public interest for the person to remain an Australian citizen, having regard to the criteria in s 36E(2) (s 36B(1)(c)).

32. In addition, s 36B(2) specified that the Minister could not make a determination under s 36B(1) if the Minister was satisfied that doing so would render a person stateless.

33. The second and third criteria from s 36B (and also the limitation to dual citizens) bear obvious resemblance to s 36D(1)(c), (d) and (2) respectively. However, the first criterion is radically different. Section 36B did not depend upon a past conviction (or convictions) and sentence (or sentences) arising pursuant to a judicial process. Instead, it established its own scheme pursuant to which the deprivation of citizenship was the

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[46] See Citizenship Act, s 36B(5)(a)-(h). The conduct identified also included fighting for, or being in the service of, a declared terrorist organisation and serving in the armed forces of a country at war with Australia, which did not correspond expressly with any provision in the *Criminal Code*: see Citizenship Act, s 36B(5)(i)-(j).

culmination of a single ministerial fact finding and decision-making process. That process was susceptible of characterisation as a process that purported to empower the Minister to make a finding as to whether reprehensible conduct had occurred (akin to adjudgment of guilt) and, if so, to impose punishment in retribution.

34. By contrast, s 36D empowers the Minister to determine that a person's Australian citizenship should cease only if, following an ordinary exercise of judicial power with all its attendant protections, a person has been convicted of a specified criminal offence and sentenced to imprisonment for at least three years. The issue in this case is whether that distinction is of constitutional significance. The respondents submit that it is. It ensures that s 36D is compatible with Ch III of the Constitution.

The plurality's reasoning

35. In *Alexander*, Kiefel CJ, Keane and Gleeson JJ held that the power reposed in the Minister by s 36B(1) was "a power which Ch III of the Constitution requires to be exercised by a court that is part of the federal judicature".[47] Justice Gageler agreed with the plurality's conclusion "and with the substance of their Honours' reasons for reaching it".[48] As a result, the plurality reasons can be taken to contain the *ratio decidendi* of the case.

36. The plurality characterised the "principal purpose" of s 36B as being "retribution for conduct deemed to be so reprehensible as to be 'incompatible with the shared values of the Australian community'".[49] That characterisation was supported by reference to the long-held understanding of "exile as a form of punishment".[50] It was also supported by reference to the statement of purpose in s 36A,[51] which states in part that "citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia". The plurality reasoned that the operative provisions that give effect to s 36A – including both s 36B and s 36D – are a response to conduct that is "so reprehensible that it is radically incompatible with the values of the

47 *Alexander* (2022) 96 ALJR 560 at [70].
48 *Alexander* (2022) 96 ALJR 560 at [98].
49 *Alexander* (2022) 96 ALJR 560 at [75] (Kiefel CJ, Keane and Gleeson JJ); see also [80], revealing that the plurality saw s 36B as imposing "punishment in the sense of retribution for the conduct described in s 36B(5)".
50 *Alexander* (2022) 96 ALJR 560 at [75] (Kiefel CJ, Keane and Gleeson JJ); see also [167]-[171] (Gordon J).
51 *Alexander* (2022) 96 ALJR 560 at [81] (Kiefel CJ, Keane and Gleeson JJ).

community".[52] That response was characterised as "retribution in the form of the deprivation of the entitlement to be at liberty in Australia".[53] Justices Gageler, Gordon and Edelman, each writing separately, similarly emphasised the policy stated in s 36A in concluding that s 36B had a punitive character.[54]

37. While the policy stated in s 36A was given effect by both ss 36B and 36D, it was the way in which s 36B carried that policy into effect that caused the plurality to conclude that s 36B purported to confer upon the Executive the exclusively judicial function of adjudging and punishing reprehensible conduct. That is apparent from the plurality's repeated emphasis on the contrast between s 36B and s 36D, despite the fact that both gave effect to the policy stated in s 36A.[55] As the plurality explained, a "comparison of the operation of s 36B with the provisions of s 36D … point[ed] to the conclusion" that s 36B infringed Ch III.[56] Their Honours then proceeded at some length to highlight the ways in which s 36B fell short of s 36D.

38. *First*, they emphasised that, unlike s 36B, s 36D imposed deprivation of citizenship "as a consequence of a conviction after a trial".[57] That has the consequence that deprivation of citizenship under s 36D can occur only where a person has benefited from "the protections afforded by a criminal trial".[58] The following passage makes the point crisply:[59]

> Both ss 36B and 36D deal with the topic of "[c]essation of citizenship on determination by [the] Minister". But in the case of s 36D, the power of the Minister arises only in relation to a person who has been convicted and sentenced of an offence or offences by a court. In contrast, the Minister's discretion under s 36B arises upon the Minister him or herself being satisfied that the conduct elements of the offence have occurred. And the Minister may be satisfied of those matters in circumstances in which the "offender" has not had a fair hearing (or indeed any hearing at all), much less the benefit of the other safeguards of a criminal trial, including the incidence of the burden of proof.

39. Thus, the defect in s 36B was identified in part as that "the process under s 36B may result in the same outcome by way of deprivation of citizenship as under s 36D, where

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52 *Alexander* (2022) 96 ALJR 560 at [82] (Kiefel CJ, Keane and Gleeson JJ); see also [75].
53 *Alexander* (2022) 96 ALJR 560 at [82] (Kiefel CJ, Keane and Gleeson JJ).
54 *Alexander* (2022) 96 ALJR 560 at [120] (Gageler J), [163] (Gordon J), [251] (Edelman J).
55 *Alexander* (2022) 96 ALJR 560 at [83]-[84] (Kiefel CJ, Keane and Gleeson JJ).
56 *Alexander* (2022) 96 ALJR 560 at [70] (Kiefel CJ, Keane and Gleeson JJ).
57 *Alexander* (2022) 96 ALJR 560 at [85] (Kiefel CJ, Keane and Gleeson JJ).
58 *Alexander* (2022) 96 ALJR 560 at [87] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added).
59 *Alexander* (2022) 96 ALJR 560 at [86] (emphasis added); see also [93] (Kiefel CJ, Keane and Gleeson JJ).

the protections afforded by a criminal trial have been afforded to the citizen".[60] This statement assumes that deprivation of citizenship can validly occur under s 36D.

40. The absence of the protections provided by the prior "due process of a criminal trial"[61] or the "safeguards of a criminal trial"[62] as a condition of the exercise of the power in s 36B was a major plank in the plurality's conclusion that s 36B was incompatible with Ch III.[63] Emphasising the significance of that matter, the plurality observed that whereas "s 36D affords a citizen the due process of a criminal trial before the Minister's discretion arises, a significant feature of s 36B is that it operates without due process at all".[64] Thus "in contrast to s 36D, which contemplates an orthodox exercise of judicial power as a necessary precondition of imposing relevantly the same punishment, s 36B does not contemplate an exercise of judicial power at all".[65]

41. *Second*, the plurality emphasised that, in "contrast to the position under s 36D", s 36B "contemplates a process of ministerial fact finding in relation to the grounds for the deprivation of citizenship in which the State is not required to carry the burden of proof"[66] and that "the Minister's discretion under s 36B arises upon the Minister him or herself being satisfied that the conduct elements of the offence have occurred".[67] Thus, at least a substantial part of the vice in s 36B was that it purported to empower the Minister to adjudicate upon whether reprehensible conduct (being the conduct elements of a criminal offence) had occurred, that adjudication being a necessary precondition to the Minister's imposition of punishment in respect of that reprehensible conduct. Justice Gordon similarly placed significance upon the Minister's role in "adjudicating on whether a person has engaged in conduct that constitutes the physical element of identified offences", emphasising that citizenship cessation was "'a consequential step' after the Minister's adjudication that the person has engaged in 'past acts' which, if accompanied by specified fault elements, would involve criminal guilt".[68]

42. The significance of the Minister's role in adjudicating upon whether reprehensible conduct has occurred in the conclusion that s 36B was invalid – that being a role that

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60 *Alexander* (2022) 96 ALJR 560 at [87] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added).
61 *Alexander* (2022) 96 ALJR 560 at [87] (Kiefel CJ, Keane and Gleeson JJ).
62 *Alexander* (2022) 96 ALJR 560 at [86] (Kiefel CJ, Keane and Gleeson JJ).
63 *Alexander* (2022) 96 ALJR 560 at [87]; see also [85]-[86], [91] (Kiefel CJ, Keane and Gleeson JJ).
64 *Alexander* (2022) 96 ALJR 560 at [91] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added).
65 *Alexander* (2022) 96 ALJR 560 at [93] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added).
66 *Alexander* (2022) 96 ALJR 560 at [87] (Kiefel CJ, Keane and Gleeson JJ).
67 *Alexander* (2022) 96 ALJR 560 at [86] (Kiefel CJ, Keane and Gleeson JJ).
68 *Alexander* (2022) 96 ALJR 560 at [165].

has no equivalent under s 36D – is powerfully reinforced by the plurality's summary of their reasoning. In paragraph 96 of their judgment, which appears immediately before the answers to the reserved questions, the plurality stated:[69]

> In summary in relation to the Ch III issue, the effect of the Minister's determination under s 36B(1) is to deprive Mr Alexander of his entitlement to enter and live at liberty in Australia. That sanction by the Parliament may be imposed only upon satisfaction of the Minister that Mr Alexander engaged in conduct that is so reprehensible as to be deserving of the dire consequence of deprivation of citizenship and the rights, privileges, immunities and duties associated with it. The power to determine the facts which enliven the power to impose such a punishment is one which, in accordance with Ch III of the Constitution, is exercisable exclusively by a court that is part of the federal judicature.

43. In light of that paragraph, *Alexander* is authority for the proposition that the "power to determine the facts that enliven the power to impose" citizenship cessation is exclusively judicial. It supports no wider proposition. That formulation delineates between s 36B and s 36D, capturing the reason that the plurality considered s 36B to be invalid, while at the same time strongly implying that s 36D is valid. While of course s 36D was not challenged in *Alexander*,[70] the plurality's comparison between s 36B and s 36D forms part of their reasoning as to why s 36B was invalid, and makes sense only if it was directed to illuminating differences between the provisions that were relevant to their validity (no purpose being served by engaging in a lengthy comparative exercise with another provision that also infringes Ch III).

44. The line drawn by the plurality in paragraph 96 of *Alexander* reflects an appropriate accommodation of the expertise and proper role of different branches of government. It allows the Parliament to identify the kinds of conduct that, if they occur, are inconsistent with ongoing membership of the Australian body politic. It then requires the judiciary, following a judicial process, to make any findings of fact necessary to determine whether that conduct has occurred. If it has, then on the basis of those findings of fact it allows the Executive – without infringing Ch III – to decide whether, having regard to all relevant public interest considerations (including those relating to international relations) citizenship cessation should occur.

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69 *Alexander* (2022) 96 ALJR 560 at [96] (emphasis added); see also [165] (Gordon J, emphasising "the Minister's role in adjudicating on whether a person has engaged in conduct"), [252] (Edelman J, emphasising that the Minister was both the person who "decided that the conduct was extreme" and the person who "exercises a discretion to determine whether Australian citizenship should cease").

70 (2022) 96 ALJR 560 at [80] (Kiefel CJ, Keane and Gleeson JJ); see also [174] (Gordon J).

45. If, contrary to paragraph 96 of *Alexander*, the relevant exclusively judicial power were to be identified not just as "the power to find the facts" that enliven a citizenship cessation power, but also as the power to decide whether citizenship cessation should be imposed, that would represent a limit upon Australia's sovereign powers to determine membership of its community of a kind without parallel among modern liberal democracies.[71] At a minimum, it would require courts in a civil proceeding to make determinations of a kind ill-adapted to the judicial process.[72] But the logic of extending the *Lim* principle to all orders for citizenship cessation in response to reprehensible conduct might mean that even a court could exercise that power only as a consequential step following the adjudgment of criminal guilt (in other words, as a sentencing function following conviction).[73] Again, that would constitute a restriction on Australia's sovereign capacity to exclude citizens who have repudiated their allegiance without any parallel in comparable countries.

46. The applicant contends that the plurality's detailed comparison of s 36B and s 36D was directed solely to answering an argument that s 36B was valid because the power it conferred on the Executive lacked certain features that are the "typical indicia of judicial power" (**AS [33]**). That is implausible, because the rejection of that argument did not require the Court to demonstrate that s 36B lacked those features by comparison with s 36D. To the contrary, the absence of those features was the premise for the argument. That explanation for the plurality's comparison of s 36B and s 36D

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71 Compare, for example, *British Nationality Act 1981* (UK) (as currently in force), s 40(2) (which provides for the Secretary of State to deprive a person of a citizenship status if satisfied that deprivation is "conducive to the public good"), s 40(4A) (which provides for the Secretary of State to deprive a person of a citizenship status, even if it would render them stateless, if satisfied that deprivation is "conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom"; *British Nationality Act 1981* (UK) (as enacted), s 40(3) and *Nationality and Citizenship Act 1948* (Cth), s 21(1)(a) (which both provided for the Executive to deprive certain persons of citizenship where they had "shown [themselves] by act or speech to be disloyal or disaffected towards [Her/His] Majesty"); *Irish Nationality and Citizenship Act 1956* (Ireland), s 19(1)(b) (which provides that the Minister may revoke a certification of naturalization if satisfied that the person "has, by any overt act, shown himself to have failed in his duty of fidelity to the nation and loyalty to the State"; *Citizenship Act 1977* (NZ), s 16(b) (which provides that the Minister may deprive a person of New Zealand citizenship if satisfied that the person "voluntarily exercised any of the privileges or performed any of the duties of another nationality or citizenship possessed by him in a manner that is contrary to the interests of New Zealand").

72 See, eg, *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 367-373 (Gummow J); *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305 (Kitto J). See also, albeit in a different context, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [27] (Gleeson CJ).

73 Cf *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ), 53 (Gaudron J).

also fails to engage with the actual reasoning summarised above, and with the formulation used by the plurality in summarising their own reasons.

(c) Section 36D does not repose exclusively judicial power in the Minister

47. Section 36D does not confer an exclusively judicial function on the Minister. It does not exhibit the vice of s 36B, because it does not confer upon the Minister "[t]he power to determine the facts which enliven the power to impose" citizenship cessation in response to reprehensible conduct.[74] Instead, s 36D is enlivened only where a court has found the relevant facts, and where as a result the person has been convicted of a specified criminal offence and sentenced to at least three years' imprisonment.[75] In that way, s 36D ensures that citizenship cessation can occur only following an "orthodox exercise of judicial power",[76] in which the person affected has been found guilty of a serious offence in proceedings in which they have received all of the safeguards of a criminal trial.[77]

48. Unlike s 36B, s 36D respects and preserves the central role of courts in adjudging and punishing criminal guilt and takes as its premise that that adjudgment and punishment has occurred. Indeed, a determination made under s 36D(1) is automatically revoked if a decision of a court has overturned or quashed the relevant conviction, or convictions, to which the determination relates or reduced the sentence, or sentences, to below the period of three years' imprisonment.[78]

49. There is no reason to extend the holding in *Alexander* to invalidate s 36D. In enacting that section, Parliament identified past convictions and sentences as factums that enliven the power conferred upon the Executive by s 36D(1).[79] The section follows a legislative model that has repeatedly been held not to involve the imposition of additional punishment for the criminal offence that enlivened the power. Indeed, the selection of past convictions as the factum to enliven further powers has historically been recognised as a factor in favour of validity.[80] Ordinarily, it is said that such powers "operate on the status of the person deriving from their conviction [and sentence]. By selecting facts of

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74 *Alexander* (2022) 96 ALJR 560 at [96] (Kiefel CJ, Keane and Gleeson JJ), [165] (Gordon J).
75 Compare *Falzon* (2018) 262 CLR 333 at [46]-[48] (Kiefel CJ, Bell, Keane and Edelman JJ), [89] (Gageler and Gordon JJ), [93] (Nettle J).
76 *Alexander* (2022) 96 ALJR 560 at [93] (Kiefel CJ, Keane and Gleeson JJ).
77 *Alexander* (2022) 96 ALJR 560 at [78], [86] (Kiefel CJ, Keane and Gleeson JJ).
78 Citizenship Act, s 36K(1)(b).
79 *Alexander* (2022) 96 ALJR 560 at [174] (Gordon J), citing *Falzon* (2018) 262 CLR 333 at [89] (Gageler and Gordon JJ).
80 *Fardon* (2004) 223 CLR 575 at [108] (Gummow J). See also *South Australia v Totani* (2010) 242 CLR 1 at [137] (Gummow J).

conviction and imprisonment, Parliament does not [authorise the Executive] to impose an additional punishment".[81]

50. The particular force of these considerations in the case of s 36D becomes apparent when one appreciates that Parliament has chosen, as the factums to enliven the Minister's citizenship cessation power, conviction and sentencing for only a specific category of offence. As explained above, the offences identified in s 36D(5) are "inherently suggestive of the absence of a continuing commitment to the Australian body politic";[82] they all involve conduct which, of its nature, is "inimical to Australia's interests".[83] It follows that the "status" of a person who has been convicted of such an offence includes that they are a person who has been found to have engaged in "conduct [that] is inimical to Australia's interests".[84] In other words, a court has determined that such a person falls within a category of persons that this Court recognised in *Alexander* may have their citizenship withdrawn in exercise of Parliament's power (pursuant to s 51(xix)) to "prescribe the conditions on which … citizenship may be … *lost*".[85] Put differently, Parliament's reliance upon conviction of specified offences and a sentence of a particular severity as the factums enlivening the Minister's power is "a method, albeit imperfect" of identifying the offending that may be "so serious as to warrant" exclusion from the body politic.[86] But the scheme also recognises that – for a range of possible public interest reasons – citizenship cessation may not be appropriate for all persons who are found to have committed such offences. The adoption of prior conviction and a lengthy sentence of imprisonment as factums to enliven s 36D therefore narrows and focuses the power upon the people to whom it could validly apply under s 51(xix), and whose conduct is most likely to warrant its exercise.

51. The Court having completed its task of convicting and sentencing the offender, it should not lightly be concluded that citizenship cessation is imposed as a further punishment for criminal offending. Rather, the power conferred on the Executive by s 36D reflects the Parliament's judgment that it may be appropriate to exclude persons who have committed these offences from the body politic, if the Minister is satisfied: (i) that the person has, by their offending, demonstrated an absence of continuing commitment to the Australian

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81 *Falzon* (2018) 262 CLR 333 at [48] (Kiefel CJ, Bell, Keane and Edelman JJ).
82 *Alexander* (2022) 96 ALJR 560 at [48] (Kiefel CJ, Keane and Gleeson JJ).
83 *Alexander* (2022) 96 ALJR 560 at [63] (Kiefel CJ, Keane and Gleeson JJ). See also [35].
84 *Alexander* (2022) 96 ALJR 560 at [63] (Kiefel CJ, Keane and Gleeson JJ).
85 *Alexander* (2022) 96 ALJR 560 at [36] (Kiefel CJ, Keane and Gleeson JJ), quoting *Ex parte Te* (2002) 212 CLR 162 at [31] (Gleeson CJ).
86 Compare, by analogy, *Roach* (2007) 233 CLR 162 at [11] (Gleeson CJ).

body politic; and (ii) that it would be contrary to the public interest for the person to remain an Australian citizen. Neither of these considerations suggests an exercise of judicial power.[87] Instead, the better view is that s 36D(1) "operate[s] by reference to" certain persons' "status deriving from … conviction, but then sets up its own normative structure" that is concerned with membership of the Australian body politic rather than with the imposition of punishment of a kind that can only be imposed by a Ch III court.[88]

52. Thus, while the consequences of an order under s 36D are such that it may, in one sense, be characterised as imposing "punishment", in circumstances where such an order can be made only after an "adjudgment of guilt" by a court, such an order does not involve "punishment" of a kind within the exclusive power of the judiciary. That follows either because the function of making such an order is not combined with the adjudgment of guilt, or because the making of the order after all relevant facts have been found by a court constitutes an exceptional case akin to the exceptions recognised in *Lim*.

53. The above conclusion derives strong support from the history of citizenship cessation legislation. That history does not reveal any legislation that empowers a court to order citizenship cessation. By contrast, there is a long history of legislation that provides for citizenship cessation, including as a result of legislative declaration,[89] or by an executive decision following conviction by a court.[90] Considerations of history therefore point against the proposition that, even where the relevant facts have been found by a court, citizenship cessation can occur only as a result of a judicial order.

54. Laws comparable to s 36D – providing for the deprivation of citizenship (whether by executive decision or automatically by operation of law) following conviction of serious offences that are prejudicial to the interests of a State – exist in many other

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87 See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 400 (Windeyer J): "public interest is a concept which attracts indefinite considerations of policy that are more appropriate to law-making than to adjudication according to existing law".

88 *Fardon* (2004) 223 CLR 575 at [74] (Gummow J). See also *Falzon* (2018) 262 CLR 333 at [48] (Kiefel CJ, Bell, Keane and Edelman JJ).

89 See, eg, *Nationality and Citizenship Act 1948* (Cth), s 19 (providing that any Australian citizen who: (i) was also a national or citizen of another country; and (ii) served in the armed forces of a country at war with Australia, automatically ceased to be an Australian citizen upon commencing that service). An equivalent provision remained law until the enactment of the 2020 Act: Citizenship Act, s 35.

90 See, eg, *Nationality Act 1920* (Cth), s 12(2)(b) and *Nationality and Citizenship Act 1948* (Cth), s 21(1)(e) and (2), which provided for the Minister to cease the citizenship of naturalized citizens who, within five years after naturalization, were sentenced to imprisonment for a term of 12 months or more where the Minister was satisfied that it was not conducive to the public good that the person continue to be a citizen. See also s 21 of the 1948 Act, following the enactment of s 7 of the *Nationality and Citizenship Act 1958* (Cth). See, similarly, *British Nationality Act 1948* (UK), s 20(3)(c) and (5); *British Nationality Act 1981* (UK) (as enacted), s 40(3)(c) and (5).

countries.[91] Of particular note, they exist in the United States of America, where the express protections afforded to citizenship might be expected to be greater than those derived from Ch III of the Australian Constitution. The Fourteenth Amendment to the United States Constitution guarantees that "[a]ll persons born or naturalized in the United States … are citizens of the United States". It is well established that Congress lacks power to take away an American citizen's citizenship without their "assent".[92] Nevertheless, it has been held that assent can be found not just in words, but also "as a fair inference from proved conduct" or from the voluntary commission of an expatriating act specified by Congress.[93] In that context, pursuant to 8 USC §1481(7),[94]

10 a person who is a national of the United States:

> … shall lose [their] nationality by voluntary performing any of the following acts with the intention of relinquishing United States nationality: … committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of title 18,[95] or wilfully performing any act in violation of section 2385 of title 18,[96] or violating section 2384 of title 18[97] by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, <u>if and when he [or she] is convicted thereof by a court martial or by a court of competent jurisdiction.</u>

20 55. The serious consequences of citizenship cessation are not, in themselves, determinative of the conclusion that the power to order citizenship cessation is exclusively judicial. To suggest otherwise is inconsistent with the reasons in *Alexander* itself with respect to s 36D.[98] It would also mean that all of the laws (both preceding and post-dating Federation) that provided for denationalization other than by a court for engaging in certain conduct were of a kind that could not be enacted by the Parliament.

56. Finally, in characterising the severity of citizenship cessation, it should be recognised that the loss of rights involved is the same irrespective of the reason citizenship cessation

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91 See, eg, 8 USC § 1481(7); *Civil Code* (France), Art 25(1)-(3). 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 22-24 (referring to similar laws providing for citizenship loss following conviction of serious offences in Belgium, Bulgaria, Cyprus, Denmark, Netherlands). See also *Strengthening Canadian Citizenship Act*, SC 2014, c 22, s 8 (which inserted the now-repealed s 10(2) into the *Canadian Citizenship Act*, SC 1985, c 29).

92 *Vance v Terrazas* (1979) 444 US 252 at 260 (White J).

93 *Vance v Terrazas* (1979) 444 US 252 at 260 (White J). See also *Richards v Secretary of State* (1985) 752 F 2d 1413 at 1420.

94 Enacted in a substantially similar form in 1952: see *Immigration and Nationality Act of 1952*, 66 Stat 163 (as enacted), § 349(a)(9).

95 Offence of rebellion or insurrection.

96 Offence of advocating overthrow of Government.

97 Offence of seditious conspiracy.

98 (2022) 96 ALJR 560 at [76] (Kiefel CJ, Keane and Gleeson JJ), [162] (Gordon J), [241], [245] (Edelman J).

occurs. From the time when citizenship ceased to be indelible, it could be lost as a result of being naturalized in a foreign state, or marriage by a woman to a foreign subject.[99] Subsequently it could also be lost (in the case of citizens by registration and naturalization) by residing outside Australia for a continuous period of seven years without giving notice of an intention to retain citizenship.[100] These examples do not involve loss of citizenship by "consent",[101] for in each case the people who lost their citizenship may have strongly wished to retain it, even if they voluntarily engaged in (or had no choice but to engage in) the conduct that triggered the loss of their citizenship. If, contrary to that submission, the voluntariness of the conduct that results in citizenship loss is the decisive consideration, then loss of citizenship that occurs as a result of the voluntary commission of a crime should likewise be characterised as voluntary.[102]

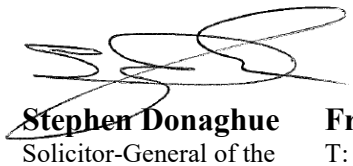
D. ANSWERS TO SPECIAL CASE QUESTIONS

57. The questions in the special case should be answered as follows: Question 1: No. Question 2: None. Question 3: The applicant.

PART VI ESTIMATED TIME

58. It is estimated that the respondents will require up to 2 hours to present oral argument.

Dated: 2 May 2023



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99 See, eg, *Naturalization Act 1870* (Imp), ss 6, 10(1), which respectively provided that a British subject would automatically cease to hold that status if naturalized in a foreign State or, for women, if they married a foreign subject; *Nationality and Citizenship Act 1948* (Cth), s 17, which provided that an adult ceased to be an Australian citizen if they acquired the citizenship of another country by some voluntary and formal act taken outside Australia other than marriage. That section was repealed by s 13 of the *Australian Citizenship Amendment Act 1984* (Cth), which was in force between 22 November 1984 and 4 April 2002, and provided that a person who acquired citizenship of another country ceased to be an Australian citizen if the "sole or dominant purpose" of their actions was to acquire the other citizenship. See Irving, "The Concept of Allegiance in Citizenship Law and Revocation: An Australian Study" (2019) 23(4) *Citizenship Studies* 372 at 375.

100 *Nationality and Citizenship Act 1948* (Cth), s 20.

101 Cf *Alexander* (2022) 96 ALJR 560 at [250].

102 Compare *Richards v Secretary of State* (1985) 752 F 2d 1413 at 1420.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **ABDUL NACER BENBRIKA**
Applicant

AND:

MINISTER FOR HOME AFFAIRS
First Respondent

10 **COMMONWEALTH OF AUSTRALIA**
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENTS

Pursuant to Practice Direction No 1 of 2019, the Respondents 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.	*Commonwealth Constitution*	Current (Compilation No 6, 29 July 1977 – present)	s 51(xix), Ch III
2.	*Constitution of the United States*	Current	Amendment XIV
Statutory provisions			
Commonwealth			
3.	*Acts Interpretation Act 1901* (Cth)	Current (Compilation No. 36, 20 December 2018 – present)	s 15A
4.	*Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth)	As made (11 December 2015)	Sch 1, item 5
5.	*Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth)	As made (17 September 2020)	Sch 1, items 9, 19
6.	*Australian Citizenship Amendment Act 1984* (Cth)	As made (25 October 1984)	s 13

No.	Description	Version	Provisions
7.	*Australian Citizenship Act 2007* (Cth)	Current (Compilation No. 29, 18 September 2020 – present)	Pt 2 Div 3 Subdiv C, ss 36A, 36B, 36D, 36E, 36K
8.	*Australian Citizenship Act 2007* (Cth)	Compilation No. 28, 6 September 2020 – 17 September 2020	s 35
9.	*Criminal Code* (Cth)	As at 15 September 2008 (1 July 2008 – 22 May 2009)	Pt 5.3, ss 101.4, 102.2, 102.3
10.	*Criminal Code Amendment (Terrorism) Act 2003* (Cth)	As made (27 May 2003)	
11.	*Judiciary Act 1903* (Cth)	Current (Compilation No. 49, 18 February 2022 – present)	s 78B
12.	*Migration Act 1958* (Cth)	Current (Compilation No. 153, 17 February 2023 – present)	s 35
13.	*Nationality Act 1920* (Cth)	As made (2 December 1920)	s 12
14.	*Nationality and Citizenship Act 1948* (Cth)	As made (21 December 1948)	ss 17, 19, 20, 21
15.	*Nationality and Citizenship Act 1958* (Cth)	As made (8 October 1958)	s 7
16.	*Naturalization Act 1903* (Cth)	As made (13 October 1903)	s 11
17.	*Naturalization Act 1917* (Cth)	As made (20 September 1917)	s 7
Foreign			
18.	*British Nationality Act 1948* (UK)	As made	s 20
19.	*British Nationality Act 1981* (UK)	Current (23 November 2022 – present)	s 40
20.	*British Nationality Act 1981* (UK)	As made (30 October 1981)	s 40
21.	*Canadian Citizenship Act*, SC 1985, c 29	As at 19 June 2014 (19 June 2014 – 31 July 2014)	s 10
22.	*Citizenship Act 1977* (NZ)	Current (1 December 2020 – present)	s 16
23.	*Civil Code* (France)	Current	Art 25

No.	Description	Version	Provisions
24.	*Immigration and Nationality Act of 1952* (US), 66 Stat 163	As made (27 June 1952)	§ 349
25.	*Irish Nationality and Citizenship Act 1956* (Ireland)	Current (20 April 2023 – present)	s 19
26.	*Naturalization Act 1870* (Imp)	As made (12 May 1870)	ss 6, 10
27.	*Strengthening Canadian Citizenship Act*, SC 2014, c 22	As made (19 June 2014)	s 8
28.	United States Code, Title 8 (Aliens and Nationality)	Current (3 January 2022 – present)	§ 1481