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
MELBOURNE REGISTRY

BETWEEN: **ABDUL NACER BENBRIKA**
Applicant

AND:

MINISTER FOR HOME AFFAIRS
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENTS

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Section 36D (**RS [6]-[16]**)

2. The power under s 36D of the Citizenship Act (cf s 36B) can be exercised only where:

   (a) a person has been convicted of an offence, or offences, specified in s 36D(5) (s 36D(1)(a)), being offences relating to terrorism, treason, sabotage, espionage, foreign interference and foreign incursions and recruitment, which are "inherently suggestive of the absence of a continuing commitment to the Australian body politic": *Alexander* (2022) 96 ALJR 560 at [48] **(Vol 11, Tab 77)**; and

   (b) the person has been sentenced to imprisonment for a period of (or periods totalling) at least three years in respect of that conviction or convictions (s 36D(1)(b)).

3. Thus, the Minister's power under s 36D to determine that a person's citizenship should cease is enlivened only where, in an ordinary criminal trial, the facts to which the Minister may have regard have been: (1) found by the court to prove guilt beyond reasonable doubt; and (2) determined to warrant a serious prison sentence.

Alexander **(2022) 96 ALJR 560 (Vol 11, Tab 77)** (**RS [31]-[46]**)

4. The plurality (Gageler J agreeing) relied upon three "considerations" in support of the conclusion that s 36B conferred a power on the Minister that Ch III required "to be exercised by a [Ch III] court", namely: (1) the consequences of a determination under s 36B for the citizen; (2) the legislative policy which informs the operation of s 36B; and (3) "a comparison of the operation of s 36B" with s 36D: at [70].

5. **As to (1)**: Section 36D will generally apply to persons within the migration zone, who are automatically granted visas upon their citizenship ceasing: s 35(3) of the *Migration Act* (**Vol 2, Tab 13**). A separate exercise of statutory power is required to affect liberty, and that power attracts merits and judicial review: cf *Damache* [2020] IESC 63 at [70] (**Vol 13, Tab 96**). Further, as the loss of rights consequent upon citizenship cessation is the same regardless of the reason for which it occurs, that consequence cannot itself be sufficient to mark citizenship cessation as an exclusively judicial function.

6. **As to (2)**: it is accepted that s 36B and s 36D share the purpose identified in s 36A: see at [82]-[84]; see also [75], [163].

7. **As to (3)**: the plurality emphasised that the Minister's discretion under s 36B arose upon the Minister him or herself being satisfied that a person had engaged in specified conduct (which was largely identified by reference to the physical elements, but not the fault elements, of certain terrorism offences), without any guarantee of due process or the protections of a criminal trial: see, eg, [85]-[87], [91], [93]. This was a matter on which Gordon J also placed emphasis: at [165], [173]. The constitutional deficiencies of s 36B were repeatedly contrasted with the protections afforded by s 36D (eg, that s 36D afforded the "safeguards of a criminal trial" and "due process" and made "an orthodox exercise of judicial power" a necessary precondition of the exercise of that power): at [85]-[87], [91], [93]. That comparison illuminated the location of the applicable constitutional limit.

8. The statement of law for which *Alexander* is authority with respect to Ch III is summarised (at [96]) in the proposition that "[t]he power to determine the facts which enliven the power to impose [the serious] punishment is one which, in accordance with Ch III … is exercisable exclusively by a [Ch III] court". That is a test that s 36B failed, but that s 36D satisfies.

Adjudgment and punishment (RS [20]-[30])

9. In *Lim* (1992) 176 CLR 1 at 27 **(Vol 4, Tab 37)**, Brennan, Deane and Dawson JJ identified the "adjudgment and punishment of criminal guilt" as an exclusively judicial function. That formulation has been repeatedly endorsed: see, eg, *Duncan* (2015) 255 CLR 388 at [41] (**Vol 4, Tab 40**); *Alexander* (2022) 96 ALJR 560 at [71], [158] (**Vol 11, Tab 77**).

10. Contrary to **ASR [2]**, this Court has not previously departed from this conjunctive formulation. That point was neither argued nor decided in *Falzon* (2018) 262 CLR 333 (**Vol 5, Tab 42**), and it has not been argued in subsequent cases. The Court should not now take that step, which would be contrary to its long-standing acceptance that:

    (a) the Executive may be given the function of adjudging criminal guilt (in the sense of ascertaining whether a person in fact committed an offence), provided that it does not result in punishment: see *BLF Case* (1982) 152 CLR 25 at 37, 68, 149-152; cf 109-110; *Today FM* (2015) 255 CLR 352 at [33] **(Vol 4, Tab 34)**; and

    (b) where a power is enlivened by the fact of an earlier conviction and/or sentence – such that the task of adjudging and punishing guilt has already been performed by

a court – conformity with Ch III does <u>not</u> simply turn on whether the effect of the exercise of the power can be characterised as "punishment". While that is highly relevant, in characterising such a power a value judgment is required that takes account, amongst other things, of historical practice: see *Lim* at 67; *Duncan* at [43]; *Polyukhovich* (1991) 172 CLR 501 at 536, 608, 610, 646, 649, 721; *Emmerson* (2014) 253 CLR 393 at [37], [74]-[75].

Section 36D does not confer exclusively judicial power on Minister (RS [47]-[56])

11. Applying *Alexander* at [96], s 36D does not purport to confer an exclusively judicial power on the Minister. It is, therefore, valid. Three factors support that conclusion.

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12. **First**, the Minister's power to impose citizenship cessation is enlivened only where <u>a court</u> has found the relevant facts, and where, as a result, the person has been found guilty of an offence that is inimical to Australia's interests. Consequently, s 36D does not exhibit the vice of s 36B. The applicant's submissions that the Minister has a "substantial" fact-finding role under s 36D(1)(c) and (d) must be rejected (cf **AS [41]-[43]; ASR [8]-[9]**). That construction is contrary to the text of the provision. Further, this Court rejected a similar argument in *Minogue* (2018) 264 CLR 252 (**Vol 6, Tab 52**).

13. **Second**, no Australian legislation has historically involved a <u>court</u> making the order for citizenship cessation. By contrast, there is a long history of legislation providing for citizenship cessation by executive decision, following a conviction by a court (see, eg, *Nationality Act 1920* (Cth), s 12(2)(b) **(Vol 3, Tab 14)**); and by automatic operation of law (see, eg, *Nationality and Citizenship Act 1948* (Cth), s 19 **(Vol 3, Tab 15)**). That historical practice supports the line identified in *Alexander* at [96].

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14. **Third**, certain matters to which the Minister must have regard under s 36D are not well suited to judicial determination (let alone appropriate to be classified as matters exclusively for judicial evaluation): see, eg, ss 36D(1)(c)-(d), 36E(2)(h).

15. Alternatively, this Court should recognise that, at least where a person has been convicted and sentenced by a court for an offence within the narrow category of offences that engage s 36D, imposition of citizenship cessation as a consequence of such offending otherwise than by a Ch III court is permissible as an exception to the *Lim* principle.

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Dated: 14 June 2023

Stephen Donaghue | Frances Gordon | Luca Moretti | Arlette Regan