HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

PHYLLIP JOHN JONES PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

Jones v Commonwealth of Australia
[2023] HCA 34
Date of Hearing: 15 June 2023
Date of Judgment: 1 November 2023
B47/2022

ORDER

The questions stated for the opinion of the Full Court in the special case filed on 4 April 2023 be answered as follows:

Question 1: *Is s 34(2)(b)(ii) of the* Australian Citizenship Act 2007 *(Cth) invalid in its operation in respect of the plaintiff because:*

(a) *it is not supported by s 51(xix) of the* Constitution*; or*

(b) *it reposes in the Minister the exclusively judicial function of punishing criminal guilt?*

Answer: *No.*

Question 2: *What, if any, relief should be granted to the plaintiff?*

Answer: *None.*

Question 3: *Who should pay the costs of the special case?*

Answer: *The plaintiff.*

Representation

S H Hartford Davis with D J Reynolds, S J Hoare and K E W Bones for the plaintiff (instructed by Fisher Dore Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, and F I Gordon SC with L G Moretti and A N Regan for the defendants (instructed by Australian Government Solicitor)

CATCHWORDS

Jones v Commonwealth of Australia

Constitutional law (Cth) – Powers of Commonwealth Parliament – Power to make laws with respect to naturalisation and aliens – Cessation of Australian citizenship – Where s 34(2)(b)(ii) of *Australian Citizenship Act 2007* (Cth) ("Act"), in context, provided Minister may revoke person's Australian citizenship acquired by conferral if, among other matters, person "convicted of a serious offence" within meaning of s 34(5) after making application to become Australian citizen – Where s 34(5) provided person "convicted of a serious offence" for purposes of s 34 if person convicted of offence against Australian law or foreign law for which person sentenced to death or to "serious prison sentence" and person committed offence before becoming Australian citizen – Where s 3 defined "serious prison sentence" as sentence of imprisonment for period of at least 12 months – Where plaintiff British and Australian citizen – Where plaintiff Australian citizen by virtue of certificate of Australian citizenship – Where plaintiff convicted of criminal offences relating to conduct before becoming Australian citizen and sentenced to more than 12 months' imprisonment – Where Minister revoked plaintiff's Australian citizenship under s 34(2) of Act – Whether s 34(2)(b)(ii) of Act supported by s 51(xix) of *Constitution* – Whether s 34(2)(b)(ii) law with respect to naturalisation.

Constitutional law (Cth) – Judicial power of Commonwealth – Cessation of Australian citizenship – Where precondition to Minister's power to revoke person's Australian citizenship under s 34(2)(b)(ii) of Act was, among other things, that person convicted of and sentenced to imprisonment for period of at least 12 months for offence committed before becoming Australian citizen – Whether s 34(2)(b)(ii) contrary to Ch III of *Constitution* for conferring upon Minister exclusively judicial function of punishing criminal guilt – Whether s 34(2)(b)(ii) limited to what is reasonably capable of being seen as necessary for purpose of protecting integrity of naturalisation process.

Words and phrases – "alien", "cessation of citizenship", "citizen", "citizenship", "denationalisation", "denaturalisation", "deprivation of citizenship", "good character", "integrity of naturalisation process", "legitimate non-punitive purpose", "naturalisation", "naturalization", "people of the Commonwealth", "proportionality", "public interest", "punishing criminal guilt", "punishment", "punitive", "reasonable necessity", "revocation of citizenship", "statutory precondition".

Constitution, s 51(xix), Ch III.
Australian Citizenship Act 2007 (Cth), s 34.

1 KIEFEL CJ, GAGELER, GLEESON AND JAGOT JJ. Subject to the *Constitution*, including the constraint imposed by Ch III that any legislative vesting of judicial power can be only in a court, s 51(xix) of the *Constitution* confers power on the Commonwealth Parliament to make laws with respect to "naturalization and aliens". Questions concerning the scope and application of the "aliens" limb of s 51(xix) have been considered and determined in numerous prior decisions. The questions in this special case, in contrast, can be determined solely by reference to the "naturalization" limb.

2 The proceeding in the original jurisdiction of the High Court which gives rise to the special case involves a challenge to the validity of s 34(2)(b)(ii) of the *Australian Citizenship Act 2007* (Cth) ("the Citizenship Act") in its application to a person who is a national or citizen of another country and who became an Australian citizen by virtue of the grant of a certificate of Australian citizenship under Div 2 of Pt III of the now repealed *Australian Citizenship Act 1948* (Cth) ("the 1948 Act"). The challenged provision, as will be seen, operates to empower a Minister administering the Citizenship Act to revoke the Australian citizenship of such a person if the person is convicted of and sentenced to imprisonment for a period of at least 12 months for an offence committed before the person became an Australian citizen and if the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

3 The substantive question raised in the special case is whether the challenged provision is invalid in its application to such a person either because it is not supported by s 51(xix) of the *Constitution* or because it reposes in the Minister the exclusively judicial function of punishing criminal guilt contrary to Ch III of the *Constitution*.

4 The short answer is that the provision is valid. It provides for "an act or process of denaturalization"[1] which is supported by the "naturalization" limb of s 51(xix) of the *Constitution*. The power it confers on the Minister to denaturalise an Australian citizen is not a power to punish criminal guilt and is not otherwise exclusively judicial. The Commonwealth Parliament's choice to confer that power on the Minister rather than a court therefore is not contrary to Ch III of the *Constitution*.

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1 See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183; *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 573 [36]; 401 ALR 438 at 447.

The circumstances of the plaintiff

5 The plaintiff, Mr Jones, was born in 1950 in the United Kingdom. Under the law of the United Kingdom, he became a citizen of the United Kingdom and its Colonies at birth and a British citizen in 1981. He remains a British citizen.

6 Mr Jones migrated to Australia with his parents in 1966. In 1988, he applied for and was granted a certificate of Australian citizenship under s 13(1) of the 1948 Act. He afterwards took an oath or made a declaration of allegiance in the manner provided by s 15(2) in accordance with the appropriate form set out in Sch 2 to the 1948 Act. He thereupon became an Australian citizen by operation of s 15(1) of the 1948 Act.

7 In 2003, Mr Jones was convicted in the District Court of Queensland of five counts of indecent dealing and indecent assault committed at various times between 1980 and 2001. Two of those five counts related to conduct that occurred entirely before he became an Australian citizen in 1988. For each of those five counts, he was sentenced to a term of imprisonment of two and a half years to be served concurrently with each other term.

8 In 2018, the then Minister for Home Affairs, Immigration and Border Protection revoked Mr Jones' Australian citizenship under s 34(2) of the Citizenship Act. By that time, Mr Jones had been an Australian citizen for 29 years and had lived in Australia continuously for 52 years. Since arriving in 1966, he had left Australia only twice, for a combined total of around 27 days. On both occasions, he had travelled on vacation on an Australian passport.

9 The result of the action of the Minister was that Mr Jones immediately ceased to be an Australian citizen by operation of s 34(4) of the Citizenship Act. By operation of s 35(3) of the *Migration Act 1958* (Cth) ("the Migration Act"), he was immediately taken to have been granted an ex-citizen visa.

10 In 2021, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs cancelled Mr Jones' ex-citizen visa under s 501(2) of the Migration Act. In 2022, Mr Jones was taken into immigration detention under s 189 of the Migration Act. He has remained in immigration detention since then.

The applicable legislative provisions, their legislative history and their legislative purpose

11 When Mr Jones applied for and was granted his certificate of Australian citizenship in 1988, Div 2 of Pt III of the 1948 Act was headed "Grant of Australian Citizenship". Division 4 of the same Part was headed "Loss of Citizenship". Both

of those Divisions had been substantially amended by the *Australian Citizenship Amendment Act 1984* (Cth) ("the 1984 Amendment Act").

12 Within Div 2 of Pt III of the 1948 Act, s 13 provided for the grant of a certificate of Australian citizenship and s 15 provided for the effect of such a grant. Section 13(1) provided that "the Minister may, in his discretion, upon application ... grant a certificate of Australian citizenship to a person who satisfies the Minister" that, amongst other things, "he is of good character"[2]. Section 15(1) provided that a person to whom a certificate of Australian citizenship was granted under the Division who took an oath or made an affirmation of allegiance, in the manner provided by s 15(2) and in accordance with the appropriate form set out in Sch 2, thereupon became an Australian citizen.

13 The precondition to the grant of a certificate of Australian citizenship under s 13(1) of the 1948 Act that the Minister be satisfied that the person was of "good character" required the Minister to be satisfied of the person's "enduring moral qualities", being their "disposition rather than general reputation"[3]. Past conviction of a serious offence was relevant to the requisite ministerial assessment of character, without necessarily being determinative of that assessment[4]. That was because the conviction amounted to conclusive evidence of the past criminal conduct to which it related[5].

14 Within Div 4 of Pt III of the 1948 Act was s 21. It was headed "Deprivation of citizenship". Section 21(1) provided:

> "Where —
>
> (a) a person who is an Australian citizen by virtue of a certificate of Australian citizenship —

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2 Section 13(1)(f) of the 1948 Act.

3 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 529 [65].

4 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 529-530 [65].

5 *Rogers v The Queen* (1994) 181 CLR 251 at 284-285. Compare *Minister for Immigration and Multicultural Affairs v SRT* (1999) 91 FCR 234 at 244-245 [44]-[46].

(i) has been convicted of an offence against section 50 in relation to the application for his certificate of Australian citizenship; or

(ii) has, at any time after furnishing the application for his certificate of Australian citizenship (including a time after the grant of the certificate), been convicted of an offence against a law in force in a foreign country or against a law of the Commonwealth, a State or Territory for which he has been sentenced to death or to imprisonment for life or for a period of not less than 12 months, being an offence committed at any time before the grant of the certificate (including a time before the furnishing of the application); and

(b) the Minister is satisfied that it would be contrary to the public interest for the person to continue to be an Australian citizen,

the Minister may, in his discretion, by order, deprive the person of his Australian citizenship, and the person shall, upon the making of the order, cease to be an Australian citizen."

15 Section 50 of the 1948 Act, to which reference was made in s 21(1)(a)(i), made it an offence to make a knowingly false or misleading representation or statement, or to conceal or cause to be concealed a material circumstance, for a purpose of or in relation to the 1948 Act.

16 Earlier forms of s 21(1)(a)(i) and s 50 had been inserted into the 1948 Act in 1958[6]. However, s 21(1) in the form which included s 21(1)(a)(ii) had been inserted only by the 1984 Amendment Act[7]. Prior to the 1984 Amendment Act, the introduction of a provision along the lines of s 21(1)(a)(ii) had been foreshadowed in a Ministerial Statement to the House of Representatives in 1982.

17 In the Ministerial Statement to the House of Representatives in 1982, the Minister for Immigration and Ethnic Affairs, Mr Macphee, stressed the importance of good character to the grant of Australian citizenship and the relevance of a

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6 See ss 7 and 11 of the *Nationality and Citizenship Act 1958* (Cth).

7 See s 15 of the 1984 Amendment Act.

criminal record to the assessment of good character[8]. He foreshadowed s 21(1)(a)(ii) in going on to say that there was "a case ... for depriving a person of citizenship if he or she has committed a serious offence before the grant of citizenship even though the conviction occurs after the grant"[9]. He explained[10]:

> "Deprivation of Australian citizenship under such a proposed amendment would not constitute an additional penalty to that imposed by a court on the conviction of the person concerned. The deprivation powers should be invoked only if an applicant has obtained citizenship by false pretences; in other words, where he has obtained something he was not entitled to. Deprivation is not automatic under any circumstances. The Minister must consider the full facts of the case and be satisfied that it would be in the public interest to deprive a person of citizenship before he orders deprivation."

18 The policy intent revealed by the Ministerial Statement in 1982 was elaborated on the following year by a successor of Mr Macphee in the office of Minister for Immigration and Ethnic Affairs, Mr West, in his second reading speech for the Bill which became the 1984 Amendment Act. With implicit reference to s 21(1)(a)(i), Mr West said that "[i]n 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"[11]. With implicit reference to s 21(1)(a)(ii), he added:

> "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

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8 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 6 May 1982 at 2359.

9 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 6 May 1982 at 2361.

10 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 6 May 1982 at 2361.

11 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 1983 at 3369.

Australian citizen. The law will not allow a person to be deprived of citizenship if it has been obtained properly and honestly."

19 The purpose of s 21(1)(a)(ii) of the 1948 Act – the "public interest sought to be protected and enhanced"[12] by that provision – was accordingly revealed by the Ministerial Statement and the second reading speech not to be the imposition of punishment in addition to that imposed by a court on the conviction of the person concerned. The purpose of s 21(1)(a)(ii) was rather aligned with the purpose of s 21(1)(a)(i). The purpose of both was to safeguard the integrity of the administrative function by which ministerial satisfaction that the person was of good character was a prerequisite to the person being granted Australian citizenship and in respect of which conviction of a serious offence would have been relevant to the performance of that function.

20 This means s 21(1)(a)(ii) operated to ensure that quirks of timing in the commencement and conclusion of criminal proceedings did not allow a person's prior criminal conduct to remain unconsidered in the ministerial determination of whether the person was of the requisite character to be granted Australian citizenship. In so doing, the provision would also create a disincentive for an applicant for Australian citizenship to conceal prior criminal conduct during the application process.

21 The "public interest", which the Minister was required to consider under s 21(1)(b) of the 1948 Act before depriving a person of Australian citizenship where s 21(1)(a)(ii) was engaged, "classically import[ed] 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 ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'"[13]. Section 21(1)(b) permitted the Minister to consider whether the Minister would have been satisfied that the person was of good character had the Minister known at the time of the grant of citizenship of the offence or offences in respect of which the person was later convicted and sentenced. But, of course, s 21(1)(b) did not limit the Minister to that consideration.

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12 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 584 [102]; 401 ALR 438 at 462, quoting *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300. See also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 341 [20], quoting *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 26 [60].

13 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216, quoting *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

It permitted the Minister also to consider, amongst other things, whether the person might have been rehabilitated in the interim.

22 The 1948 Act was repealed upon the commencement of the Citizenship Act by the *Australian Citizenship (Transitionals and Consequentials) Act 2007* (Cth) ("the Consequential Provisions Act")[14]. On and from its commencement, the Citizenship Act included as an Australian citizen a person who was an Australian citizen under the 1948 Act immediately before that commencement and who had not ceased to be an Australian citizen under the Citizenship Act[15]. Mr Jones was within that category.

23 Subdivision B of Div 2 of Pt 2 of the Citizenship Act, headed "Citizenship by conferral", deals with a topic which corresponds broadly to the topic of the grant of Australian citizenship previously dealt with in Div 2 of Pt III of the 1948 Act. The scheme of Subdiv B is to provide for a person to acquire Australian citizenship in consequence of a ministerial approval of an application for Australian citizenship. Corresponding to the precondition to the grant of a certificate of Australian citizenship under s 13(1) of the 1948 Act that the Minister was satisfied that the person who had applied for the certificate was of "good character", a standard precondition to the Minister approving a person becoming an Australian citizen under Subdiv B is that the Minister is satisfied that the person "is of good character at the time of the Minister's decision on the application"[16].

24 By operation of a provision of the Consequential Provisions Act, a person in the position of Mr Jones, who had been an Australian citizen under Div 2 of Pt III of the 1948 Act, was "taken ... to be" an Australian citizen under Subdiv B of Div 2 of Pt 2 on the commencement of the Citizenship Act[17].

25 Division 3 of Pt 2 of the Citizenship Act, headed "Cessation of Australian citizenship", deals with a topic which corresponds broadly to the topic of the loss of Australian citizenship previously dealt with in Div 4 of Pt III of the 1948 Act. Within Div 3 is s 34, headed "Revocation by Minister – offences or fraud". The effect of s 34 is explained in the simplified outline of the Division to be that "if

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14 See ss 2, 3 and item 42 of Sch 1 to the Consequential Provisions Act.

15 Section 4(1)(b) of the Citizenship Act.

16 See s 24(1A) read with s 21(2)(h), (3)(f), (4)(f), (6)(d) and (7)(d) of the Citizenship Act.

17 See s 3 and item 2(2) of Pt 1 of Sch 3 to the Consequential Provisions Act.

you did not automatically become an Australian citizen, the Minister can revoke your citizenship in circumstances involving offences or fraud"[18].

26 Section 34(2)(b)(i) and (ii) of the Citizenship Act correspond to s 21(1)(a)(i) and (ii) of the 1948 Act. Section 34(2)(b)(i) and (ii) in context provide:

> "The Minister may, by writing, revoke a person's Australian citizenship if:
>
> (a) the person is an Australian citizen under Subdivision B of Division 2 ...; and
>
> (b) any of the following apply:
>
> (i) the person has been convicted of an offence against section 50 of this Act ... in relation to the person's application to become an Australian citizen;
>
> (ii) the person has, at any time after making the application to become an Australian citizen, been convicted of a serious offence within the meaning of subsection (5);
>
> ...; and
>
> (c) the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen."

27 Section 34(3) adds:

> "However, the Minister must not decide under subsection (2) to revoke a person's Australian citizenship if:
>
> (a) the Minister may revoke the person's Australian citizenship under that subsection only because of the application of subparagraph (2)(b)(ii); and
>
> (b) the Minister is satisfied that the person would, if the Minister were to revoke the person's Australian citizenship, become a person who is not a national or citizen of any country."

28 Section 34(4) provides for the consequence of a ministerial decision under s 34(2). The consequence is that "[i]f the Minister revokes a person's Australian

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18 Section 32A of the Citizenship Act.

citizenship, the person ceases to be an Australian citizen at the time of the revocation".

29 Section 34(5), to which reference is made in s 34(2)(b)(ii), provides:

> "For the purposes of this section, a person has been ***convicted of a serious offence*** if:
>
> (a) the person has been convicted of an offence against an Australian law or a foreign law, for which the person has been sentenced to death or to a serious prison sentence; and
>
> (b) the person committed the offence at any time before the person became an Australian citizen."

30 The expression "serious prison sentence", used in s 34(5)(a), is defined to mean a sentence of imprisonment for a period of at least 12 months[19].

31 Section 50, to which reference is made in s 34(2)(b)(i), corresponds to s 50 of the 1948 Act in making it an offence to make a knowingly false or misleading representation or statement, or to conceal or cause or permit to be concealed a material circumstance, for a purpose of or in relation to the Citizenship Act.

32 In their application to a person who, like Mr Jones, had been an Australian citizen under Div 2 of Pt III of the 1948 Act and who was taken from the commencement of the Citizenship Act to be an Australian citizen under Subdiv B of Div 2 of Pt 2 of the Citizenship Act, s 34(2)(b)(i) and (ii) are given a modified operation by the Consequential Provisions Act[20]. Section 34(2)(b)(i) applies to such a person "as if" it also referred to the person's conviction, at any time, of an offence against s 50 of the 1948 Act in relation to the person's application for the certificate of Australian citizenship under that Act[21]. Section 34(2)(b)(ii) applies to such a person "as if" it also referred to the person's conviction, at any time after the person made the application for the certificate of Australian citizenship under

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19 Section 3 of the Citizenship Act.

20 See s 3 and item 6(1) of Pt 1 of Sch 3 to the Consequential Provisions Act.

21 See s 3 and item 6(2) of Pt 1 of Sch 3 to the Consequential Provisions Act.

the 1948 Act, of an offence referred to in s 21(1)(a)(ii) of the 1948 Act that the person committed at any time before the grant of the certificate[22].

33 Thus, in their modified application to a person in the position of Mr Jones, s 34(2)(a), (b)(ii) and (c) of the Citizenship Act replicate the power which the Minister administering the 1948 Act had under s 21(1)(a)(ii) and (b) of that Act at the time Mr Jones was granted his certificate of Australian citizenship under s 13(1) of that Act enabling him to become an Australian citizen by operation of s 15(1) of that Act. The power which the Minister administering the 1948 Act then had, and which the Minister administering the Citizenship Act has retained, was and has at all times remained a power administratively to revoke the Australian citizenship administratively granted to the person. The power was and has remained exercisable if: (1) at any time after the person applied for their certificate of Australian citizenship, the person was convicted of and sentenced to imprisonment for a period of at least 12 months for an offence committed before the person became an Australian citizen; and (2) the Minister was satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

34 Plainly enough, the purpose of s 34(2)(a), (b)(ii) and (c) of the Citizenship Act in that modified application remains the purpose of s 21(1)(a)(ii) and (b) of the 1948 Act at the time Mr Jones was granted his certificate of Australian citizenship. The purpose of s 34(2)(a), (b)(ii) and (c) in that modified application is to continue to protect the integrity of the administrative process by which that and other grants were made under s 13(1) of the 1948 Act.

35 The consequence of that legislative continuity has been that, at the time he became an Australian citizen in 1988 by force of s 15(1) of the 1948 Act and at all times thereafter, Mr Jones was and remained at risk of revocation of his Australian citizenship by a responsible Minister if Mr Jones was convicted of and sentenced to imprisonment for a period of at least 12 months for an offence committed before he became an Australian citizen and the Minister was satisfied that it would be contrary to the public interest for Mr Jones to remain an Australian citizen. It was Mr Jones' conviction and sentence in 2003 for offences committed between 1980 and 1988 which led to that risk materialising in 2018.

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22 See s 3 and item 6(3) of Pt 1 of Sch 3 to the Consequential Provisions Act.

A narrow path to validity

36 The hearing of the special case occurred immediately after the hearing in *Benbrika v Minister for Home Affairs*[23]. In the course of that hearing, it became apparent that the issues needing to be resolved to answer the substantive question asked in the special case in this matter are quite narrow.

37 In respect of the first part of the substantive question, which asks whether s 34(2)(b)(ii) of the Citizenship Act is invalid in its application to Mr Jones on the basis that it is not supported by s 51(xix) of the *Constitution*, the Solicitor-General of the Commonwealth relied on reasoning in *Alexander v Minister for Home Affairs*[24] and *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[25] and on the decision in *Meyer v Poynton*[26] to argue that s 51(xix) empowers the Commonwealth Parliament to subject the grant of Australian citizenship to an alien through a process of naturalisation to any condition the Parliament might see fit to impose. However, the Solicitor-General accepted that it was sufficient for the purpose of supporting s 34(2)(b)(ii) to confine the argument to a condition the purpose of which is to protect the integrity of the naturalisation process itself.

38 Counsel for Mr Jones argued that the reasoning in *Alexander* and *Te* should be confined, and that *Meyer* should be distinguished or overruled. They argued that the naturalisation limb of s 51(xix) of the *Constitution* should be construed to exclude power on the part of the Commonwealth Parliament to make Australian citizenship subject to an ongoing condition that is "unreasonable" or that remains applicable once the citizen who was formerly an alien has become "integrated and absorbed into the political community". However, they ultimately accepted that s 34(2)(b)(ii) of the Citizenship Act would not overreach either of the limitations for which they argued if it meets the criterion, which both parties accepted it must in any event meet to comply with Ch III of the *Constitution*, that it is reasonably capable of being seen as necessary for the purpose of protecting the integrity of the naturalisation process.

39 In respect of the second part of the substantive question, which asks whether s 34(2)(b)(ii) of the Citizenship Act is invalid in its application to Mr Jones on the

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23 [2023] HCA 33.

24 (2022) 96 ALJR 560 at 573-574 [36]-[38]; 401 ALR 438 at 447-448.

25 (2002) 212 CLR 162 at 171-173 [24]-[31].

26 (1920) 27 CLR 436 at 441.

basis that it reposes in the Minister the exclusively judicial function of punishing criminal guilt contrary to Ch III of the *Constitution*, the arguments of both parties took as their starting point the holding in *Alexander* (now confirmed in *Benbrika*) that the principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[27] applies to a Commonwealth law empowering the Commonwealth Executive to strip a person of Australian citizenship in the same way as it applies to a Commonwealth law empowering the Commonwealth Executive to detain a person in custody. Both parties accepted the principle in *Lim* to result in such a law being characterised as "punitive", and therefore as contrary to Ch III, unless the law is reasonably capable of being seen as necessary for a legitimate non-punitive purpose[28].

40 Consistently with the legislative context and history to which reference has been made, Ms Gordon KC, who appeared with the Solicitor-General, identified the legitimate non-punitive purpose of s 34(2)(b)(ii) of the Citizenship Act to be the protection of the integrity of the naturalisation process. Counsel for Mr Jones did not dispute the characterisation of that purpose as legitimate and non-punitive. They argued, rather, that s 34(2)(b)(ii) is not reasonably capable of being seen as necessary for that purpose.

41 The answers to both parts of the substantive question reserved were by those means revealed in the course of the hearing to turn on a single dispositive issue: whether s 34(2)(b)(ii) of the Citizenship Act is reasonably capable of being seen as necessary to protect the integrity of the naturalisation process in accordance with which Mr Jones was granted his certificate of Australian citizenship under s 13(1) of the 1948 Act so as to have become an Australian citizen under s 15(1) of that Act.

The test of reasonable necessity

42 The word "necessary", Gleeson CJ pointed out in *Mulholland v Australian Electoral Commission*[29], "does not always mean 'essential' or 'unavoidable',

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27 (1992) 176 CLR 1.

28 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343-344 [27]-[29]; *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 584-585 [106]; 401 ALR 438 at 463.

29 (2004) 220 CLR 181 at 199 [39].

especially in a context where a court is evaluating a decision made by someone else who has the primary responsibility for setting policy". "There is, in Australia", his Honour noted, "a long history of judicial and legislative use of the term 'necessary', not as meaning essential or indispensable, but as meaning reasonably appropriate and adapted"[30]. That was the sense in which the word was used in the formulation of the principle in *Lim*.

43 In *Falzon v Minister for Immigration and Border Protection*[31], Kiefel CJ, Bell, Keane and Edelman JJ rejected an argument that the criterion of reasonable necessity in the application of the principle in *Lim* is to be assessed by means of the analytical tool of structured proportionality which has been adopted by a majority of this Court in the context of considering infringement of the implied constitutional freedom of political communication and the express guarantee of freedom of interstate trade and commerce in s 92 of the *Constitution*. Their Honours emphasised that use of that analytical tool is inappropriate to the application of the principle in *Lim* because the purpose and framework of the analysis is different. In the context of the implied constitutional freedom of political communication and the express guarantee of freedom of interstate trade and commerce, the analysis is ultimately directed to a second-stage question of justification: whether a burden found at the first stage of analysis to be imposed by a law on a constitutionally guaranteed freedom is nonetheless justified in its nature and extent. In the application of the principle in *Lim*, the criterion of reasonable necessity can be described as requiring a law which empowers the imposition of a form of detriment to be justified[32]. But the application of the principle in *Lim* is ultimately directed to a single question of characterisation: whether the power to impose the detriment conferred by the law is properly characterised as punitive and therefore as exclusively judicial.

44 Judicial determination of whether a law is reasonably capable of being seen as necessary for a legitimate non-punitive purpose in the application of the principle in *Lim* must proceed in a manner that is both faithful to the constitutional values safeguarded by that principle, as explained in *Lim*[33] and now reinforced in

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30 (2004) 220 CLR 181 at 199-200 [39].

31 (2018) 262 CLR 333 at 343-344 [25]-[32].

32 (2018) 262 CLR 333 at 344 [33]. See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611-612 [98].

33 (1992) 176 CLR 1 at 27-28.

Benbrika[34], and mindful of the procedural and substantive limitations inherent in the performance of the judicial function. It would fit uncomfortably with the judicial tradition of which the emergence of the principle in *Lim* is part to attempt to constrain the analytical techniques or to map out subsidiary principles in the abstract.

45 As with other questions pertaining to judicial power, historical practices and classifications are informative. And as with any constitutional question, looking to how comparable laws have in practice been seen by courts discharging comparable constitutional or quasi-constitutional responsibilities in comparable jurisdictions can be instructive.

Application of the test

46 Reference was made in *Alexander*[35] to *Trop v Dulles*[36]. There a statute providing for naval and military personnel to lose their citizenship upon conviction by court martial of wartime desertion was held to be "penal" and to infringe the guarantee against "cruel and unusual punishment" in the Eighth Amendment to the Constitution of the United States. Warren CJ contrasted that punitive form of "denationalization" with forms of "denaturalization" the constitutionality of which had been upheld in earlier cases[37]. The Chief Justice said[38]:

> "Denaturalization is not imposed to penalize the alien for having falsified his application for citizenship; if it were, it would be a punishment. Rather, it is imposed in the exercise of the power to make rules for the naturalization of aliens. In short, the fact that deportation and denaturalization for fraudulent procurement of citizenship may be imposed for purposes other than punishment affords no basis for saying that in this case denationalization is not a punishment."

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34 [2023] HCA 33 at [36]-[39].

35 (2022) 96 ALJR 560 at 598 [172], 599 [174], 613 [248], 629 [325]-[326], 632 [337]; 401 ALR 438 at 480, 481, 500, 521-522, 525.

36 (1958) 356 US 86.

37 *Schneiderman v United States* (1943) 320 US 118; *Baumgartner v United States* (1944) 322 US 665.

38 (1958) 356 US 86 at 98-99 (footnote omitted).

47 Understood in the context of the earlier cases to which he referred, the reference by Warren CJ to "denaturalization for fraudulent procurement of citizenship" was not confined to cases of fraud or concealment but encompassed denaturalisation for citizenship proven to have been "illegally procured", including where a finding made at the time of grant of citizenship that a statutory precondition to the grant had been met was subsequently proven by additional "clear, unequivocal, and convincing" evidence to have been erroneous when made[39].

48 More recent examples of courts in the United States holding denaturalisation in cases of "illegally procured" citizenship to be non-punitive, consistently with *Trop*, have included cases in which findings made at the time of the grant of citizenship that a statutory precondition that the applicant "is a person of good moral character" was met have subsequently been proven erroneous by reference to evidence which has constituted or included later convictions relating to prior criminal conduct[40].

49 For the purpose of determining whether a Commonwealth law providing for denaturalisation is reasonably capable of being seen as necessary for the legitimate non-punitive purpose of protecting the integrity of the naturalisation process so as to escape characterisation as punishment, what is usefully taken from that body of case law in the United States is the significance of relating the provision for denaturalisation to one or more of the statutory prerequisites to naturalisation.

50 The form of denaturalisation for which s 34(2)(b)(ii) combines with s 34(2)(a) and (c) of the Citizenship Act to provide, in their modified application to a person in the position of Mr Jones, is reasonably capable of being seen as necessary to protect the integrity of the naturalisation process for which ss 13(1) and 15(1) of the 1948 Act provided. That is so when attention is focused on four features of the legislative context and history earlier recounted.

51 The first of those features is the statutory precondition to the grant of a certificate of Australian citizenship under s 13(1) of the 1948 Act that the Minister

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39 *Schneiderman v United States* (1943) 320 US 118 at 124-125; *Baumgartner v United States* (1944) 322 US 665 at 675, 678. See also *Fedorenko v United States* (1981) 449 US 490 at 506-507.

40 eg *United States v Nunez-Garcia* (2003) 262 F Supp 2d 1073; *United States v Bogacki* (2012) 925 F Supp 2d 1288; *United States v Vilchis Rojas* (ND Ill, No 19-cv-8034, 5 May 2021).

administering the 1948 Act was satisfied that the person was of "good character". The second feature is that prior serious offending was relevant to the assessment which the Minister needed to undertake to determine whether that precondition was met. The third is that any later conviction of a prior serious offence was likely to call into question the correctness and completeness of the evidentiary basis on which the ministerial assessment was made. The fourth feature is that s 34(2)(b)(ii) replicates, and in so doing perpetuates, the substance of the regime for the revocation of citizenship upon later conviction of a past serious offence which existed under s 21(1)(a)(ii) of the 1948 Act on and from the moment citizenship was conferred under s 15(1) of that Act. The inclusion of s 34(2)(b)(ii) accordingly subjected a person in the position of Mr Jones to no greater jeopardy of denaturalisation than the person faced, and which the person must be taken to have known that the person would face, when applying for and obtaining Australian citizenship under the 1948 Act. The effect of s 34(2)(b)(ii), like s 21(1)(a)(ii) of the 1948 Act before it, was to permit what had been considered and done administratively to be reconsidered and undone administratively if at any time later a criminal conviction were to demonstrate the original decision to have been made on materially incorrect or incomplete information.

52 Those four features in combination answer the principal criticism of s 34(2)(b)(ii) made by counsel for Mr Jones in support of their argument that the provision goes further than is reasonably capable of being seen as necessary for the acknowledged protective purpose because "it lacks criteria directly to connect the citizen's offending to some irregularity in the process of naturalization". The connection of s 34(2)(b)(ii) to irregularity in the process of naturalisation which resulted in Mr Jones acquiring Australian citizenship in 1988 is substantial and is unbroken.

53 Of the other criticisms made by counsel for Mr Jones in support of their argument that s 34(2)(b)(ii) goes further than is reasonably capable of being seen as necessary for the acknowledged protective purpose, three warrant specific responses. The first was that the requirement of s 34(2)(c) that the Minister be satisfied that it would be contrary to the public interest for the person whose citizenship is revoked to remain an Australian citizen "is overbroad" and would permit the Minister to use the power of revocation of citizenship "for punitive purposes". The second was the absence of a time limit for the exercise of the power to revoke citizenship after the date of conviction. The third was what was said to be a discrepancy created by the limitation on the power of revocation imposed by s 34(3) applying to revocation of citizenship in circumstances covered by s 34(2)(b)(ii) but not applying to revocation of citizenship in circumstances covered by s 34(2)(b)(i).

54 The requirement of s 34(2)(c) that the Minister be satisfied that it would be contrary to the public interest for the person whose citizenship is revoked to remain an Australian citizen furthers the purpose of protecting the integrity of the naturalisation process for which ss 13(1) and 15(1) of the 1948 Act provided by facilitating reconsideration of the critical question whether the person was of good character at the time of grant without constraining the capacity of the Minister to have regard to subsequent rehabilitation and integration into the Australian community. Were the Minister to purport to invoke the power of revocation of the Australian citizenship of someone convicted of a serious crime for the purposes of retribution, denunciation or deterrence under the guise of being satisfied that it would be contrary to the public interest for that person to remain an Australian citizen, the purported exercise of power would be unauthorised on the basis that the power would have been exercised for an extraneous and improper purpose[41].

55 Once it is understood that s 34(2) would not authorise the Minister to revoke the Australian citizenship of someone convicted of a serious crime for a purpose of retribution, denunciation or deterrence, the absence of a time limit within which the Minister is required to exercise the power after the date of conviction cannot detract from the non-punitive character of s 34(2)(b)(ii) established by the combination of features to which reference has been made.

56 The reason why s 34(3), prohibiting revocation of the Australian citizenship of a person who the Minister is satisfied would thereby not be a national or citizen of any country, applies to revocation of citizenship in circumstances covered by s 34(2)(b)(ii) but not in circumstances covered by s 34(2)(b)(i) lies in the Convention on the Reduction of Statelessness[42]. An obligation of Australia under that Convention is that it "not deprive a person of its nationality if such deprivation would render [the person] stateless"[43]. The obligation is subject to an exception "where the nationality has been obtained by misrepresentation or fraud"[44]. The application of s 34(3) in circumstances covered by s 34(2)(b)(ii) gives effect to the

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41 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505. Compare *Re Sergi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 224 at 230-231.

42 [1975] ATS 46.

43 Article 8(1).

44 Article 8(2)(b).

obligation; the non-application of s 34(3) in circumstances covered by s 34(2)(b)(i) reflects the limited scope of the exception.

Formal answers to questions

57 The questions stated by the parties in the special case and the answers to them are as follows:

(1) Is s 34(2)(b)(ii) of the Citizenship Act invalid in its operation in respect of the plaintiff because:

(a) it is not supported by s 51(xix) of the *Constitution*; or

(b) it reposes in the Minister the exclusively judicial function of punishing criminal guilt?

Answer: No.

(2) What, if any, relief should be granted to the plaintiff?

Answer: None.

(3) Who should pay the costs of the special case?

Answer: The plaintiff.

58 GORDON J. The plaintiff became an Australian citizen in 1988 by a grant of Australian citizenship under Div 2 of Pt III of the now repealed *Australian Citizenship Act 1948* (Cth) ("the 1948 Act"). In May 2003, the plaintiff was convicted and sentenced to two and a half years imprisonment for five counts of indecent dealing and indecent assault, with two of those counts relating to conduct occurring entirely before the plaintiff became an Australian citizen.

59 In July 2018, the Minister for Home Affairs, Immigration and Border Protection purportedly revoked the plaintiff's Australian citizenship under s 34(2) of the *Australian Citizenship Act 2007* (Cth) ("the Citizenship Act") on the basis that the criterion in s 34(2)(b)(ii) of the Citizenship Act was satisfied: "the person has, at any time after making the application to become an Australian citizen, been convicted of a serious offence within the meaning of subsection (5)"[45]. At the date of citizenship revocation, the plaintiff had been an Australian citizen for 29 years and had lived in Australia continuously for 52 years. It had also been more than 15 years since the plaintiff's convictions for indecent dealing and indecent assault.

60 Although the plaintiff was initially granted a visa upon revocation of his citizenship, that visa was cancelled in November 2021 by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs under s 501(2) of the *Migration Act 1958* (Cth). In January 2022, the plaintiff was taken into immigration detention and remains there pending his removal from Australia. He has never returned to the United Kingdom since migrating from there to Australia, with his parents and siblings, as a teenager in 1966.

61 The plaintiff challenged the validity of s 34(2)(b)(ii) of the Citizenship Act on two grounds: *first*, that it is not supported by the "naturalization and aliens" head of power in s 51(xix) of the *Constitution*, and *second*, that it is contrary to Ch III of the *Constitution* because it reposes in the Minister administering the Citizenship Act the exclusively judicial function of punishing criminal guilt.

62 The questions stated for the opinion of the Full Court were narrow and limited. The facts and statutory framework are set out in the reasons of other members of the Court. I gratefully adopt them.

63 The dispositive issue is whether s 34(2)(b)(ii) confers on the Minister part of the judicial power of the Commonwealth – the imposition of punishment – contrary to Ch III of the *Constitution.* All members of this Court agree that that is addressed by asking whether the power in s 34(2)(b)(ii) is limited to what is reasonably capable of being seen as necessary for a legitimate non-punitive

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45 For ease of reference in these reasons, the power in s 34(2) in its operation with respect to the criterion in s 34(2)(b)(ii) is referred to generally as "the power in s 34(2)(b)(ii)".

purpose[46] – in this case, the protection of the integrity of the naturalisation process. The answer is that it is not, and that s 34(2)(b)(ii) is therefore invalid. The plaintiff sought, and should be granted, a declaration that he is an Australian citizen.

64 Given that conclusion, it is unnecessary to resolve the first ground of asserted invalidity. That ground, and the submissions of the defendants (together, "the Commonwealth") as to the scope of the head of power in s 51(xix), raise important issues that need not be addressed in this case[47]. It is sufficient to proceed on the basis that s 34(2)(b)(ii) is supported by the "naturalization and aliens" head of power in s 51(xix) of the *Constitution* because it is a law with respect to naturalisation.

Statutory purpose of s 34(2)(b)(ii)

65 Identifying the purpose of s 34(2)(b)(ii) – and the manner in which it seeks to achieve its purpose – is essential to determining its validity under Ch III of the *Constitution*. Statutory purpose can be described as the "public interest sought to be protected and enhanced" by the law[48], which may be identified by reference to "the mischief" that the law seeks to redress[49]. Statutory purpose is not something which exists outside the statute; "[i]t resides in its text and structure"[50].

66 Section 34 is headed "Revocation by Minister – offences or fraud". Section 34(1) confers a discretionary power on the Minister to revoke the citizenship of a person who obtained citizenship *by descent* or *by adoption* under Subdiv A or AA of Div 2 of Pt 2 of the Citizenship Act. That power can be enlivened in two circumstances. The first is where the person has been convicted of an offence against s 50 of the Citizenship Act or s 137.1 or s 137.2 of the

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46 See Reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ at [38]-[39]; Reasons of Edelman J at [148]-[149]; Reasons of Steward J at [188]. See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 33.

47 See, eg, *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 589-594 [133]-[156]; 401 ALR 438 at 468-475.

48 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300.

49 See, eg, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132], 261 [232]; *Brown v Tasmania* (2017) 261 CLR 328 at 391-392 [208]-[210]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 71 [183].

50 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 [44]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78].

Criminal Code (Cth) in relation to their application to become an Australian citizen. Those offences relate to the giving of false or misleading statements or representations[51], the concealment of material circumstances[52], and the giving of false or misleading information[53] or documents[54]. The second is where the person obtained the Minister's approval to become an Australian citizen as a result of third-party fraud within the meaning of s 34(8) of the Citizenship Act[55]. In either circumstance, the Minister may only revoke citizenship if satisfied that it would be contrary to the public interest for the person to remain an Australian citizen[56].

67 Section 34(2) confers a discretionary power on the Minister to revoke the citizenship of a person who obtained citizenship *by conferral* under Subdiv B of Div 2 of Pt 2 of the Citizenship Act[57]. That power can be enlivened in four circumstances. One of those circumstances is in s 34(2)(b)(ii), which is the provision challenged in this proceeding: "the person has, at any time after making the application to become an Australian citizen, been convicted of a serious offence within the meaning of subsection (5)".

68 Section 34(2)(b)(ii), read with the definition of "serious offence"[58], empowers the Minister to revoke the Australian citizenship of a person who obtained citizenship by conferral if, at any time *after* making the application to become an Australian citizen, the person is convicted of and sentenced to imprisonment of at least 12 months for an offence committed *before* the person became an Australian citizen. That power may only be exercised if the Minister is

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51 Citizenship Act, s 50(1).

52 Citizenship Act, s 50(2).

53 *Criminal Code*, s 137.1.

54 *Criminal Code*, s 137.2.

55 Section 34(8) requires a relevant conviction and that the act or omission constituting the offence was connected with the Minister approving the applicant becoming an Australian citizen.

56 Citizenship Act, s 34(1)(c).

57 Relevantly, under transitional provisions, a person who acquired Australian citizenship under Div 2 of Pt III of the 1948 Act is taken to be an Australian citizen under Subdiv B of Div 2 of Pt 2 of the Citizenship Act: *Australian Citizenship (Transitionals and Consequentials) Act 2007* (Cth), Sch 3, items 1 and 2(2). See also Citizenship Act, s 4(1)(b).

58 See Citizenship Act, s 34(5) (definition of "serious offence"), read with s 3 (definition of "serious prison sentence").

satisfied that it would be contrary to the public interest for the person to remain an Australian citizen[59]. The Minister must not decide to revoke a person's citizenship under s 34(2)(b)(ii) if the Minister is satisfied that the person would become a person who is not a national or citizen of any country[60]. If the Minister revokes a person's Australian citizenship, the person ceases to be an Australian citizen at the time of the revocation[61].

69 Two of the other circumstances in s 34(2) are the same as those under s 34(1): where the person has been convicted of an offence against s 50 of the Citizenship Act or s 137.1 or s 137.2 of the *Criminal Code* in relation to the person's application to become an Australian citizen (s 34(2)(b)(i)); and where the person obtained approval to become a citizen as a result of third-party fraud (s 34(2)(b)(iv)). The final circumstance is where the person obtained the Minister's approval to become an Australian citizen as a result of migration-related fraud within the meaning of s 34(6)[62] (s 34(2)(b)(iii)). To exercise the power in those circumstances, the Minister must also be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen[63].

70 It is apparent that the purpose of s 34, in most of its operations, is to protect the integrity of the naturalisation process by enabling the revocation of citizenship in circumstances where it was obtained as a result of fraud or false or misleading statements connected to the person's citizenship application or grant of citizenship or entry into Australia. Section 34(2)(b)(ii) differs from the other provisions in s 34(1)(b) and (2)(b) by not having this clear connection to the integrity of the naturalisation process.

71 The Commonwealth accepted that, unlike the other provisions, s 34(2)(b)(ii) may be enlivened even if the relevant offending is not directly causative of a person's acquisition of citizenship. The Commonwealth submitted

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59 Citizenship Act, s 34(2)(c).

60 Citizenship Act, s 34(3).

61 Citizenship Act, s 34(4).

62 Section 34(6) requires a relevant conviction and that the act or omission that constituted the offence was connected with the person's entry into Australia or the grant to the person of a visa or permission to enter and remain in Australia. The meaning of "migration-related fraud" is further limited by s 34(7), which provides that s 34(6) does not apply to a person in respect of an offence if the Minister is satisfied that the act or omission that constituted the offence was not in any way (whether directly or indirectly) material to the person becoming a permanent resident.

63 Citizenship Act, s 34(2)(c).

that nevertheless the purpose of s 34(2)(b)(ii), like the other provisions in s 34(1)(b) and (2)(b), is to protect the integrity of the naturalisation process. Why? A person is only eligible to become an Australian citizen under Subdiv B of Div 2 of Pt 2 of the Citizenship Act if the Minister is satisfied that the person is of good character at the time of the Minister's decision on the application[64]. Section 34(2)(b)(ii) only applies to offending conduct engaged in *prior* to the grant of citizenship that is sufficiently serious to result in a sentence of imprisonment of at least 12 months, and where the conviction occurred *after* the application was made to become an Australian citizen. Although, unlike the other provisions in s 34(1)(b) and (2)(b), s 34(2)(b)(ii) does not require fraud, concealment or dishonesty in the acquisition of citizenship, it is directed to a different kind of mischief. The Commonwealth's submission was that the mischief to which s 34(2)(b)(ii) is directed is the "gap" created by the possibility of criminal conduct, occurring *before* the grant but not known about at the time of the grant, that is clearly relevant to the good character criterion of eligibility for citizenship.

72 Those submissions should be accepted. That identification of the statutory purpose is consistent with the text, context and legislative history[65] of s 34(2)(b)(ii). It is also consistent with relevant extrinsic materials: a Ministerial Statement to the House of Representatives in 1982[66] and the second reading speech for the *Australian Citizenship Amendment Act 1984* (Cth)[67]. As the Commonwealth submitted, the purpose of the power in s 34(2)(b)(ii) is to protect the integrity of the naturalisation process by ensuring that accidents of timing do not allow decisions about naturalisation to be made irrevocably on incorrect and incomplete information, and to provide a disincentive for an applicant for citizenship to conceal their prior criminal conduct or to rush to secure citizenship before that conduct is revealed.

73 However, that identified statutory purpose is not the end of the inquiry for the asserted invalidity under Ch III. Indeed, the plaintiff came to accept that protection of the integrity of the naturalisation process could be described as the purpose of all the provisions in s 34(1)(b) and (2)(b), but submitted that once s 34(2)(b)(ii) was properly characterised for the purposes of the constitutional

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64 Citizenship Act, s 21(2)(h).

65 See Reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ at [14]-[19], [26], [33].

66 See Reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ at [17], referring to Australia, House of Representatives, *Parliamentary Debates* (Hansard), 6 May 1982 at 2361.

67 See Reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ at [18], referring to Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 1983 at 3369.

inquiry, that was not its "true" purpose, or in other words it pursued that purpose in a way which transgressed the constitutional boundary.

Chapter III of the *Constitution*

74 The *Constitution* "is based upon a separation of the functions of government, and the powers which it confers are divided into three classes – legislative, executive and judicial"[68], as set out in its first three chapters. Chapter III of the *Constitution* sets out an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested[69]. In so doing, Ch III places limits on judicial, legislative and executive power[70].

75 Punishment for criminal guilt is an exclusively judicial function under the *Constitution*[71]. A law purporting to empower the Executive to deprive a person of nationality and citizenship may be invalid on that basis[72]. Not all hardship or distress inflicted upon a person constitutes punishment[73]. That a law permits denationalisation and deprivation of citizenship does not necessarily dictate the conclusion that the law is punitive[74].

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68 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264. See also *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 231-232 [68]-[71]; 408 ALR 381 at 399-400.

69 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.

70 *Boilermakers'* (1956) 94 CLR 254 at 268-270, 273, 276, 279. See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10, 16-17, 20, 26; *Private R v Cowen* (2020) 271 CLR 316 at 369 [139]-[140], 370-371 [142]-[144]; *The Commonwealth v AJL20* (2021) 273 CLR 43 at 83-84 [78]-[80], 84-85 [83]-[84], 95 [106]-[107], 98 [114], 106-107 [137]. See also *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 380; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 504-505 [71]-[73], 513-514 [104].

71 *Benbrika v Minister for Home Affairs* ("*Benbrika [No 2]*") [2023] HCA 33 at [33]-[35], [60], [69], [89]-[90], affirming *Lim* (1992) 176 CLR 1 at 27.

72 *Alexander* (2022) 96 ALJR 560; 401 ALR 438; *Benbrika [No 2]* [2023] HCA 33.

73 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17].

74 *Alexander* (2022) 96 ALJR 560 at 613 [249]; 401 ALR 438 at 500.

76 As I explain in *Benbrika v Minister for Home Affairs* ("*Benbrika [No 2]*")[75], it should be accepted, following *Chu Kheng Lim v Minister for Immigration*[76] and *Alexander v Minister for Home Affairs*[77], that absent a legitimate non-punitive purpose, the default characterisation of a law providing for non-consensual denaturalisation, denationalisation or deprivation of citizenship will be that it is punitive. That is because, like detention – and indeed perhaps to a greater degree – the deprivation of nationality and citizenship imposes profound detriment on the individual. Detention may only be a temporary loss of rights and liberty. Deprivation of nationality and citizenship is a permanent rupture in the relationship between the individual and the State, involving loss of fundamental rights including by exposure to detention and deportation from the territory[78].

77 Like a law authorising detention, a law for involuntary denationalisation and citizenship deprivation will be valid if it is limited to what is reasonably capable of being seen as necessary for a legitimate non-punitive purpose[79]. The plaintiff was correct to identify this as being the relevant test, drawing on

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75 [2023] HCA 33 at [63]-[65]. See also *Alexander* (2022) 96 ALJR 560 at 578 [72]-[73], 579 [76]-[77], 583 [95], 583 [98], 597 [166], 613 [248]; 401 ALR 438 at 454, 455-456, 460, 461, 478, 500. See also Reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ at [38]-[39], [43]; Reasons of Edelman J at [148]-[149]; Reasons of Steward J at [188].

76 (1992) 176 CLR 1.

77 (2022) 96 ALJR 560; 401 ALR 438.

78 See *Benbrika [No 2]* [2023] HCA 33 at [63]. See also *Migration Act*, ss 13(1), 14(1), 189(1), 196(1), 198.

79 See *Lim* (1992) 176 CLR 1 at 33-34; see also 10, 58, 65-66, 71. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [138]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [25]-[26]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 86 [98], 130 [260], 160 [379]-[381]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343 [27], 343-344 [29], 355-356 [82]; *Minister for Home Affairs v Benbrika* ("*Benbrika [No 1]*") (2021) 272 CLR 68 at 96 [32], 113 [78], 119 [95], 138 [151], 141 [160], 142 [163], 147 [177], 168-169 [225]; *AJL20* (2021) 273 CLR 43 at 64-65 [27], 83 [79], 102 [127]-[128]. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 653-654 [215]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 287 [171], 288 [174], 292 [187], 294-295 [195]-[200]; *Garlett v Western Australia* (2022) 96 ALJR 888 at 918 [143], 926-927 [179]-[180], 930 [190]-[191], 944 [257]-[258], 954 [313]; 404 ALR 182 at 215, 224-225, 228-229, 246, 260.

Lim[80]. The Commonwealth's argument that the test in *Lim* does not apply is rejected. As a default characterisation, involuntary denationalisation and citizenship stripping is punitive. A law that empowers involuntary denationalisation and citizenship stripping must be justified.

78 The central point made by the Commonwealth was that s 34(2)(b)(ii) does not confer judicial power – the imposition of punishment – because it is a provision for the protection of the integrity of the naturalisation process. Protection of the integrity of the naturalisation process is a legitimate non-punitive purpose – it reflects that it is a well-recognised attribute of sovereignty that every nation state is entitled to decide what aliens shall or shall not become members of its community[81]. As explained above, the protection of the integrity of the naturalisation process broadly can be described as the purpose of s 34(2)(b)(ii). However, in the context of the Ch III inquiry, s 34(2)(b)(ii) can only be said to properly *have* that non-punitive purpose if it is limited to what is reasonably capable of being seen as necessary for that purpose[82]. Put in other words, if s 34(2)(b)(ii) pursues its purpose in a manner incompatible with the doctrine of the separation of judicial power under Ch III, or if the provision is not sufficiently tailored to the achievement of its purpose, then it is not properly characterised or justified as non-punitive[83]. The application of the *Lim* principle therefore requires an assessment of the relationship between means and ends. Labels such as "proportionality" are misleading to the extent that they import notions of structured proportionality[84].

79 In considering whether the power in s 34(2)(b)(ii) is contrary to Ch III, it is important to consider whether the provision reflects a condition imposed on the plaintiff's naturalisation. As I stated in *Alexander*[85], "in respect of a law conferring

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80 (1992) 176 CLR 1.

81 *Alexander* (2022) 96 ALJR 560 at 590 [138]; 401 ALR 438 at 470, and the authorities there cited.

82 See *Falzon* (2018) 262 CLR 333 at 343-344 [29].

83 See *Alexander* (2022) 96 ALJR 560 at 585 [106]; 401 ALR 438 at 463. See also, in the context of powers conferred on courts to make preventative orders for detention or imposing other constraints on liberty: *Vella* (2019) 269 CLR 219 at 279 [151], 287 [171], 292 [187], 294-295 [195]-[200]; *Benbrika [No 1]* (2021) 272 CLR 68 at 138 [151], 142 [163], 146 [173], 147 [177]; *Garlett* (2022) 96 ALJR 888 at 918 [143], 926 [179], 930 [190]-[191]; 404 ALR 182 at 215, 224-225, 228-229.

84 See *Falzon* (2018) 262 CLR 333 at 343-344 [29]-[31].

85 (2022) 96 ALJR 560 at 599 [174]; 401 ALR 438 at 481, referring to *Trop v Dulles* (1958) 356 US 86 at 98-99.

power on the Minister to cancel a person's citizenship if they obtained citizenship by making false statements or engaging in fraudulent conduct, denaturalisation might be more properly characterised as the consequence of breaching a condition imposed on the person's entry into the community, rather than punishment".

80 At the time the plaintiff was granted citizenship, he had to satisfy the Minister he was of good character[86], and there was a power in the 1948 Act (relevantly equivalent to the power in s 34(2)(b)(ii) of the Citizenship Act) for citizenship to be revoked if a person was convicted, after furnishing their application for the certificate of citizenship, of an offence committed prior to the grant for which the person had been sentenced to imprisonment for at least 12 months[87]. That predecessor power in the 1948 Act, continued by s 34(2)(b)(ii) of the Citizenship Act, was in force at the time of the grant of the plaintiff's citizenship and remains a power only applying in respect of any offending *before* the grant of citizenship where the conviction was not until *after* the making of the application for citizenship. It was and is a condition and power in respect of which the plaintiff can be taken to have been on notice at the time of his application for citizenship and the time of grant of citizenship.

81 As explained, the Commonwealth argued that s 34(2)(b)(ii) protects the integrity of the naturalisation process in two ways: first, by ensuring that accidents of timing do not allow decisions about naturalisation to be made irrevocably on incorrect or incomplete information; second, by providing a disincentive for an applicant for citizenship to conceal their prior criminal conduct or to rush to secure citizenship before that conduct is revealed.

82 The plaintiff, on the other hand, submitted that the following features of s 34(2)(b)(ii) disclosed a "significant disconformity" between the operation of s 34(2)(b)(ii) and the protective purpose postulated by the Commonwealth.

83 *First*, the plaintiff submitted that the application of s 34(2)(b)(ii) is indifferent to the integrity of the naturalisation process in that it applies whether or not the conduct to which the offence relates was disclosed at the time of the application; whether or not the applicant was even invited or required to make disclosure of such matters at the time; and whether or not the conduct would have necessarily precluded the grant of citizenship. The plaintiff relied on the fact that the power in s 34(2)(b)(ii) is enlivened by a broad range of offending conduct having no necessary connection to the naturalisation process. By contrast, the other provisions in s 34(1)(b) and (2)(b) require a person to have been convicted of an offence for dishonesty or concealment in relation to their citizenship application

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86 1948 Act (as in force at time of grant of plaintiff's citizenship), s 13(1)(f).

87 1948 Act (as in force at time of grant of plaintiff's citizenship), s 21(1).

or that the person obtained the Minister's approval to become a citizen as a result of fraud. The plaintiff submitted that the purpose which the Commonwealth ascribed to s 34(2)(b)(ii) – protecting the integrity of the naturalisation process – is already pursued by those other provisions. Further, the plaintiff submitted that those other provisions are tailored to the purpose because the necessary fraud, concealment or dishonesty is causally linked to the grant of citizenship. By contrast, the plaintiff submitted, s 34(2)(b)(ii) effectively "deem[s]" that the serious offending would have precluded the grant of citizenship.

84 It may be accepted that the other provisions in s 34(1)(b) and (2)(b) are more closely tailored to the purpose of protecting the integrity of the naturalisation process. However, this does not necessarily lead to invalidity of s 34(2)(b)(ii). The other provisions are dealing with a different mischief – fraud, dishonesty or concealment in the naturalisation process[88]. And it is not right to contend that revocation for fraud, dishonesty or concealment in the naturalisation process is the only permissible means of protecting the integrity of the naturalisation process. Parliament may wish to protect the integrity of the naturalisation process by addressing another mischief: the "gap" created by the possibility of criminal conduct occurring before the grant, relevant to the good character criterion of eligibility, that is not known about at the time of grant. That "gap" might be addressed by imposing a requirement on an applicant for citizenship to disclose criminal conduct, such that a failure to disclose that conduct would engage offence provisions for fraud, dishonesty or concealment. Or it might be addressed by provisions similar to those in the United States[89], which require that naturalisation be proved to have been "illegally procured" (that the person was statutorily ineligible to naturalise at the time they became a naturalised citizen)[90] or procured "by concealment of a *material* fact or by *willful* misrepresentation"[91]. Or the "gap" might be addressed by other means. The Parliament of the Commonwealth, in enacting s 34(2)(b)(ii), has adopted a different legislative framework. That was a choice that was open to the Parliament, provided that the means by which the "gap" was sought to be addressed are limited to what is reasonably capable of being seen as necessary to protect the integrity of the naturalisation process.

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88 That s 34(2)(b)(ii) is addressing a different issue to the other provisions in s 34(1)(b) and (2)(b) is reinforced by the fact that s 34(3) only applies to s 34(2)(b)(ii) and not the other provisions. That limitation reflects the Convention on the Reduction of Statelessness.

89 See 8 USC §1451(a) (emphasis added).

90 See *Fedorenko v United States* (1981) 449 US 490 at 506.

91 See *Kungys v United States* (1988) 485 US 759 at 767. See also *Maslenjak v United States* (2017) 137 S Ct 1918.

85 *Second*, the plaintiff submitted that s 34(2)(c) (the public interest criterion) requires consideration not of whether the person was of good character at the time of grant or whether the person would not have been granted citizenship had the offending been known, but instead whether it *presently* would be contrary to the public interest for the person to remain a citizen. This forward-looking assessment was said to invite consideration of a broad range of matters having nothing to do with good character at the time of the grant or the protection of the integrity of the naturalisation process.

86 The Commonwealth submitted that, properly construed, the public interest criterion is an additional hurdle for the Minister and provides some benefit for the person. As an additional hurdle it reflects that the object of protecting the integrity of the naturalisation process is not cut and dried; it may be nuanced and, in the words of Ms Gordon KC for the Commonwealth, "ought not to be pursued at any cost, given the harshness of the consequences". But, as will be explained, that submission overstates the degree to which the public interest criterion is capable of moulding and limiting the exercise of the power in a manner consistent with its purpose.

87 *Third*, the plaintiff relied on the absence of time limits between naturalisation and exercise of the power, and between conviction and exercise of the power. There is a built-in time limit to the power: the offence must have been committed *before* naturalisation and the conviction must have occurred *after* the making of the application for citizenship. Further, the lack of a time limit between naturalisation and exercise of the power reflects that it can take many years to detect criminal conduct and it is unpredictable as to when criminal offences are detected and convictions secured.

88 That leaves the lack of a time limit between conviction and exercise of the power, which is particularly pertinent here, where there was a 15 year gap between the plaintiff's conviction in 2003 and the Minister's decision in 2018. The plaintiff submitted that a time limit from the date of conviction would show that the provision was aimed at enabling the Minister to respond to new information – the conviction for pre-naturalisation conduct – which might call the grant of citizenship into question. The plaintiff submitted that, where the power to revoke is of unlimited duration after conviction, that tells against the protective purpose because s 34(2)(b)(ii) enables denaturalisation to occur even where (as here) the facts of the criminal conviction and sentence have been a matter of public record for decades.

89 The default characterisation that revocation of naturalisation is punitive is not displaced, but is reinforced, by the legal and practical operation of

s 34(2)(b)(ii). In particular, it is reinforced by considering, as an aspect of the power, the period of time during which the power may be exercised[92].

90 Section 34(2)(b)(ii) leaves the class of naturalised citizens to whom it applies – persons who became citizens by conferral and who have since been convicted of a "serious offence" within the meaning of s 34(5) – at permanent risk of the revocation of their nationality and citizenship. The Executive could "scour [the] paperwork" to find naturalised citizens in that class and at any time purport to revoke their nationality and citizenship under s 34(2)(b)(ii) on the basis of ministerial public interest satisfaction, affording those naturalised Australians "precious little security"[93]. The presence of s 34(2)(b)(ii) on the statute books makes such a naturalised citizen liable, for the rest of their life, to potential expulsion from the nation. It is not only the exercise of the power, but the presence of the power, which hurts[94]. Section 34(2)(b)(ii) exposes a naturalised citizen who has been convicted of a "serious offence" to revocation of naturalisation beyond the limits necessary for the protection of the integrity of the naturalisation process[95].

91 The Commonwealth's only response to the plaintiff's submissions about the lack of a time limit after conviction was to submit that "the passage of time and any significance that ought to be attributed to that, is the very thing – not the very thing, one of the things that can be taken into account [for the purposes of ministerial public interest satisfaction under s 34(2)(c)]". The Commonwealth's submission was that the public interest criterion in s 34(2)(c) limited the exercise of the power in s 34(2)(b)(ii) in a way which would prevent it being used for punitive purposes or with punitive effect. The Commonwealth rejected the suggestion that the absence of any statutory prescription of time within which revocation might occur after conviction bore upon questions of validity of the provision. That submission amounted to saying that citizenship could be revoked under s 34(2)(b)(ii) no matter how long before revocation the person concerned had been convicted of an offence which they had committed before naturalisation but for which they had been tried and convicted after making the application for naturalisation. That is, no matter how long had elapsed since the conviction,

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92 See, by analogy, *AJL20* (2021) 273 CLR 43 at 83-84 [80], citing *Plaintiff S4* (2014) 253 CLR 219 at 232 [29]. See also *AJL20* (2021) 273 CLR 43 at 65 [28], 83 [79], 86-87 [87], 91 [97].

93 See, by analogy, *Maslenjak* (2017) 137 S Ct 1918 at 1927.

94 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 August 1958 at 711.

95 See, by analogy, *AJL20* (2021) 273 CLR 43 at 83 [79], citing *Lim* (1992) 176 CLR 1 at 33-36.

the revocation was, and was capable of being, for the purpose of protecting the integrity of the naturalisation process.

92 The greater the amount of time between conviction and revocation, the less revocation has to do with the state of affairs that existed at the time of naturalisation and the processes undertaken for that purpose, and the less it has to do with the conviction and the extent to which that conviction brings into question the integrity of the process of naturalisation. This case is illustrative. Whilst acknowledging that the plaintiff did not seek judicial review of the Minister's decision in this proceeding, one might ask what the revocation of the plaintiff's citizenship 15 years after conviction had to do with protecting the naturalisation process.

93 The Commonwealth rightly said that this Court cannot and should not try to mark the point at which the boundary of protecting the process of naturalisation is passed. But it is not right to say that the public interest criterion in s 34(2)(c) confines the application of the power to circumstances that do not infringe Ch III. Section 34(2)(c) does not save s 34(2)(b)(ii). "Public interest" is too wide a concept. Section 34(2)(c) asks the Minister to consider reasons why it might *now* be contrary to the public interest for the person to remain an Australian citizen. As other members of the Court observe, the expression "in the public interest", when used in a statute, "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 ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'"[96]. That is, formation of the satisfaction under s 34(2)(c) may be confined only by what is excluded, namely reasons or considerations that are extraneous or forbidden. The "public interest" does not *require* consideration of any particular matter. As the Commonwealth's submissions necessarily accepted, how much time had elapsed between conviction and revocation would be only one circumstance among many others that might go to inform ministerial satisfaction about the public interest. And the power in s 34(2) does not contain any other criteria that would structure or constrain the exercise of the Minister's discretion in a manner consistent with the asserted purpose of s 34(2)(b)(ii).

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96 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216, quoting *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505, quoted in Reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ at [21] and Reasons of Steward J at [201].

94 It cannot be that the power in s 34(2)(b)(ii) is sufficiently tailored merely because, like all statutory powers[97], it cannot be validly exercised for an extraneous or improper purpose. Necessarily, a statutory provision cannot authorise the Executive to exercise a power for the purpose of imposing punishment. But as members of this Court have often recognised, the distinction between a punitive and a protective (or non-punitive) purpose can be elusive[98]. Furthermore, identifying what is not to be taken into account in exercising the power under s 34(2)(b)(ii) – such as retribution, denunciation or deterrence – says nothing about what might be considered.

95 The starting point is that denationalisation is punitive. Section 34, in most of its operations, protects the integrity of the naturalisation process by enabling the revocation of citizenship in circumstances where it was obtained as a result of fraud or false or misleading statements connected to the person's citizenship application or grant of citizenship or entry into Australia. Section 34(2)(b)(ii), however, stands apart from the other provisions in s 34(1)(b) and (2)(b) by not having such a close connection to the protection of the integrity of the naturalisation process. The statutory assumption underlying s 34(2)(b)(ii) is that revocation of a person's citizenship at any time following their conviction for a serious offence is for the purpose of protecting the integrity of the naturalisation process. But the relevant and necessary connection between revocation and that purpose fades as time goes by after proof of the conduct that calls into question the person's good character at the time of grant. And that is the problem. To escape its default characterisation as punitive, the power must be *limited* to what is reasonably capable of being seen as necessary. The Commonwealth did not – I would say could not – identify any reason why an *indefinite* power of revocation following conviction for a "serious offence" is capable of being seen as necessary to protect the integrity of the naturalisation process.

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97 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348-349 [23]-[24], citing *Browning* (1947) 74 CLR 492 at 505, *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368, *O'Sullivan* (1989) 168 CLR 210 at 216 and *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 84 [31]. See also *Li* (2013) 249 CLR 332 at 350 [26], 363-364 [67], 370-371 [90]-[91].

98 See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562 at 611-612 [135]-[137]; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 145 [32]; *Fardon* (2004) 223 CLR 575 at 592 [20], 613 [82], 647-648 [196]-[197]; *South Australia v Totani* (2010) 242 CLR 1 at 170 [472]; *Minogue v Victoria* (2019) 268 CLR 1 at 26 [47]; *Benbrika [No 1]* (2021) 272 CLR 68 at 149 [183]. See also *Alexander* (2022) 96 ALJR 560 at 584-586 [106]-[113]; 401 ALR 438 at 463-465. See also *ENT19 v Minister for Home Affairs* (2023) 97 ALJR 509 at 513 [4], [7]; 410 ALR 1 at 4, 5.

96 The power given by s 34(2)(b)(ii) is of such breadth and open-endedness that its application is not confined to revocation in circumstances that are reasonably capable of being seen as necessary to protect the integrity of the naturalisation process by addressing the "gap" identified by the Commonwealth. The breadth and open-endedness of the power means that it is similarly not limited to what is reasonably capable of being seen as necessary to protect the integrity of the naturalisation process by providing a disincentive for persons to conceal criminal conduct or to rush to secure citizenship before that conduct is revealed. It is the *existence* of the power in s 34(2)(b)(ii) to revoke citizenship after conviction that provides the disincentive for a person to conceal criminal conduct when the person is applying for citizenship, not the unlimited period of time after conviction when the power to revoke might be exercised.

97 Chapter III places limits on judicial, legislative and executive power[99]. One of those limits is that Parliament cannot enact a law purporting to confer on a member of the Executive a power to impose punishment. On its proper construction, the power in s 34(2)(b)(ii) does not comply with that limit. In other words, it is not sufficiently constrained to be properly characterised as non-punitive. It is obnoxious to the *Lim* principle and to the constitutional rationales or values that underpin Ch III's strict separation of federal judicial power from legislative and executive power[100].

98 Both parties argued the special case on the footing that s 34(2)(b)(ii) was either wholly valid or wholly invalid under Ch III. Neither party suggested that s 34(2)(b)(ii) could be read down[101]. Section 34(2)(b)(ii) is invalid as it is contrary to Ch III of the *Constitution*.

Answers to questions

99 The questions stated by the parties in the special case should be answered as follows:

(1) Is s 34(2)(b)(ii) of the Citizenship Act invalid in its operation in respect of the plaintiff because:

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99 See [74]-[75] above.

100 See *Benbrika [No 2]* [2023] HCA 33 at [51], and the authorities there cited.

101 *Acts Interpretation Act 1901* (Cth), s 15A. See, eg, *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111; *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 291; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 312 [89]. See also *Thoms v The Commonwealth* (2022) 96 ALJR 635 at 651-652 [75] fn 123; 401 ALR 529 at 547.

(a) it is not supported by s 51(xix) of the *Constitution*; or

(b) it reposes in the Minister the exclusively judicial function of punishing guilt?

Answer: (1)(a) Unnecessary to answer;

(1)(b) Yes.

(2) What, if any, relief should be granted to the plaintiff?

Answer: It should be declared that:

(a) s 34(2)(b)(ii) of the Citizenship Act is invalid; and

(b) the plaintiff is an Australian citizen.

(3) Who should pay the costs of the special case?

Answer: The defendants.

EDELMAN J.

Introduction

100 Mr Jones is 72 years old. He was born in the United Kingdom and migrated to Australia in 1966 at the age of 15. In 1988, he was naturalised as an Australian citizen. In 2018, after Mr Jones had lived in Australia for 52 years, the Minister for Home Affairs, Immigration and Border Protection ("the Minister") determined that he was satisfied that it was contrary to the public interest for Mr Jones to remain an Australian citizen. The Minister exercised his discretion to revoke Mr Jones' Australian citizenship.

101 The basis upon which the Minister exercised his discretion to revoke Mr Jones' citizenship was s 34(2)(b)(ii) of the *Australian Citizenship Act 2007* (Cth). Section 34(2)(b)(ii) provides a gateway to the revocation of citizenship where a person had committed an offence prior to the grant of citizenship but was convicted of that offence subsequent to the application for, or grant of, citizenship and was punished by more than one year's imprisonment. In 2003, 15 years after he had become an Australian citizen, Mr Jones was convicted of five offences, two counts of which concerned conduct that occurred entirely before his grant of citizenship. Mr Jones was sentenced to two and a half years in prison.

102 In this special case, Mr Jones challenged the legislative power of the Commonwealth Parliament to pass s 34(2)(b)(ii), essentially on the basis that the provision went further than was reasonably capable of being seen as necessary for a legitimate purpose. The defendants sought to uphold the validity of s 34(2)(b)(ii) on a broad ground and on a narrow ground.

103 The broad ground involved a submission, repeatedly made by the Commonwealth in recent cases[102], that sought to explain, develop, and adapt the reasoning of a decision of this Court that is not entirely pellucid[103]. The effect of the defendants' submission on the broad ground, if it were accepted, would be that the *Constitution* would create two classes of Australians. One class of true Australians, or first-class Australians, would be beyond the scope of the head of power in s 51(xix) concerning aliens ("the aliens power"). That class, on the defendants' submission, would be those who are born in Australia, to two Australian-citizen parents, and without any other citizenship or nationality. Almost all other citizens, including all those such as Mr Jones who had been naturalised, would be second-class Australians, permanently within the scope of the aliens

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102 See *Love v The Commonwealth* (2020) 270 CLR 152 at 311 [444]. See also *Chetcuti v The Commonwealth* (2021) 272 CLR 609; *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560; 401 ALR 438.

103 *Pochi v Macphee* (1982) 151 CLR 101 at 109.

power in s 51(xix) of the *Constitution*. The Commonwealth Parliament would have perpetual power to define them as aliens and to treat them as such including by empowering the Executive to revoke their citizenship and to deport them from Australia for any non-punitive reason.

104 The approach to second-class Australians under the broad ground advanced by the defendants has close parallels with a minority approach once taken to the "immigration and emigration" power in s 51(xxvii) of the *Constitution*: "[o]nce an immigrant always an immigrant"[104]. But the premise that an immigrant can never be "a true Australian"[105] is not reflected in the meaning of s 51(xxvii) of the *Constitution*[106], an instrument that was itself forged by those who were immigrants to Australia or the descendants of immigrants to Australia. An immigrant who is fully and unconditionally absorbed into the Australian community, falling outside the immigration power in s 51(xxvii) of the *Constitution*, is no less a "true Australian" than an Australian who was born in this country to parents who were fully and unconditionally absorbed into the Australian community. There are not two classes of Australians.

105 The defendants' broad ground should be rejected for similar reasons in relation to the aliens power in s 51(xix) of the *Constitution*. Although the *Constitution* does not contemplate that statutory or even constitutional entitlements must be afforded to the same extent to each of the people of the Commonwealth[107], the *Constitution* does not recognise two classes of Australians, with one entire class exposed to a potential legislative power to be deported from Australia at any time and for a wide range of reasons. The aliens power in the *Constitution* extends only to those people who are not the "people of the Commonwealth"[108], in other

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104 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 81. See also at 83.

105 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 82.

106 *Love v The Commonwealth* (2020) 270 CLR 152 at 282 [369], referring to *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 62-65, *O'Keefe v Calwell* (1949) 77 CLR 261 at 277, *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 172-173, and *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369 at 373-374, 382.

107 See, eg, *Constitution*, s 34. See also discussion of "substantial reasons" for exclusion in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7], 198 [83], 199 [85].

108 See *Constitution*, s 24. See also covering cl 5, ss 7, 117. See further, *Singh v The Commonwealth* (2004) 222 CLR 322 at 382 [149].

words those who have not been unconditionally absorbed into the Australian political community[109].

106 The defendants' narrow ground has more to commend it. The narrow ground focused upon the head of power in s 51(xix) concerning naturalisation ("the naturalisation power") and the conditions that the Commonwealth Parliament can impose upon the conferral of the statutory status of citizen by naturalisation under that power. The defendants' submission was that if Mr Jones had committed an offence before he was naturalised, but had been convicted subsequently and punished by more than a year's imprisonment, then Mr Jones' citizenship by conferral was vulnerable to revocation through the s 34(2)(b)(ii) gateway without being characterised as punishment, because that gateway is reasonably capable of being seen as necessary for the legitimate purpose of protecting the integrity of the naturalisation process.

107 For the reasons below, the defendants' narrow ground should be accepted. But the s 34(2)(b)(ii) gateway can only apply to empower the Executive to act within the boundaries of the provision's purpose of protecting the integrity of the naturalisation process.

Mr Jones and the relevant provisions of the *Australian Citizenship Act*

108 Mr Jones was granted a certificate of Australian citizenship under s 13(1) of the *Australian Citizenship Act 1948* (Cth) ("the 1948 Act"). Section 13(1) of the 1948 Act provided for a discretion for the relevant Minister to grant a certificate of Australian citizenship to a person, conditional upon the Minister's satisfaction of a range of matters, including a condition that the person was "of good character"[110]. Mr Jones became an Australian citizen by operation of s 15(1) of the 1948 Act.

109 At the time of Mr Jones' naturalisation, s 21 of the 1948 Act imposed, in effect, a discretionary condition upon a person's continuing citizenship by naturalisation[111]. It created a discretionary ministerial power to revoke citizenship, with the power enlivened by circumstances after naturalisation that, in effect, cast doubt on whether the person satisfied the condition of being of good character at the time of naturalisation[112]. Those circumstances were as follows: (i) prior to the grant of the certificate of Australian citizenship the person had committed an

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109 See *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 601-609 [187]-[226]; 401 ALR 438 at 484-495.

110 1948 Act, s 13(1)(f).

111 See *Australian Citizenship Amendment Act 1984* (Cth), s 15.

112 See 1948 Act, s 13(1)(f).

offence; (ii) at any time after the furnishing of the application for the certificate the person was convicted of that offence and sentenced to at least 12 months' imprisonment; and (iii) the Minister was satisfied that it would be contrary to the public interest for the person to continue to be an Australian citizen.

110 On 27 May 2003, Mr Jones was convicted of five offences, on his plea of guilty to two indictments. The first indictment contained four counts, two of which were agreed in this special case to concern conduct committed entirely before Mr Jones had been naturalised. Relevantly, those two counts concerned the indecent treatment of a girl under 16 with a circumstance of aggravation. The sentence imposed did not distinguish between the different counts or between the indictments. The sentence imposed for all five counts was simply imprisonment for a period of two and a half years. It was assumed in this special case that the sentence for each count was two and a half years and that each sentence was to be served concurrently[113].

111 The effect of Mr Jones' convictions in 2003 was that the legislative condition upon his naturalisation that he be of "good character", reflected in ss 13(1) and 21 of the 1948 Act, may not have been satisfied. If the Minister were satisfied that the condition was not satisfied and that it would be contrary to the public interest for Mr Jones to continue to be an Australian citizen, then the Minister could, in their discretion, order that Mr Jones be deprived of his Australian citizenship[114].

112 In 2007, the 1948 Act was repealed[115] and the *Australian Citizenship Act 2007* (Cth) was enacted in its place. Mr Jones automatically became an Australian citizen under the *Australian Citizenship Act*[116]. The "good character" eligibility requirement for citizenship was maintained in the *Australian Citizenship Act*[117]. The effect of transitional provisions was that Mr Jones was "taken ... to be" an Australian citizen by naturalisation under the *Australian Citizenship Act*[118]. That deeming provision, together with s 34(2)(b)(ii) of the *Australian Citizenship Act*,

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113 See *Penalties and Sentences Act 1992* (Qld), s 155.

114 1948 Act, s 21(1)(b).

115 *Australian Citizenship (Transitionals and Consequentials) Act 2007* (Cth), s 3 and Sch 1, Pt 2, item 42.

116 *Australian Citizenship Act 2007* (Cth), s 4(1)(b).

117 *Australian Citizenship Act 2007* (Cth), s 21(2)(h).

118 *Australian Citizenship (Transitionals and Consequentials) Act 2007* (Cth), s 3 and Sch 3, Pt 1, item 2(2).

also meant that the Minister retained the power to revoke Mr Jones' citizenship for failing to meet a condition of naturalisation.

113 Section 34(2)(b)(ii) of the *Australian Citizenship Act*, read with s 34(5) and the definition of "serious prison sentence" in s 3, relevantly provides that the Minister may, by writing, revoke a person's Australian citizenship if:

> "the person has, at any time after making the application to become an Australian citizen, been convicted of [an offence against an Australian law ... for which the person has been sentenced to ... [imprisonment for a period of at least 12 months] ... and ... the person committed the offence at any time before the person became an Australian citizen]".

114 On 9 July 2018, 15 years after Mr Jones' convictions, the Minister determined that he was satisfied that it was contrary to the public interest for Mr Jones to remain an Australian citizen and exercised his discretion to revoke Mr Jones' Australian citizenship under s 34(2)(b)(ii). The effect of the revocation of Mr Jones' citizenship was that he lost some of the core rights which are consequent upon the grant of citizenship that he acquired in 1988. Mr Jones was automatically granted an ex-citizen visa[119]. In 2021, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs cancelled Mr Jones' ex-citizen visa[120]. Mr Jones has been in immigration detention since 14 January 2022.

Mr Jones' challenge to s 34(2)(b)(ii)

115 The parties stated two principal questions of law for this Court. The first was whether s 34(2)(b)(ii) of the *Australian Citizenship Act* was invalid in its operation to Mr Jones because it was not supported by s 51(xix) of the *Constitution*. The second was whether s 34(2)(b)(ii) was invalid because it reposed in the Minister the exclusively judicial function of punishing criminal guilt.

116 In one respect, the two submissions converged. Counsel for Mr Jones accepted that the naturalisation power in s 51(xix) of the *Constitution* could support the revocation of statutory citizenship for the purpose of protecting the integrity of the naturalisation process. But, he submitted, s 34(2)(b)(ii) of the *Australian Citizenship Act* went further than was reasonably capable of being seen as necessary to further that legitimate, non-punitive, purpose. For that reason, s 34(2)(b)(ii) was said to be punitive and contrary to Ch III of the *Constitution* as a conferral upon the Executive of a power to punish which is exclusively judicial. Otherwise, he accepted, the provision would be valid.

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119 *Migration Act 1958* (Cth), s 35(3).

120 *Migration Act 1958* (Cth), s 501(2).

117 The defendants had two answers to Mr Jones' challenge, one raising a broad issue and one raising a narrow issue. The broad issue raised by the defendants concerned whether s 34(2)(b)(ii) was supported by the aliens power in s 51(xix) of the *Constitution*. The aliens power, they submitted, supported any legislation, not enacted as punishment, to revoke statutory citizenship and denationalise any Australian, other than the class of Australians who were born in Australia to two Australian-citizen parents, and who did not have any other nationality or citizenship. In effect, other than with respect to these first-class Australians, the aliens power could permit legislation that would remove from any Australian not merely the statutory rights and privileges consequent upon citizenship but also their constitutional status as one of the people of the Commonwealth.

118 The defendants' narrower issue raised in answer to Mr Jones' challenge concerned whether s 34(2)(b)(ii) of the *Australian Citizenship Act* could be supported by the naturalisation power because it effectively imposed a valid and non-punitive condition upon the naturalisation of Mr Jones—namely, that he had not committed offences prior to naturalisation that showed he was not of good character at the time of naturalisation but which were only revealed subsequent to naturalisation.

119 The starting point is the broad issue. If the defendants are correct that the aliens power supports the non-punitive denationalisation of any naturalised Australian, then the broad power to naturalise people under legislation supported by the naturalisation power would be complemented by a broad power to denationalise them under legislation supported by the aliens power, including revoking their statutory citizenship status. There would be no need to enquire into the limited circumstances in which the naturalisation power might itself permit denationalisation or revocation of the statutory citizenship status of naturalised Australians, such as by the breach of a condition at the time of grant that is reasonably capable of being seen as necessary for the purpose of protecting the integrity of the naturalisation process.

The broad issue: denationalisation under the aliens power

The aliens power in s 51(xix) does not support denationalisation

120 The effect of the defendants' broad submission is that the power in s 51(xix) to "make laws ... with respect to ... aliens" authorises legislation with respect to persons who are presently *non*-aliens within the *Constitution*, not merely to revoke their statutory citizenship and thus remove all the rights and privileges that are consequent upon citizenship, but also to de*nationalise* them, depriving them of nationality by removing their constitutional status as people of the Commonwealth and enabling their deportation from Australia. The defendants' broad submission had two steps. Both are necessary for their submission to be accepted. Both are wrong.

121 First, it was submitted that the constitutional power to make laws with respect to aliens has two aspects. One aspect, which can be accepted, is that it is a power to attach consequences to the status of "alien". That is another way of saying that it is a power to make laws with respect to aliens. It is what the text of the provision says. But the other aspect was said to be an anterior (necessarily implied) power of the Commonwealth Parliament "to define 'alien'". In other words, the submission was that the express power for the Commonwealth Parliament to make laws with respect to aliens includes an implied constitutional power for the Commonwealth Parliament generally to define for itself the meaning of an alien.

122 Secondly, it was submitted that since the Commonwealth Parliament has the power to define the constitutional meaning of an alien, and since Parliament has the power to take away a statutory status that it has granted, Parliament also has the power to treat as aliens even those people who might be non-aliens, with the exception of a constitutionally protected group of first-class Australians.

(1) The Parliament cannot define for itself the meaning of "alien"

123 The immediate problem for the defendants' submission is that, as Gleeson CJ said in *Singh v The Commonwealth*[121], echoing the proposition of Gibbs CJ (with whom Mason and Wilson JJ agreed) in *Pochi v Macphee*[122], "[e]veryone agrees that the term 'aliens' does not mean whatever Parliament wants it to mean". That statement is premised upon the notion that it is for this Court, and not for the Commonwealth Parliament, to determine the meaning of a constitutional term such as "alien". This is the principle in *Australian Communist Party v The Commonwealth*[123] ("the *Communist Party Case*"). As Fullagar J expressed the principle in the course of considering the defence power in that case, "[a] power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse"[124].

124 The principle in the *Communist Party Case* applies beyond constitutional powers to legislate with respect to defence (s 51(vi)) or lighthouses (s 51(vii))[125]. It is the reason that the power in relation to trade marks in s 51(xviii) does not permit the Commonwealth Parliament itself to "call a spade a 'trade mark,' and

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121 (2004) 222 CLR 322 at 329 [5]. See also at 343 [36], 383 [153].

122 (1982) 151 CLR 101 at 109. See also at 112, 116.

123 (1951) 83 CLR 1.

124 *Communist Party Case* (1951) 83 CLR 1 at 258.

125 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 601-602 [187]-[188]; 401 ALR 438 at 484-485.

then legislate as to spades"[126]. A fundamental presupposition of the *Constitution* is that the Commonwealth Parliament cannot alter the essential meaning of the terms of the *Constitution*[127]. In relation to s 51(xix), the essential meaning of an alien is that of a "foreigner" or an "outsider" to the political community[128]. Commonwealth legislation might affect a person's status as an outsider, especially by naturalisation when it admits to the Australian political community those who were not previously members. But legislation cannot conclusively determine constitutional meaning. The Commonwealth Parliament cannot legislate itself into power just by calling any of the people of the Commonwealth "outsiders" or "aliens" and legislating with respect to them as though they were aliens.

125 When four members of this Court in *Chetcuti v The Commonwealth*[129] said that it is a "settled understanding that the aliens power encompasses both 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", their Honours could not have been intending to suggest that the principle in the *Communist Party Case* did not apply to the aliens power so that an alien could mean whatever the Commonwealth Parliament wanted it to mean[130]. All that could have sensibly been meant is that the Commonwealth Parliament has power to attach a statutory status to any or all of those people who fall within the constitutional concept of an alien, and to provide for the consequences of such a status. Indeed, their Honours accepted that where a

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126 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 614.

127 See the cases referred to in *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 637 [57].

128 See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183, 189; *Singh v The Commonwealth* (2004) 222 CLR 322 at 351 [59], 395 [190]; *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 635-636 [53]; *Thoms v The Commonwealth* (2022) 96 ALJR 635 at 648-649 [61]; 401 ALR 529 at 543-544. See also *Love v The Commonwealth* (2020) 270 CLR 152 at 186-187 [61], 190 [73]-[74], 248-249 [263], 256-257 [276], 260-261 [289]-[290], 262 [296], 272 [333], 272-273 [335]-[336], 273 [338], 274 [340]-[341], 276-277 [349], 279 [357], 280-281 [363]-[364], 284 [374], 286-287 [391]-[392], 288 [394], 289 [396], 290 [398], 293-294 [404], 296 [410], 298-299 [415], 313-314 [450]-[451], 315-316 [454].

129 (2021) 272 CLR 609 at 622 [12]. See also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 572 [33]; 401 ALR 438 at 446.

130 See also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 603 [196]-[198]; 401 ALR 438 at 487.

law of the Commonwealth Parliament treats "all non-citizens as aliens", that law might need to be disapplied "to the extent of any constitutional overreach"[131].

126 The defendants in this special case sought to avoid the problem created for their broad submission by the *Communist Party Case* by developing a view that there is an exception to the power of the Commonwealth Parliament to define the meaning of an alien. That view was built upon remarks by Gibbs CJ that could not have been intended to provide an exhaustive exception[132]. The exceptional category of constitutional non-aliens was said to be those Australians who are born in Australia, to two Australian-citizen parents, and who do not hold foreign citizenship.

127 The obvious difficulty with this submission is that the creation of this exception still leaves to the Commonwealth Parliament the power to define the meaning of "alien". It merely creates a category of first-class Australians who are constitutional *non*-aliens, leaving everyone outside that category capable of being defined as an alien by the Commonwealth Parliament. Further, the suggested definitional power of the Commonwealth Parliament is so broad that it leaves the doctrine in the *Communist Party Case* as little more than a fig leaf to mask constitutional immodesty. Significantly, even with the exception for first-class Australians, the Commonwealth Parliament would have power to define as aliens potentially half of the people of the Commonwealth[133]. That half of Australia's permanent population would include, as second-class Australians: all those Australians who have been naturalised; all those who hold (whether intentionally or not) another citizenship, perhaps other than by an exorbitant foreign law[134]; and all those who have a parent who is not an Australian citizen.

128 Without more, the defendants' submission would also include in the group of second-class Australians many Aboriginal or Torres Strait Islander Australians. Unless "citizenship" in the defendants' submission were to be treated, by a constitutional fiction unanimously rejected by this Court, as a hollow concept capable of existing as a constitutional criterion by the mere expedient of a statutory word[135], many Indigenous Australians would be second-class Australians on the defendants' submission. That is because, at the time of their birth, the parents of

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131 *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 621 [11]. See also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 573 [35]; 401 ALR 438 at 447.

132 *Pochi v Macphee* (1982) 151 CLR 101 at 109.

133 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 600 [182]; 401 ALR 438 at 483.

134 See *Sykes v Cleary* (1992) 176 CLR 77 at 113.

135 See *Re Canavan* (2017) 263 CLR 284 at 329 [134].

many Indigenous Australians did not have the full substance of citizenship. By any real measure, and for some years after 1949, when the statutory concept of Australian citizenship was created[136], many Indigenous Australians were deprived of substantial parts of the three[137] categories of rights consequent upon citizenship: civil rights, political rights and social rights[138]. Chesterman and Galligan thus described Aboriginal Australians during this period as being "citizens without rights"[139]. One consequence of the decision in *Love v The Commonwealth*[140] was to deny continuing effect to this history by rejecting the suggested exhaustive nature of the defendants' category of first-class Australians.

129 Nevertheless, in this special case the defendants described the outcome in *Love* as creating a "sui generis exception" for Aboriginal Australians, an apparently anomalous addition to the defendants' category of first-class Australians. On this view, the apparent anomaly arises because despite self-identification, community recognition and deep connection to the Australian land for tens of thousands of years, many Aboriginal Australians would fall to be treated as inferior to those first-class Australians whom the defendants recognised as falling beyond the aliens power.

(2) The aliens power is not a power to denationalise non-aliens

130 The second step of the defendants' broad submission was that the power of the Commonwealth Parliament to define the meaning of an alien, subject to the exceptional category of first-class Australians, carried with it an ability to empower the Executive to impose "civil death"[141] upon potentially half of the

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136 *Nationality and Citizenship Act 1948* (Cth). See *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 625-626 [20]-[22], 645 [76], 662-663 [123]-[124].

137 Marshall, *Citizenship and Social Class: And Other Essays* (1950) at 10-11.

138 As to civil rights, see *Emigration Act 1910* (Cth), s 3; *Migration Act 1958* (Cth) (as enacted), s 64; *Migration Act 1973* (Cth), s 6. As to political rights, see Rubenstein, "Citizenship in Australia: Unscrambling Its Meaning" (1995) 20 *Melbourne University Law Review* 503 at 519; *Commonwealth Electoral Act 1902* (Cth), s 31; *Commonwealth Franchise Act 1902* (Cth), s 4. As to social rights, see, eg, *Natives (Citizenship Rights) Act 1944* (WA), s 6.

139 Chesterman and Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (1997) at 3.

140 (2020) 270 CLR 152.

141 Craies, "The Compulsion of Subjects to Leave the Realm" (1890) 6 *Law Quarterly Review* 388 at 396. See also *Newsome v Bowyer* (1729) 3 P Wms 37 at 38 [24 ER 959 at 960]; *Farquhar v His Majesty's Advocate* (1753) Mor 4669 at 4671.

permanent population of Australia at any time and for any non-punitive reason by the denationalisation of any person other than first-class Australians. It was effectively submitted that any second-class Australians who had been naturalised (because, for instance, they were not born in Australia[142]) could be reinstated as aliens at any time and for any non-punitive reason because Parliament may withdraw "rights [which] it has granted".

131 There are loosely expressed passages in the various reasons of members of this Court in *Alexander v Minister for Home Affairs*, including my own (albeit limited to extreme cases)[143], that might be read as supporting the aliens power as a sole, and sufficient, source of power to denationalise. But, for five reasons, the aliens power cannot be a sufficient source of power to denationalise those people of the Commonwealth who were never aliens or who had ceased to be aliens.

132 First, textually, the power to legislate with respect to aliens is not a power to legislate with respect to those who are *not*, or who are no longer, aliens. The text of s 51(xix) does not contemplate the alienation of those who are not aliens. The collocation of the power to legislate with respect to "naturalization" reinforces this point. Naturalisation itself is the formal recognition of a person's status as a member of the Australian political community or the conferral of such a status upon a person who was not already such a member. The naturalisation power is the power to recognise, or to create, the status of *non*-alien. It is not a general power to transform non-aliens into aliens. So too, the aliens power is not a power over *non*-aliens.

133 Secondly, the defendants' interpretation of the aliens power is inconsistent with the requirement for substantial justification before particular core constitutional entitlements of the people of the Commonwealth could be removed. These core constitutional entitlements do not include all the civil, political and social rights that are consequent upon statutory notions of citizenship[144]. But they have been held to include the entitlement of the people of the Commonwealth not to be deprived of the ability to vote without substantial justification[145]. As Gummow, Kirby and Crennan JJ said of invalid legislative provisions that precluded serving prisoners from voting, membership of the Australian federal

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142 See *Australian Citizenship Act 2007* (Cth), s 12(1).

143 (2022) 96 ALJR 560 at 573-574 [36]-[38], 601 [185]; 401 ALR 438 at 447-448, 484.

144 See Marshall, *Citizenship and Social Class: And Other Essays* (1950).

145 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7]. See also at 199 [83].

body politic is "not extinguished by the mere fact of imprisonment"[146]. Similarly, and contrary to the defendants' interpretation of the aliens power, it has been said that there is a "strong case for the invalidity of expulsion" of a person "included in the body of the sovereign people" because to be "forced to leave, or be prevented from returning to, Australia would of course also impair the exercise of people's constitutional functions"[147]. At the least, as Kiefel CJ, Keane and Gleeson JJ have said, "the Parliament cannot expand the scope of s 51(xix) by adopting an understanding of the people that would also be an affront to ss 7 and 24 of the *Constitution*"[148].

134 Thirdly, the defendants' submissions are not even consistent with the reasoning in the case from which much of the modern expansion of the aliens power has proceeded and which the defendants' submissions sought to develop: *Pochi v Macphee*[149]. In that case, Gibbs CJ (with whom Mason and Wilson JJ agreed) recognised that although the Commonwealth Parliament could not expand the meaning of "alien" beyond its "ordinary understanding", it was open to treat Mr Macphee as an alien because he was a "person who was born outside Australia, whose parents were not Australians, *and who has not been naturalized as an Australian*"[150].

135 Fourthly, the effect of treating the aliens power as giving rise to a general power to denationalise all but a protected class of first-class Australians would be to place naturalised Australians within a constitutional category of second-class Australians who would hold their status as people of the Commonwealth precariously. The Commonwealth Parliament could legislate so that any naturalised Australian could be denationalised and deported from Australia for any non-punitive reason. Yet, as this Court unanimously said in the context of s 44(i)

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146 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [84], see also at 174 [7]. And see *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 20 [23], 49 [123], see also at 111-112 [344].

147 Zines, "We the People: The Sovereignty of the People", in Coper and Williams (eds), *Power, Parliament and the People* (1997) 91 at 101. See also *R (O) v Secretary of State for the Home Department* [2023] AC 255 at 270 [26]; Foster, "'An "Alien" by the Barest of Threads'—The Legality of the Deportation of Long-Term Residents from Australia" (2009) 33 *Melbourne University Law Review* 483 at 515.

148 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 575 [46]; 401 ALR 438 at 449.

149 (1982) 151 CLR 101.

150 *Pochi v Macphee* (1982) 151 CLR 101 at 109-110 (emphasis added).

of the *Constitution* in *Re Canavan*[151], it is "clearly correct" not to recognise any implied distinction between Australian citizens who are natural-born and those who become citizens by naturalisation. Whether or not the Commonwealth Parliament exercises its legitimate powers to confer different statutory rights or entitlements upon different people of the Commonwealth, the *Constitution* itself does not create any status distinction between, on the one hand, those people who have lost their status as aliens and become the people of the Commonwealth by naturalisation and, on the other hand, those who were never aliens. All are people of the Commonwealth within the *Constitution*.

136 Fifthly, to give this scope to the aliens power would be in substantial tension with the result of the canonical decision of this Court in the *Communist Party Case*[152]. In that case, it was held that the *Constitution* conferred no power on the Commonwealth Parliament to enact legislation that, amongst other things, purported to empower the Governor-General to declare as unlawful, and dissolve, a body affiliated with the Communist Party if, in the opinion of the Governor-General, the continued existence of that body would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the *Constitution* or of Commonwealth laws[153]. In the majority, Dixon J said that the law was invalid because it was not addressed to "suppressing violence or disorder" and was not based upon an objective test but instead "proceed[ed] directly against particular bodies or persons by name or classification or characterization" and did "so as to affect adversely their status, rights and liabilities once for all"[154]. By contrast, a broad scope for the aliens power would enable legislation authorising the Governor-General not merely to dissolve an association of persons on the basis of subjective views concerning defence but to remove any or all of those people from Australia for any non-punitive reason, provided that they were not within the protected category of first-class Australians.

137 It can be accepted that the application of constitutional meaning is not frozen in time. Hence, the application of the essential meaning of "alien" was affected by the creation of Australian citizenship in 1949. After 1949, naturalisation as an Australian citizen might be more than merely formal recognition that a person is an unconditional member of the Australian political community and a gateway to numerous statutory rights and privileges. In some cases naturalisation might itself involve an admission of the person to that

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151 See (2017) 263 CLR 284 at 308-309 [53].

152 (1951) 83 CLR 1.

153 *Communist Party Case* (1951) 83 CLR 1 at 205, 213, 232, 271, 285. See also at 248.

154 *Communist Party Case* (1951) 83 CLR 1 at 192, see also at 193-194. And see *Thomas v Mowbray* (2007) 233 CLR 307 at 363-364 [147].

community. But the power, after 1949, formally to recognise admission of, or to admit, people to the Australian political community could not have created a new constitutional source of power to *denationalise* people, turning them into constitutional aliens.

138 In 1949, Australia had barely finished counting the tens of thousands of Australians, natural-born and naturalised, who had given their lives to fight for freedom against regimes whose vile laws included those that stripped groups of their own citizens of all of their civil, political and social rights[155]. No circumstance of Australian society in 1949 could require a new application of the aliens power that would treat the freshly minted Australian statutory citizenship as the basis to create a constitutional tentacle of hatred, empowering the exclusion and involuntary removal of many of the people of the Commonwealth. Nor can any subsequent development justify this Court now "divert[ing] the flow of constitutional law into new channels"[156] to create such a sweeping new power for the "total destruction of the individual's status in organized society"[157] by "a fate universally decried by civilized people"[158].

An implied power to denationalise is not applicable in this case

139 Although the aliens power is not, by itself, a source of power to denationalise, the aliens power is part of the context of an implied constitutional power of denationalisation in very limited circumstances[159]. The aliens power forms part of the constitutional context that permits the recognition of objective acts of voluntary renunciation of membership of the people of the Commonwealth. The aliens power might also be seen as part of the context that permits the recognition of a constitutional implication of a power to denationalise that is "incidental to the existence of the Commonwealth as a state"[160] in very limited cases, including where there are threats, objectively established rather than

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155 See, eg, *First Regulation to the Reichs Citizenship Law of 14 Nov 1935*, Art 4(1) read with Art 5(2)(c). See further Hilberg, *The Destruction of the European Jews*, rev ed (1985), vol 2 at 417-430.

156 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396.

157 *Trop v Dulles* (1958) 356 US 86 at 101, quoted in *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 613 [248]; 401 ALR 438 at 500.

158 *Trop v Dulles* (1958) 356 US 86 at 102, quoted in *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 613 [248]; 401 ALR 438 at 500.

159 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 601 [185]; 401 ALR 438 at 484.

160 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 269.

perceived[161], to the existence of the Commonwealth or its institutions. As Steward J has explained, a person can be denationalised as a consequence of "actions or steps that are indelibly inconsistent with ... membership of [the Australian political] community" such as "actions directed at overthrowing state institutions where such conduct amounts to a clear rejection of allegiance to Australia"[162]. A similar point was made by Isaacs J in *Ex parte Walsh and Johnson; In re Yates*[163], who spoke of the national power to deport a person, including "an alien or a fellow-subject", based on "the right of the community as a whole to preserve its own existence", giving examples of individuals plotting with foreign powers against the safety of the country, and of spies and traitors.

140 Whether, or when, this implied power could be "purely protective"[164] and whether, or when, it is punitive need not be presently considered because this is not such an extreme case enlivening the implied constitutional power to denationalise, nor was it claimed to be.

The narrow issue: revocation of citizenship under the naturalisation power

141 The power to legislate "with respect to ... naturalization" in s 51(xix) is a power to recognise formally, or to confer upon a person, a status of non-alien—that is, a status as one of the people of the Commonwealth. It cannot be a power to *de*nationalise (alienate) the people of the Commonwealth who were never aliens in any sense of the word. And, like the aliens power, it is not a general power to denationalise those people of the Commonwealth who have been naturalised. As Gordon J said in *Alexander*[165]:

> "As a general proposition, persons who have been naturalised or otherwise admitted to membership of the Australian community cannot subsequently be treated as or converted into 'aliens' by statute supported by the aliens power because the aliens power is spent once the person is naturalised or otherwise admitted to membership of the community."

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161 See *Communist Party Case* (1951) 83 CLR 1 at 192.

162 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 621 [286], 622 [290], see also at 610 [233]; 401 ALR 438 at 511, 512, see also at 496-497.

163 (1925) 37 CLR 36 at 94.

164 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 155 [197].

165 (2022) 96 ALJR 560 at 590 [138]; 401 ALR 438 at 470.

142 In *Alexander*[166], Kiefel CJ, Keane and Gleeson JJ (with whose reasons Gageler J agreed in substance) said in relation to revocation of citizenship that "[a]s a general principle, where the Parliament may confer rights by the exercise of legislative power, it may also take them away". That statement is, with respect, plainly correct, if their Honours meant either or both of: (i) the exercise of a power that confers a status or confers rights or privileges on reasonable conditions must imply a power to remove the status, rights or privileges upon breach of those conditions; or (ii) a power to legislate generally implies a power to repeal or amend the legislation[167].

143 On the other hand, if the statement were taken to mean that the naturalisation power in s 51(xix) carries with it a power generally to change constitutional facts by denationalising (alienating) any naturalised person who is one of the people of the Commonwealth, then the statement is wrong. Not only is that not what s 51(xix) says—it is a general power with respect to naturalisation, not a general power with respect to *denationalisation*—but, for the reasons explained earlier, the *Constitution* does not contemplate naturalised persons as a second-class category of Australians whom Parliament can define to be, or treat as, aliens. Indeed, even wartime legislation that provided only for the temporary detention in military control of naturalised persons who there was reason to believe were disaffected or disloyal[168] has been said to be a law that "could only be justified during such a crisis"[169].

144 There is, however, scope within the naturalisation power for the imposition of conditions upon naturalisation. Naturalisation can be granted upon conditions that limit the entitlement to some or all of the statutory civil, political or social rights that are consequent upon citizenship, or conditions that limit the conferral of, rather than mere recognition of, a new status. But, as explained below, the imposition of those conditions pursuant to the naturalisation power cannot empower the Executive to revoke the conferral of citizenship as punishment.

An anomalous case

145 In *Meyer v Poynton*[170], Starke J considered the validity of s 11(b) of the *Naturalization Act 1903* (Cth), which provided that the Governor-General could

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166 (2022) 96 ALJR 560 at 573-574 [38]; 401 ALR 438 at 447-448.

167 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355-356 [12]-[14], 372 [57].

168 See *Lloyd v Wallach* (1915) 20 CLR 299.

169 *Communist Party Case* (1951) 83 CLR 1 at 227.

170 (1920) 27 CLR 436.

revoke a certificate of naturalisation where the Governor-General was satisfied that it was desirable to revoke the certificate for any reason. That provision was introduced in 1917 on the basis that "in war time [a general power of revocation] may be very necessary"[171]. The Governor-General relied upon s 11(b) to revoke the certificate of naturalisation of Mr Meyer, a German national who had been naturalised in 1909 under the *Naturalization Act 1903* (Cth). After an order was made for Mr Meyer's deportation, he brought an application for an interim injunction to restrain that deportation. One issue raised by Mr Meyer's application was whether a law depriving a naturalised citizen of citizenship was a law relating to naturalisation[172].

146 In a decision delivered on the same day as argument and without calling upon the defendants on the issue of power, Starke J referred to the power under the *Naturalization Act 1903* (Cth) "to admit the nationals of other Powers to Australian citizenship" and to "reserve to ourselves, or rather to the Governor-General, the power to take away that citizenship and those rights and privileges in certain cases"[173]. That reservation would be by the imposition of specified conditions subsequent on naturalisation. He continued, by reference to such conditions[174]:

> "It seems to me that if the power given by the *Naturalization Act* 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."

147 There was no argument in *Meyer v Poynton* about the constitutional limits to the valid conditions that could be placed upon naturalisation. The lack of argument on this point might have reflected the wartime context of the case. In any event, the decision preceded, by many years, the recognition by this Court of the restrictions on the executive power to punish and the development of a conception of punishment by reference to notions of proportionality.

Two different types of punitive provision

148 In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[175] the joint judgment applied the principle of a Commonwealth

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171 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 August 1917 at 853; *Naturalization Act 1917* (Cth), s 7.

172 *Meyer v Poynton* (1920) 27 CLR 436 at 438, 440-441.

173 *Meyer v Poynton* (1920) 27 CLR 436 at 440-441.

174 *Meyer v Poynton* (1920) 27 CLR 436 at 441.

175 (1992) 176 CLR 1 at 33.

separation of powers to recognise that a legislative provision cannot be punitive, in the sense that it cannot empower the Commonwealth Executive to impose punishment[176]. The concept of a punitive provision that was considered in *Lim* extends to two different types of provision. The first is those provisions that fall within the typical meaning of "punitive": a sanction for conduct that has objects such as retribution or general or specific deterrence[177]. Apart from limited exceptions, it is illegitimate to confer power with such a purpose upon any body other than a judicial one[178].

149 The second type of "punitive" provision is one that deprives a person of basic or fundamental rights or privileges for legitimate, non-punitive, purposes but is not reasonably capable of being seen as necessary for those legitimate purposes. Sometimes, provisions in this class are described as "prima facie" punitive[179]. Sometimes, they are, in effect, deemed to be punitive[180]. However described, such provisions are treated as "punitive" because they are disproportionate to their legitimate purpose[181]. The narrow issue in this case concerns whether s 34(2)(b)(ii) falls within this second type of punitive provision.

Proportionality and punishment

150 In *Falzon v Minister for Immigration and Border Protection*[182], the principal joint judgment of Kiefel CJ, Bell, Keane and Edelman JJ said that questions concerning whether a law is punitive for the purpose of Ch III, and "[t]he test of 'reasonable necessity' in proportionality testing", are "different because they arise in different constitutional contexts". It was said that proportionality testing is used to resolve part of the question of the limits to legislative power. It was

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176 See *Benbrika v Minister for Home Affairs* [2023] HCA 33 at [89]-[91].

177 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 611-612 [238]-[240]; 401 ALR 438 at 498.

178 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

179 See, eg, *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 98 [37].

180 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.

181 *Garlett v Western Australia* (2022) 96 ALJR 888 at 945 [266]; 404 ALR 182 at 248-249; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 149 [184].

182 (2018) 262 CLR 333 at 344 [30]-[31].

concluded that "[q]uestions of proportionality cannot arise under Ch III"[183]. Unfortunately, and with regret, it is necessary to say that the reasoning employed by me and the other parties to the principal joint judgment was based upon confusion about the nature of proportionality reasoning and involved a non sequitur. Consequently, the intermediate conclusion drawn from that reasoning was wrong, although the result of the case was not necessarily wrong on the assumption upon which it was argued, which was that Mr Falzon was an alien.

151 The confusion about proportionality that arose in the reasoning of the principal joint judgment in *Falzon* lay in the assumption that there was a fundamental difference between the test for whether a law is punitive in the second sense described above—expressed in the joint judgment in *Lim*[184] as whether the law goes beyond "what is reasonably capable of being seen as necessary for [particular legitimate] purposes"—and the stages of the structured proportionality test. But the two are simply statements of the same principle at different levels of generality. Structured proportionality involves a more particular, less general, approach that can also be expressed at a higher level of generality as whether a law is "reasonably appropriate and adapted or proportionate to the achievement of a legitimate purpose"[185] or whether a law is reasonably capable of being seen as necessary for legitimate purposes. The difference is that the verbal formula in *Lim* at the higher level of generality does not demand reasoning that is as structured and transparent. But it does not prevent such reasoning. And it is a formula that has long been applied in this context.

152 As this Court said in *Lange v Australian Broadcasting Corporation*[186], one of the "[d]ifferent formulae" for proportionality is whether "the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose". The requirement in *Lim*[187] that the law be "reasonably capable of being seen as necessary" is a further formulation with powerful echoes of the same considerations of latitude given to Parliament for policy choices as the test for "reasonable necessity" in the

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183 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 344 [32].

184 (1992) 176 CLR 1 at 33.

185 *Comcare v Banerji* (2019) 267 CLR 373 at 400 [32].

186 (1997) 189 CLR 520 at 562. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85]; *Momcilovic v The Queen* (2011) 245 CLR 1 at 212 [549].

187 (1992) 176 CLR 1 at 33.

implied freedom of political communication[188]. Both formulations are looser than the staged approach to a structured proportionality enquiry and neither separates the final enquiry as to whether the law is adequate in the balance. But these are merely differences in the technique demanded for reasoning: both formulations of the structured proportionality enquiry are ultimately aimed at avoiding idiosyncratic judicial discretion.

153 The reasoning in *Falzon* was based upon a non sequitur because a mere difference in constitutional context says nothing about whether a test for proportionality should be applied in order to assess whether a law is sufficiently justified by a legitimate purpose. The Australian expression of the test of structured proportionality was, itself, imported into Australian law from a different constitutional context that was most immediately seen in German law[189]. The Australian expression of the test as "reasonably appropriate and adapted" was imported from a different context that was most immediately seen in United States law[190].

154 This reasoning in the principal joint judgment in *Falzon* led to the wrong conclusion that there is no role for proportionality testing in Ch III of the *Constitution.* Although expressed by reference to different, and more general, verbal formulae, and although not commonly expressed in a structured way, proportionality testing is not infrequent when considering whether a law has transgressed the limits of Ch III of the *Constitution.* For instance, Ch III of the *Constitution* permits a court to deprive a party of procedural fairness but only if that deprivation is justified, sometimes expressed as being no more than is reasonably necessary to protect a compelling countervailing interest[191]. Again, Ch III of the *Constitution* permits the individual injustice of preventive detention, but only if that individual injustice is justified by systemic considerations,

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188 See *Clubb v Edwards* (2019) 267 CLR 171 at 343-344 [495]-[498]; *Comcare v Banerji* (2019) 267 CLR 373 at 442 [165]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 77-79 [199]-[202]. See also *Ruddick v The Commonwealth* (2022) 96 ALJR 367 at 397-398 [148]; 399 ALR 476 at 512.

189 See *McCloy v New South Wales* (2015) 257 CLR 178 at 212-221 [64]-[94], 236-237 [146], 281-282 [308]-[311]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 52-53 [37], 72 [101], 122-123 [297]-[299]; *Clubb v Edwards* (2019) 267 CLR 171 at 305 [391] fn 458, 331-332 [466]; *Palmer v Western Australia* (2021) 272 CLR 505 at 552 [141], 553 [143]-[144], 572 [198].

190 *Clubb v Edwards* (2019) 267 CLR 171 at 331 [465].

191 *SDCV v Director-General of Security* (2022) 96 ALJR 1002 at 1055 [231], 1056 [238]-[239]; 405 ALR 209 at 268, 270-271. See also (2022) 96 ALJR 1002 at 1035 [138], 1038 [153], 1043 [176], 1070 [308]; 405 ALR 209 at 243, 247, 253-254, 289.

sometimes expressed as being no more than is reasonably necessary for a legitimate objective[192]. And, beyond the exercise of judicial power, the separation of powers in Ch III of the *Constitution* permits the executive detention of aliens in custody for particular legitimate purposes provided that the law does not go beyond "what is reasonably capable of being seen as necessary for [particular legitimate] purposes"[193].

The test of proportionality and revocation of citizenship

155 Chapter III of the *Constitution* constrains the conditions that can be imposed upon naturalisation, the breach of which may result in the loss of the civil, political and social rights consequent upon citizenship, and arguably also denationalisation and alienation. There is no justification for treating Ch III of the *Constitution* as imposing any less of a constraint upon the legislative creation of executive power to revoke citizenship with the consequent loss of many civil, political and social rights than upon the legislative creation of executive power to detain an alien. Both powers may be punitive if, in the words of the joint judgment in *Lim*, they go beyond "what is reasonably capable of being seen as necessary for [particular legitimate] purposes"[194].

156 Mr Jones and the defendants expressed their submissions concerning the proportionality between the legitimate purpose for a condition upon naturalisation and the operation and reasonably anticipated effect of s 34(2)(b)(ii) by reference to the *Lim* formulation, or similar wording, rather than the structured reasoning process required by structured proportionality. It is convenient, in light of its well-established nature, to adopt that more general verbal formula. The legitimate purpose upon which the defendants relied was the protection of the integrity of the naturalisation process. The conditions that operate to enliven an executive power to revoke citizenship must therefore be reasonably capable of being seen as necessary for the purpose of protecting the integrity of the process or grant of naturalisation.

Mr Jones' three groups of submissions

157 It was common ground in this case, and properly so, that this purpose of protection of the integrity of the naturalisation process is a legitimate legislative purpose. The same purpose has supported revocation of citizenship in the United

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192 *Garlett v Western Australia* (2022) 96 ALJR 888 at 918 [143], 933 [200], 944-945 [261], 954 [313]; 404 ALR 182 at 215, 232, 247, 260.

193 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.

194 (1992) 176 CLR 1 at 33.

States: "to protect the integrity of the naturalization process"[195], such as where citizenship "is procured when the prescribed qualifications have no existence in fact, [the citizenship] may be cancelled by suit"[196].

158 It was also common ground that s 34(2)(b)(ii) is part of a suite of gateway provisions to revocation of citizenship which have this protective purpose of empowering the revocation of citizenship where a person has obtained citizenship to which they should not have been entitled[197]. Each of the other gateway provisions to revocation in s 34(2)(b) is concerned, in broad terms, with misrepresentation or fraud in the application process. Thus, s 34(2)(b)(i) is concerned with various misrepresentation or fraud offences in relation to applications to become a citizen. Section 34(2)(b)(iii) is concerned with people who obtained the Minister's approval to become Australian citizens as a result of migration-related fraud. And s 34(2)(b)(iv) is concerned with people who obtained the Minister's approval to become Australian citizens as a result of third-party fraud.

159 Mr Jones' submission, however, was that s 34(2)(b)(ii) of the *Australian Citizenship Act* goes beyond what is reasonably capable of being seen as necessary for the legitimate purpose of protecting the integrity of the naturalisation process and therefore involves the invalid conferral upon the Executive of an exclusively judicial power to punish. Mr Jones' submissions that s 34(2)(b)(ii) is not reasonably capable of being seen as necessary for that purpose fell broadly into three groups.

160 First, there were submissions relating to context: s 34(2)(b)(ii), it was said, is unnecessary in light of the other gateways in s 34(2)(b) that protect the process of naturalisation. It was also said that, unlike the other gateways, s 34(2)(b)(ii) does not require that the citizen's offending be connected to the process of naturalisation, and that it also contains an exception where the Minister is not satisfied that the person has another nationality or citizenship.

161 Secondly, Mr Jones made various submissions concerned with the breadth of the Minister's discretion. One of those submissions was that "the absence of any time limit on the use of the power [following] conviction breaks the connection of necessity between the measure and the identified purpose". Another was that the

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195 *United States v Kairys* (1986) 782 F 2d 1374 at 1382. See also *Fedorenko v United States* (1981) 449 US 490 at 506-507.

196 *Baumgartner v United States* (1944) 322 US 665 at 672, quoting *Tutun v United States* (1926) 270 US 568 at 578.

197 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 6 May 1982 at 2361.

breadth of the Minister's discretion concerning whether it would be contrary to the public interest for the person to remain an Australian citizen meant that the discretion could be used for punitive purposes.

162 Thirdly, there were submissions that s 34(2)(b)(ii) pursues a purpose other than the protection of the integrity of the naturalisation process because it is narrower than it might have been expressed were it truly directed at that purpose. This was said to be because it is concerned only with naturalisation by conferral of citizenship status and not with naturalisation by descent or adoption, or because it excludes cases where revocation of citizenship would result in statelessness, or because it also requires the satisfaction of the Minister that it is contrary to the public interest for the person to remain a citizen.

163 None of these groups of submissions should be accepted.

(1) The first group of submissions

164 As to the first group of submissions, Mr Jones is correct that s 34(2)(b)(ii) does not concern the application process to become an Australian citizen in the same direct manner as the other gateway provisions broadly concerned with misrepresentation or fraud in the application process. But it is no less concerned with the integrity of the naturalisation process. Unless an applicant confessed in their application to offences which they had committed but for which they had not been convicted or perhaps even charged, the Minister would not have all relevant information at the time of assessing the application to determine whether the applicant was of good character.

165 The absence of this good character information before the Minister might not be the result of any misrepresentation or fraud by the applicant in relation to the application. In rare circumstances, the applicant might not even be aware that their past conduct had involved a serious offence. There was therefore a need to protect the integrity of the naturalisation process to cover circumstances where information concerning past offending was not available to the Minister at the time that the application was considered. This would ensure that the good character evaluation would not be stultified by the absence of information relevant to the application process for Australian citizenship. The integrity of the naturalisation process in those circumstances is addressed only by the s 34(2)(b)(ii) gateway together with the requirement in s 34(2)(c) that the Minister be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

166 Mr Jones also pointed out that the power of the Minister to revoke citizenship under the s 34(2)(b)(ii) gateway, unlike the other gateways in s 34(2)(b), contains an exception where the Minister is not satisfied that the person has another nationality or citizenship. That requirement, contained in s 34(3), gives

effect to Art 8(1) of the Convention on the Reduction of Statelessness[198], which prohibits a State from depriving a person of nationality if that deprivation would render the person stateless. But there are exceptions to that obligation where the nationality has been obtained by misrepresentation or fraud[199], reflected in s 34(2)(b)(i), s 34(2)(b)(iii) and s 34(2)(b)(iv).

(2) The second group of submissions and the two steps required by s 34(2)(c)

167 The second group of submissions focused upon the lack of a time-limit for the exercise of the power that is based on the s 34(2)(b)(ii) gateway and the breadth of the Minister's consideration of the public interest in s 34(2)(c). The lack of a time-limit was relied upon in two different respects. First, there is no time-limit between the date (before naturalisation) of the commission of the offence and the date of conviction (after the application for, or grant of, citizenship). In this case that gap was more than 20 years. Secondly, there is no time-limit between the date of conviction and the date of exercise of the ministerial power. In this case, that gap was a further 15 years. The circumstances of this special case thus illustrate that in the absence of a limit to that time-period the potential scope of the power in s 34(2)(b)(ii) is not insignificant.

168 The apparent reason for the absence of any time-limit between the applicant's commission of the offence before naturalisation and the subsequent conviction is that the most serious and egregious offences might not be discovered and tried, and be the subject of convictions, until many years after the offence had been committed.

169 The apparent reason for the absence of any limit to the time-period between conviction and the exercise of ministerial power is to ensure that a citizen by conferral who had relevantly offended, but who had not been convicted, prior to the conferral of citizenship cannot obtain an advantage by any delay, however lengthy, in the receipt of the information about the conviction by the Minister.

170 Mr Jones submitted that the unlimited time-period for the exercise of the Minister's power, coupled with the apparent breadth of the condition in s 34(2)(c) concerning the Minister's satisfaction that it would not be in the public interest for the person to remain an Australian citizen, meant that the ministerial power based on the gateway in s 34(2)(b)(ii) could be used for purposes beyond the scope of the legitimate purpose of the protection of the integrity of the naturalisation process.

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198 [1975] ATS 46.

199 Convention on the Reduction of Statelessness [1975] ATS 46, Art 8(2)(b).

171 Mr Jones is correct that s 34(2) contains no express restriction that prevents the Minister from relying upon the gateway in s 34(2)(b)(ii) as additional punishment for an offence or for some reason other than protection of the integrity of the naturalisation process. But it does contain an implied restriction. The application of a broadly expressed power is, by implication, confined to its purposes[200]:

> "Where a statute confers a discretionary power, it is implied—if it is not expressed—that the power be exercised for the purpose for which it was conferred ... [A] power couched in general terms is construed as conferring the power to be used only in accordance with the objects and policy of the Act".

For this reason, it has rightly been said that a value judgment to be exercised regarding what serves, or undermines, "the public interest" is "not made in a normative vacuum. It is made in the context of, and for the purposes of, [the relevant legislation]"[201]. It is confined by "the subject matter and the scope and purpose of the statutory enactment[]"[202].

172 An example is *Brownells Ltd v Ironmongers' Wages Board*[203]. In that case, this Court considered the scope of a statutory power for wages boards to determine various working conditions including the minimum wage rates for certain trades and any variations or additions to rates, including for overtime, "as to the Board shall seem just"[204]. One board sought to set higher overtime rates for employees "for the purpose of bringing about the closing of shops at an hour other than that required" by other legislation[205]. Although the express qualification on the provision for setting rates was only that which seemed "just", the board was held to have acted ultra vires. The implied purpose of the Act in "confer[ring] powers"

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200 *Walton v Gardiner* (1993) 177 CLR 378 at 409. See also *Katsuno v The Queen* (1999) 199 CLR 40 at 57 [24], quoting *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 424; *The Commonwealth v AJL20* (2021) 273 CLR 43 at 100-101 [124]-[125].

201 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 428 [5].

202 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216, quoting *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

203 (1950) 81 CLR 108.

204 *Wages Boards Act 1920* (Tas), s 23(III).

205 *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108 at 120, referring to *Shops Act 1925* (Tas).

upon the board, arising from the "general character of the statute", was to "determin[e] matters connected with the relations of employers and employees"[206].

173 The open-textured provision in s 34(2)(c) is confined by the implied purpose of s 34(2) in the same way. Indeed, if it were not so confined then it would be necessary to consider whether it could be partially disapplied in order to preserve its constitutional validity by confining its application to the purpose of protecting the integrity of the naturalisation process[207]. In considering the operation of s 34(2)(c), it is useful to begin with the operation of s 34(2)(c) in relation to the other gateways in s 34(2)(b) before turning specifically to s 34(2)(b)(ii).

174 As explained above, each of the gateways in s 34(2)(b) has the purpose of protecting the integrity of the naturalisation process. In each case, the operation of the public interest criterion in s 34(2)(c) is shaped by that purpose. Apart from s 34(2)(b)(ii), the other gateways contain a requirement of causation or contribution linking the conduct with the naturalisation process. For instance: s 34(2)(b)(i) is concerned with knowingly making a representation or statement that is false or misleading "in relation to the person's application to become an Australian citizen"; s 34(2)(b)(iii) is concerned with naturalisation obtained "as a result of" migration-related fraud; and s 34(2)(b)(iv) is concerned with naturalisation obtained "as a result of" third-party fraud. Like the United States legislation that serves the same protective purpose, in each of the gateways in s 34(2)(b) (apart from s 34(2)(b)(ii)) the contribution need not be "but for" causation provided that the relevant act contributed to, or "played some role" in, the naturalisation process[208].

175 The breadth of these gateways to the revocation of citizenship is then narrowed by s 34(2)(c), which ensures that revocation can only validly occur where it is reasonably necessary for the purpose of s 34(2), which is to protect the integrity of the naturalisation process. The public interest criterion in s 34(2)(c) is thus essential to the protective purpose of s 34(2).

176 Two steps must be involved in the Minister's consideration under s 34(2)(c). First, the Minister must consider whether, despite the circumstances associated with each gateway, they are satisfied that citizenship would have been granted in any event: unlike the mere contribution that can satisfy the gateways, the public interest consideration conforms with the protective purpose by requiring

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206 *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108 at 120.

207 *Acts Interpretation Act 1901* (Cth), s 15A. See *Clubb v Edwards* (2019) 267 CLR 171 at 317-318 [422]-[425].

208 *Maslenjak v United States* (2017) 137 S Ct 1918 at 1927. See 8 USC §1451(e); 18 USC §1425(a).

consideration of whether the relevant act would have made a difference—that is, whether, "but for" the relevant act, citizenship would still have been granted. Section 34(2)(c) should be applied in this way because it would be more than is reasonably necessary to protect the integrity of the naturalisation process to remove a person's citizenship for a reason that would not have altered the grant of citizenship. Secondly, s 34(2)(c) requires consideration of whether, notwithstanding that naturalisation may not have been granted at the earlier time, the protection of the integrity of the naturalisation process does not require revocation of citizenship because it may nevertheless not be contrary to the public interest for the person *now* to remain an Australian citizen.

177 The public interest criterion in s 34(2)(c) operates in the same way for the s 34(2)(b)(ii) gateway as it does for the other gateways. The particular purpose of s 34(2)(b)(ii), together with s 34(2)(c), is to protect the integrity of the naturalisation process where the Minister is satisfied that a person was not of good character at the time of naturalisation and that it remains contrary to the public interest for the person to be an Australian citizen. The implied constraint of purpose requires the same two steps to be taken by the Minister in their consideration of s 34(2)(c) when based upon the gateway in s 34(2)(b)(ii).

178 The first step in the application of the public interest criterion based upon the gateway in s 34(2)(b)(ii) is that the Minister must be satisfied that the person's conviction and punishment for the offence after the application for, or grant of, citizenship meant that the person was not of good character at the time that the Minister conferred citizenship on that person. If the Minister is not so satisfied, then it cannot be contrary to the public interest for the person to remain an Australian citizen. It is not reasonably necessary for the protection of the integrity of the naturalisation process to require the revocation of a grant of citizenship that the Minister is satisfied would have been granted in any event.

179 The second step recognises that the protection of the integrity of the naturalisation process will not always require the revocation of citizenship of a person who, whilst not being of good character at the time of the application, might now be of good character. If the person might now be of good character, then the Minister might consider that it is not contrary to the public interest for the person to remain an Australian citizen.

180 Section 34(2)(c) therefore does not permit the Minister's revocation of citizenship based on the s 34(2)(b)(ii) gateway unless the Minister considers that the conduct for which the person was convicted and punished after their application for, or grant of, citizenship deprived the person of good character at the time of naturalisation. A simple example might be a person who commits a serious offence some decades before naturalisation and, although convicted and sentenced to 12 months' imprisonment after the application for, or grant of, citizenship, was considered by the Minister to have been wholly reformed, and therefore of good character, by the time of naturalisation. A person "may be guilty

of grave wrongdoing and may subsequently become ... of good character"[209]. If, many years later, the person were to commit an unrelated, very serious offence, such that they were considered to have become of bad character, the Minister would have no power to revoke the person's citizenship "in the public interest".

181 These two steps need not be express in the Minister's reasoning process. They might be implicit. Or they might be subsumed into an overall consideration of whether a person remains of good character. But the Minister's consideration cannot extend beyond those steps. In particular, and relevantly to Mr Jones' argument that s 34(2)(b)(ii) is punitive, the application by the Minister of s 34(2)(c) will be invalid if it involves any purpose other than the protection of the integrity of the naturalisation process. Even if the existence of an illegitimate purpose is not express in reasons given by the Minister for revocation, the illegitimate purpose might be inferred from the circumstances.

182 For these reasons, the exercise of the revocation power pursuant to the s 34(2)(b)(ii) gateway is reasonably capable of being seen as necessary to protect the integrity of the naturalisation process despite the unlimited time-period and the apparent breadth of the condition in s 34(2)(c). But although the possibility of a lengthy and unexplained delay between conviction and the Minister's decision does not invalidate s 34(2)(b)(ii), it might be the basis for, even a strong basis for, an inference that a decision to revoke citizenship was made for a purpose other than protecting the integrity of the naturalisation process by an assessment of good character at the time of naturalisation or subsequently. In other words, the second step of the process described above requires the Minister to consider whether the person remains of bad character, notwithstanding that the conviction meant that the person may not have been of good character at the time of naturalisation. A lengthy and unexplained delay between conviction and the Minister's decision might cast doubt upon whether the evaluation was properly based on whether the person remains of bad character.

(3) The third group of submissions

183 As to the third group of submissions, unless the narrowness of the power based on the gateway in s 34(2)(b)(ii) were so extreme as to suggest that the power had no sufficient or rational connection with the protection of the integrity of the naturalisation process, it could not be an objection to the power being reasonably capable of being seen as necessary for that purpose that the Commonwealth Parliament has chosen a less expansive law than it might otherwise have chosen in order to fulfil that purpose.

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209 *In re Davis* (1947) 75 CLR 409 at 416, quoted in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 530 [65].

184 It is, therefore, no objection that Parliament excluded from the Minister's power to revoke citizenship those instances of naturalisation by descent or adoption or those circumstances where revocation would cause Australia to be in breach of its international obligations. Nor, in light of the interpretation of s 34(2)(c) explained above, can it be any objection that a further condition for revocation is the Minister's satisfaction that it would be contrary to the public interest for the person to remain an Australian citizen. Rather, as explained above, the application of s 34(2)(c) will necessarily be confined to the purpose of protecting the integrity of the naturalisation process.

Conclusion

185 The questions in the special case should be answered as follows:

(1) Is s 34(2)(b)(ii) of the *Australian Citizenship Act* invalid in its operation in respect of the plaintiff because:

(a) it is not supported by s 51(xix) of the *Constitution*; or

(b) it reposes in the Minister the exclusively judicial function of punishing criminal guilt?

Answer: No.

(2) What, if any, relief should be granted to the plaintiff?

Answer: None.

(3) Who should pay the costs of the special case?

Answer: The plaintiff.

186 STEWARD J. The plaintiff was born in the United Kingdom of Great Britain and Northern Ireland in 1950. He migrated to Australia in 1966. On 21 December 1988, he acquired Australian citizenship pursuant to the *Australian Citizenship Act 1948* (Cth) ("the Old Citizenship Act"). In 2003, the plaintiff was convicted of five counts of indecent dealing and indecent assault, some of which occurred before he became a citizen of Australia. Two events have since taken place as a result of the plaintiff's offending. First, in 2018 the Minister for Home Affairs, Immigration and Border Protection revoked the plaintiff's citizenship pursuant to s 34(2) of the *Australian Citizenship Act 2007* (Cth) ("the Present Citizenship Act"). Thereafter, the plaintiff held an ex-citizen visa which permitted him to remain in Australia. Secondly, in 2021 the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs cancelled the plaintiff's ex-citizen visa. Thereafter, the plaintiff assumed the status of an unlawful non-citizen who is to be deported. This special case concerns only the first decision. In particular, the plaintiff challenges the validity of s 34(2)(b)(ii) of the Present Citizenship Act.

187 It should initially be observed that the immediate effect of revoking the plaintiff's citizenship was not to expose him to immigration detention pending deportation to the United Kingdom. His ex-citizen visa was a permanent visa which permitted him to remain lawfully in Australia (but not to re-enter this country). Rather, the denationalisation of the plaintiff had the consequence of disentitling the plaintiff from the statutory benefits which attach to a person by reason of being an Australian citizen. When the plaintiff's ex-citizen visa was cancelled in 2021, he lost the right to remain here and became subject to detention pending deportation. This Court has previously decided that a law which authorises the cancellation of a visa, thereby making one liable to this form of detention, does not involve the imposition of any punishment and is therefore valid[210].

188 For the short reasons which follow, I agree with Kiefel CJ, Gageler, Gleeson and Jagot JJ that s 34(2)(b)(ii) of the Present Citizenship Act is a valid law of the Commonwealth. It does not offend the principle established by this Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* that the power to punish a person by way of retribution, denunciation or deterrence is exclusively judicial[211]. That is because, properly characterised, s 34(2)(b)(ii) is reasonably capable of being seen as necessary for the legitimate non-punitive purpose of protecting the integrity of the naturalisation process. As was conceded in oral argument by the plaintiff, in the circumstances of this case,

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210 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 351 [63] per Kiefel CJ, Bell, Keane and Edelman JJ, 352 [69] per Gageler and Gordon JJ, 358 [93] per Nettle J.

211 (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

that conclusion also disposes of the plaintiff's attack on s 34(2)(b)(ii) as being unsupported by the "naturalization" limb of s 51(xix) of the *Constitution*.

The "good character" condition

189 It has long been a condition of naturalisation in this country[212], and others[213], that an applicant be of good repute or good character. Thus, from 1903 a person seeking a certificate of naturalisation was required to obtain a certificate from a Justice of the Peace, a postmaster, a teacher or a police officer confirming that he or she was a "person of good repute": s 6(1)(b) of the *Naturalization Act 1903* (Cth). From 1920, a person seeking a certificate of naturalisation needed to satisfy the Governor-General that he or she was of "good character": s 7(1)(b) of the *Nationality Act 1920* (Cth). When the plaintiff sought citizenship of Australia in 1988 under the Old Citizenship Act, he also needed to be a person of "good character": s 13(1)(f) of the Old Citizenship Act. The need for a person to be of "good character", as a condition of naturalisation, remains to this day: s 21(2)(h) of the Present Citizenship Act.

190 As the reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ explain, any past offending by an applicant for citizenship would plainly be relevant to issues of good character. But such offending would not necessarily be determinative of that issue. As Latham CJ observed in *In re Davis*[214]:

> "A man may be guilty of grave wrongdoing and may subsequently become a man of good character."

191 The plaintiff did not challenge the validity of any law which conditioned the acquisition of citizenship upon a person being of "good character". The imposition of such a condition amply falls within the legislative power to pass laws concerning "naturalization" for the purposes of s 51(xix) of the *Constitution*. Nor was it suggested that the quality of being of "good character" was confined to a consideration only of the conduct of a person in applying for citizenship. Critically, there was thus no suggestion that only certain types of past offending could be relevant to the issue of having a "good character".

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212 And, indeed, prior to Federation: see, eg, *Aliens Act 1863* (SA), s 7; *Aliens Act 1864* (SA), s 9; *Aliens Act 1890* (Vic), ss 5 and 7.

213 See, eg, *Aliens Act 1866* (NZ), ss 5 and 7; *Aliens Act 1880* (NZ), s 4; *Naturalization Act 1906* (US), s 4.

214 (1947) 75 CLR 409 at 416. See also *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 529-530 [65] per Gleeson CJ and Gummow J.

192 Australian naturalisation legislation has also long recognised that undisclosed offending which takes place before a grant of naturalisation or citizenship, but which is discovered later, may be a legitimate ground for the denationalisation of a person. The legitimacy arises from the same condition that a person be of "good character" when seeking membership of the Australian community. A person seeking naturalisation who is ostensibly of good character, but who has committed a very serious crime or crimes which have yet to be uncovered, may fail this condition.

193 Thus, s 12(2)(c) of the *Nationality Act 1920* relevantly provided that the Governor-General could revoke a person's certificate of naturalisation if the Governor-General was satisfied that the person was not, when naturalised, of good character. Section 12(2)(b) conferred the same power of revocation where the person had, within five years after naturalisation, been sentenced in "any court in His Majesty's dominions" to a term of imprisonment of not less than 12 months, or to a term of "penal servitude", or to a fine of not less than 100 pounds. In each case the power could only be exercised if the Governor-General was satisfied that it would not be conducive to the public good for the person to continue to hold a certificate of naturalisation.

194 Similar powers of denationalisation were also originally conferred by s 21 of the Old Citizenship Act[215]. Section 21(1)(d) was in near identical terms to s 12(2)(c) of the *Nationality Act 1920*, whilst s 21(1)(e) conferred a power of citizenship deprivation where the person had, within five years after naturalisation, been sentenced "in any country" to a term of imprisonment of 12 months or more. Those provisions were repealed in 1958[216] and replaced with a narrower power of citizenship deprivation limited to conviction for a particular offence of knowingly making a false statement, or concealing a material circumstance, for a purpose of or in relation to the Old Citizenship Act[217]. However, in 1984, the power was expanded to conviction, whether in Australia or overseas, at any time after the furnishing of an application for citizenship, of an offence, committed before the person was granted a certificate of Australian citizenship, for which that person had, relevantly, been sentenced to imprisonment for a period of not less than 12 months[218].

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215 Then titled the *Nationality and Citizenship Act 1948* (Cth).

216 *Nationality and Citizenship Act 1958* (Cth), s 7.

217 Section 50 of the Old Citizenship Act, as amended by the *Nationality and Citizenship Act 1958* (Cth), s 11. A public interest test also needed to be satisfied.

218 *Australian Citizenship Amendment Act 1984* (Cth), s 15.

195 Section 34(2)(b)(ii) of the Present Citizenship Act is the successor to these provisions. It permits the Minister to revoke the citizenship of a naturalised person where the person has, at any time after the making of an application for citizenship, been convicted of a "serious offence". The term "serious offence" is defined in s 34(5) and refers to being convicted of an offence against Australian or foreign law, committed at any time before the person became a citizen, for which the person has been sentenced to death or to a serious prison sentence, defined in s 3 to mean a term of imprisonment for a period of at least 12 months. Before this power can be exercised the Minister must be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen[219].

The purpose of s 34(2)(b)(ii)

196 If s 51(xix) of the *Constitution* validly supports a law that conditions naturalisation upon the need for an applicant for citizenship to be of "good character", it must follow that laws which address the potential for the true character of a person to be masked during the application process must also be valid. The latter type of law, to use the language of Kiefel CJ, Gageler, Gleeson and Jagot JJ, protects the integrity of the naturalisation process by which a Minister is properly satisfied that an applicant is of good character. Indeed, the plaintiff's counsel accepted that laws truly of this type could not be characterised as punitive in nature.

197 The dispositive question in this special case is thus whether s 34(2)(b)(ii) is a law of this type. The plaintiff submitted that it was not. He submitted that the law is not reasonably capable of being characterised as necessary for the purpose of protecting the integrity of the naturalisation process. Substantially for the reasons given by Kiefel CJ, Gageler, Gleeson and Jagot JJ, I respectfully disagree[220].

198 Some additional observations should be made. There are three aspects of the power conferred by s 34(2)(b)(ii) which arguably support the proposition that it is not reasonably capable of being seen as necessary for a legitimate non-punitive purpose. The first is that, unlike s 12(2)(b) of the *Nationality Act 1920* and the original s 21(1)(e) of the Old Citizenship Act, there is no temporal limitation on when a naturalised person may be convicted of a serious offence that will then engage the power of revocation. Secondly, unlike the version of s 21 of the Old

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219 Present Citizenship Act, s 34(2)(c).

220 This is not to be taken as an expression of agreement with all of the authorities cited by Kiefel CJ, Gageler, Gleeson and Jagot JJ, such as *Trop v Dulles* (1958) 356 US 86, *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560; 401 ALR 348 and *Benbrika v Minister for Home Affairs* [2023] HCA 33.

Citizenship Act enacted in 1958[221], the definition of "serious crime" is arguably too broad; it is not tied to crimes relating to the process whereby naturalisation is sought. It is unlike, for example, s 34(2)(b)(iii) of the Present Citizenship Act, which confers a power of revocation where there has been "migration-related fraud", as defined by s 34(6). And thirdly, there is no time limit within which a relevant Minister may exercise the power of revocation following conviction of a serious crime. As Gordon J points out, here the power was exercised 15 years after the plaintiff's conviction.

199 The first aspect is largely answered by Kiefel CJ, Gageler, Gleeson and Jagot JJ with the observation that s 34(2)(b)(ii) does not authorise the revocation of citizenship for purposes of retribution, denunciation or deterrence[222]. But I would also add that it is not unreasonable to expose a person to the threat of denationalisation where they have committed, before becoming a citizen, a "serious" crime that, if it had been disclosed at the time of application, is likely to have led the Minister to have concluded that the person was not of good character. Moreover, it is now well known that some crimes, such as child sexual abuse, can take many, many years before they are prosecuted with a resulting conviction. In the context of the need to preserve the soundness of new membership of the Australian polity, the lack here of any temporal limitation on when a conviction must take place does not demonstrate the presence of a different purpose, namely to punish a naturalised person.

200 The second aspect is more difficult. The naturalisation power in s 51(xix) confers a broad power within which Parliament is free to make legislative choices about, relevantly, the integrity of the naturalisation process. Thus, for example, it might have been open to Parliament to have adopted a form of s 12(2)(c) of the *Nationality Act 1920* or the original s 21(1)(d) of the Old Citizenship Act whereby citizenship is revoked if it is subsequently found that a person was not of good character when he or she applied for citizenship. Instead, Parliament has chosen a somewhat arbitrary analogue of this type of power. There is a latent assumption within s 34(2)(b)(ii), when combined with s 34(2)(c), that a person who has been convicted of the sort of pre-citizenship offence that merits a prison sentence of at least 12 months was not of good character when he or she applied to become a citizen. However, I do not think that assumption militates against a conclusion that s 34(2)(b)(ii) is reasonably capable of being seen as necessary for the protection of the integrity of the naturalisation process. It is simply the expression of a legislative choice about how best to preserve that integrity.

201 That is so for a number of reasons. First, as mentioned above, it was not suggested that *only* certain types of offending could be considered by the Minister

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221 See *Nationality and Citizenship Act 1958* (Cth), s 7.

222 Reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ at [54]-[55].

when assessing the presence of "good character" for the purposes of s 21(2)(h) of the Present Citizenship Act. Given that s 34(2)(b)(ii) is intended to address offending which had not been disclosed prior to a person becoming a citizen, it would make little sense to confine its scope to only those offences associated with the application process for naturalisation. Secondly, the types of convictions that may engage s 34(2)(b)(ii) are not unconfined; they are limited to convictions for serious offences. In that respect, and as already mentioned, it is not unreasonable to assume that a person is unlikely to have been of good character if, before becoming a citizen, he or she had committed an offence or offences that subsequently merited a prison sentence of at least 12 months. Thirdly, even if in some cases such an assumption is found to be wrong, the legislative scheme precludes any unnecessarily harsh outcome. That is because of the need for the Minister to be satisfied that it is in the "public interest" for the person not to remain a citizen before the power of revocation can be exercised. As Kiefel CJ, Gageler, Gleeson and Jagot JJ observe, what is or is not in the public interest[223]:

> "classically import[ed] 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 ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'".

202 Where s 34(2)(b)(ii) is engaged but, for whatever reason, it can be seen that the naturalised person was nonetheless of "good character" when he or she applied for citizenship, it will be open to a Minister, for the purposes of s 34(2)(c), to fail to be satisfied that it would be contrary to the public interest for the person to remain a citizen.

203 The third aspect is most troubling. It is at least an unattractive legislative choice to expose a citizen from the date of conviction until death to the risk of denationalisation – a risk which hangs over the head of such a person like the "sword of Damocles". It is harder to justify on this occasion a sufficient connection between such an open-ended power and a non-punitive purpose of protecting the integrity of the naturalisation process. Yet, care must be taken not to introduce here a requirement of legal reasonableness, if in substance that means that the law must be proportionate in order to be valid[224]. Asking whether a law is reasonably capable of being seen as necessary for a legitimate non-punitive purpose is to ask a question

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223 Reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ at [21], quoting *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ, in turn quoting *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

224 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343-344 [25]-[32] per Kiefel CJ, Bell, Keane and Edelman JJ.

concerning that law's purpose. Here, the question must be: does the creation of such an open-ended power of denationalisation preclude the characterisation of s 34(2)(b)(ii) – and 34(2)(c) – as laws which exist for the purpose of protecting the integrity of the naturalisation process?

204 With some hesitation, and with very great respect, the answer must be "No". That is because the law still addresses the behaviour – or good character – of the naturalised person *before* the grant of citizenship. It is also because that person must be taken to have had notice of the future risk of revocation when they committed a serious crime prior to naturalisation. And, like the second aspect above, the Minister must still be satisfied that it would be contrary to the "public interest" for the person to remain an Australian citizen. In that respect, it should be accepted, at least in general terms, that the larger the time period between conviction and consideration of the power to denationalise, the more difficult it will be for the Minister to be so satisfied.

Relief

205 I agree with the answers given by Kiefel CJ, Gageler, Gleeson and Jagot JJ to the questions posed by the special case.