# HIGH COURT OF AUSTRALIA

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

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ABDUL NACER BENBRIKA APPLICANT

AND

MINISTER FOR HOME AFFAIRS & ANOR RESPONDENTS

*Benbrika v Minister for Home Affairs*
[2023] HCA 33
*Date of Hearing: 14 June 2023*
*Date of Judgment: 1 November 2023*
M90/2022

**ORDER**

*The questions stated for the opinion of the Full Court in the further amended special case filed on 6 June 2023 be answered as follows:*

*Question 1:* *Is s 36D of the* Australian Citizenship Act 2007 *(Cth) invalid in its operation in respect of the applicant because it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt?*

*Answer:* *Yes.*

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

*Answer:* *It is declared that:*

*(a)* *s 36D of the* Australian Citizenship Act 2007 *(Cth) is invalid; and*

*(b)* *the applicant is an Australian citizen.*

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

*Answer: The respondents.*

**Representation**

C J Horan KC with A Aleksov, J E Hartley and E A M Brumby for the applicant (instructed by Doogue + George Lawyers)

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

## CATCHWORDS

### Benbrika v Minister for Home Affairs

Constitutional law (Cth) – Judicial power of Commonwealth – Cessation of Australian citizenship – Where s 36D of *Australian Citizenship Act 2007* (Cth) ("Act") provided Minister for Home Affairs may make determination that person ceases to be Australian citizen if, among other matters, person has been convicted of offence against provision of Pt 5.3 of *Criminal Code* (Cth) (terrorism) and sentenced to period of imprisonment of at least 3 years in respect of conviction, and Minister satisfied conduct demonstrates repudiation of allegiance to Australia – Where s 36B of Act held in *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560; 401 ALR 438 to be contrary to Ch III of *Constitution* for conferring upon Minister exclusively judicial function of adjudging and punishing criminal guilt – Where applicant citizen of Algeria and Australia – Where applicant convicted of and sentenced to term of imprisonment exceeding 3 years for offences against provisions of Pt 5.3 of *Criminal Code* – Where Minister determined pursuant to s 36D of Act that applicant cease to be Australian citizen – Where accepted, on authority of *Alexander*, that s 36D of Act properly characterised as punitive – Whether s 36D, like s 36B, contrary to Ch III of *Constitution* for conferring upon Minister exclusively judicial function of punishing criminal guilt – Whether Ch III prohibits reposing in Commonwealth Executive power to punish criminal guilt where court has adjudged criminal guilt – Whether prohibition subject to exception for involuntary deprivation of citizenship as punishment following conviction.

Words and phrases – "adjudging and punishing criminal guilt", "alien", "allegiance to Australia", "citizen", "citizenship", "citizenship cessation", "denationalisation", "deprivation of citizenship", "deprivation of liberty", "exercise of judicial power", "judicial function", "people of the Commonwealth", "punishment", "punitive", "separation of powers", "terrorism", "terrorism-related conduct".

*Constitution*, Ch III.
*Australian Citizenship Act 2007* (Cth), ss 36A, 36D.

1 KIEFEL CJ, GAGELER, GLEESON AND JAGOT JJ. This is the determination of questions stated by the parties for the consideration of the Full Court by means of a special case under r 27.08 of the *High Court Rules 2004* (Cth) in a proceeding commenced in the Federal Court of Australia under s 39B of the *Judiciary Act 1903* (Cth) and removed into the High Court by order under s 40 of that Act.

2 The special case is a sequel to *Alexander v Minister for Home Affairs*[1]. There, s 36B of the *Australian Citizenship Act 2007* (Cth) ("the Citizenship Act") was held invalid on the basis that "it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt"[2] contrary to Ch III of the *Constitution*. Here, the sole substantive question for determination is whether s 36D of the Citizenship Act is invalid on the same basis.

3 For the reasons which follow, it is.

## Factual context

4 The applicant, Mr Benbrika, was born in 1960 in Algeria. He was and remains an Algerian citizen.

5 Mr Benbrika arrived in Australia in 1989. He became an Australian citizen in 1998 by operation of s 15(1) of the *Australian Citizenship Act 1948* (Cth), having been granted on application a certificate of Australian citizenship pursuant to s 13 and having made a pledge of commitment in a form specified in Sch 2 to that Act.

6 In 2008, following a trial by jury in the Supreme Court of Victoria, Mr Benbrika was convicted of three offences under Pt 5.3 of the *Criminal Code* (Cth): intentionally being a member of a terrorist organisation, knowing that it was a terrorist organisation, contrary to s 102.3(1); intentionally directing activities of a terrorist organisation, knowing it was a terrorist organisation, contrary to s 102.2(1); and possessing a thing connected with preparation for a terrorist act, knowing of that connection, contrary to s 101.4(1). He was sentenced to terms of imprisonment of seven years for the first offence, 15 years for the second offence and five years for the third offence[3].

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**1** (2022) 96 ALJR 560; 401 ALR 438.

**2** (2022) 96 ALJR 560 at 634; 401 ALR 438 at 528.

**3** *R v Benbrika* (2009) 222 FLR 433 at 471 [247].

7 In 2010, the Court of Appeal of the Supreme Court of Victoria set aside Mr Benbrika's conviction for the third offence but upheld his convictions for the other two offences. The Court of Appeal also reduced his sentence of imprisonment to five years for the first offence but upheld his sentence of 15 years' imprisonment for the second offence[4]. That sentence expired on 5 November 2020.

8 On 20 November 2020, the Minister for Home Affairs determined in writing pursuant to s 36D(1) of the Citizenship Act that Mr Benbrika cease to be an Australian citizen. Mr Benbrika subsequently applied for revocation of that determination pursuant to s 36H of the Citizenship Act. No decision has been made by the Minister on that application.

9 By operation of s 35(3) of the *Migration Act 1958* (Cth) ("the Migration Act"), Mr Benbrika was granted an ex-citizen visa on the purported cessation of his Australian citizenship on 20 November 2020.

**Statutory context**

10 Together with s 36B, s 36D is within Subdiv C of Div 3 of Pt 2 of the Citizenship Act. That subdivision is headed "Citizenship cessation determinations". As was recorded in *Alexander*[5], the subdivision was inserted by the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) in partial replacement of the scheme for the cessation of citizenship previously inserted by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).

11 Subdivision C is introduced by s 36A. That section provides:

> "This Subdivision is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia."

12 The purpose declared by s 36A applies equally to s 36D as to s 36B. "Translated to the level appropriate for analysis of the compatibility of s 36B [or s 36D] with Ch III of the *Constitution*", as was put in *Alexander*[6], the purpose "is

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**4** *Benbrika v The Queen* (2010) 29 VR 593.

**5** (2022) 96 ALJR 560 at 570 [19]; 401 ALR 438 at 443.

**6** (2022) 96 ALJR 560 at 587 [120]; 401 ALR 438 at 466.

properly characterised as one of denunciation and exclusion from formal membership of the Australian community of persons shown by certain conduct to be unwilling to maintain or incapable of maintaining allegiance to Australia".

13 Like s 36B(1), s 36D(1) is expressed to confer a power on the Minister administering the Citizenship Act which can be exercised only by the Minister personally[7] and without need for the Minister to observe any requirement of natural justice[8]. The power expressed to be conferred by each provision is the power to determine in writing that a person ceases to be an Australian citizen, with the consequence that the person ceases to be an Australian citizen at the time the determination is made[9]. The power expressed to be conferred by each provision is applicable regardless of how the person became an Australian citizen[10] but cannot be exercised if the Minister is satisfied that the person would thereby cease to be a national or citizen of any country[11].

14 Whereas a condition of the exercise of the power conferred by s 36B(1) is that the Minister is satisfied that the person has engaged in conduct which satisfies the physical elements of one or more specified offences[12], a condition of the exercise of the power conferred by s 36D(1) is that the person has been convicted of one or more specified offences in respect of which the person has been sentenced to a specified period or periods of imprisonment[13]. Otherwise, the two powers are conditioned by essentially identical requirements: that the Minister is satisfied that the person's conduct (as found by the Minister in the case of the power conferred by s 36B(1) or to which the conviction or convictions relate in the case of the power conferred by s 36D(1)) demonstrates repudiation of the person's

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**7** Sections 36B(9) and 36D(7) of the Citizenship Act.

**8** Sections 36B(11) and 36D(9) of the Citizenship Act.

**9** Sections 36B(3) and 36D(3) of the Citizenship Act.

**10** Sections 36B(4) and 36D(4) of the Citizenship Act.

**11** Sections 36B(2) and 36D(2) of the Citizenship Act.

**12** Section 36B(1)(a), (5) and (6) of the Citizenship Act.

**13** Section 36D(1)(a) and (b), (5) and (6) of the Citizenship Act.

allegiance to Australia[14]; and that the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen[15].

15 Specifically, when read with so much of s 36D(5) as is relevant to the circumstances of Mr Benbrika, s 36D(1) provides:

> "(1) The Minister may determine in writing that a person ceases to be an Australian citizen if:
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> (a) the person has been convicted of an offence, or offences, against one or more of the provisions specified in subsection (5); and
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> (b) the person has, in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 3 years, or to periods of imprisonment that total at least 3 years; and
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> (c) the Minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and
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> (d) the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen (see section 36E).
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> ...
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> (5) For the purposes of paragraph (1)(a), the provisions are the following:
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> ...
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> (f) a provision of Part 5.3 of the *Criminal Code* (terrorism), other than section 102.8 or Division 104 or 105;
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> ...
>
> Note: A determination may be made in relation to a conviction for an offence against a provision specified in subsection (5) that

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**14** Sections 36B(1)(b) and 36D(1)(c) of the Citizenship Act.

**15** Sections 36B(1)(c) and 36D(1)(d) of the Citizenship Act.

occurred before the subsection commenced (see item 19 of Schedule 1 to the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020*)."

16 Like a determination under s 36B(1), a determination under s 36D(1) is subject to powers conferred on the Minister to revoke the determination with retrospective effect in circumstances which include where the Minister is satisfied that revoking the determination would be in the public interest. One of those powers of revocation in the public interest, conferred by s 36H(3)(b), is exercisable on application by the person whose citizenship has been revoked made within a specified time after the person is notified of the determination. The other, conferred by s 36J(1), is exercisable at any time on the Minister's own initiative. Each can be exercised only by the Minister personally[16]. The latter can be exercised without need for the Minister to observe any requirement of natural justice[17].

17 Section 36E provides:

"(1) This section applies when the Minister is considering the public interest for the purposes of deciding whether to make a determination under subsection 36B(1) or 36D(1), or whether to revoke such a determination.

...

(2) The Minister must have regard to the following matters:

(a) in deciding whether to make a determination under subsection 36B(1) or revoke such a determination—the severity of the conduct to which the determination relates;

(b) in deciding whether to make a determination under subsection 36D(1) or revoke such a determination—the severity of the conduct that was the basis of the conviction or convictions, and the sentence or sentences, to which the determination relates;

(c) the degree of threat posed by the person to the Australian community;

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**16** Sections 36H(8) and 36J(8) of the Citizenship Act.

**17** Section 36J(7) of the Citizenship Act.

(d) the age of the person;

(e) if the person is aged under 18—the best interests of the child as a primary consideration;

(f) in deciding whether to make a determination under subsection 36B(1) or revoke such a determination—whether the person is being or is likely to be prosecuted in relation to conduct to which the determination relates;

(g) the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;

(h) Australia's international relations;

(i) any other matters of public interest."

18 Like a determination under s 36B(1), a determination under s 36D(1) does not of itself result in the immediate detention and subsequent removal from Australia of a person who, like Mr Benbrika, was in Australia when the determination was made. Upon being stripped by the determination of Australian citizenship, and thereby being deprived of the "fundamental" entitlement of a citizen "to enter and live at liberty in Australia"[18], the person becomes a "non-citizen" whose permission to enter and remain in Australia depends on the holding of a visa[19]. But the person is saved from becoming an "unlawful non-citizen" and from thereby becoming subject to immediate detention and subsequent removal[20] by s 35(3) of the Migration Act, which provides that the person is taken to have been granted an ex-citizen visa at the time of cessation of citizenship. By operation of s 35(1) of the Migration Act, an ex-citizen visa is a permanent visa by which its holder is granted permission "to remain in, but not re-enter, Australia".

**The significance of the reasoning in *Alexander***

19 The reasoning of the majority in *Alexander* which led to the conclusion of the invalidity of s 36B(1) of the Citizenship Act took as its starting point the

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**18** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 578-579 [74], 583 [96]; 401 ALR 438 at 454-455, 460.

**19** Sections 13 and 29 of the Migration Act.

**20** Sections 14, 189, 196 and 198 of the Migration Act.

canonical statement of principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[21] that "the adjudgment and punishment of criminal guilt under a law of the Commonwealth" is a "function" which "appertains exclusively to and could not be excluded from the judicial power of the Commonwealth" with the consequence that "Ch III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive".

20 The majority in *Alexander* rejected an argument that the principle so stated in *Lim* is limited to Commonwealth laws which purport to empower the Commonwealth Executive to detain persons in custody[22]. The majority instead arrived at the conclusion that the principle is applicable to a Commonwealth law which purports to empower the Commonwealth Executive to strip a person of Australian citizenship, a conclusion which was concisely expressed in its formal answer to a question reserved that s 36B(1) is invalid because "it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt"[23].

21 The majority arrived at the conclusion that the power reposed in the Minister by s 36B(1) infringed the principle in *Lim* having regard to two principal considerations. One concerned the nature and severity of the consequences of a purported exercise of the power. The other concerned the purpose of the power as identified in s 36A.

22 As to the nature and severity of the consequences of a purported exercise of power, all members of the majority equated cessation of citizenship with exile or banishment, which they noted had historically been regarded as punishment[24]. The plurality, comprising Kiefel CJ, Keane and Gleeson JJ, with whom Gageler J expressed substantial agreement[25], described cessation of Australian citizenship as

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**21** (1992) 176 CLR 1 at 27 (citations and internal quotation marks omitted).

**22** (2022) 96 ALJR 560 at 577 [67], 578 [70], 583 [98]; 401 ALR 438 at 453-454, 461.

**23** (2022) 96 ALJR 560 at 583 [97]; 401 ALR 438 at 461.

**24** (2022) 96 ALJR 560 at 578 [72], 583 [98], 597-598 [168]-[170], 613-614 [250]; 401 ALR 438 at 454, 461, 479-480, 501.

**25** (2022) 96 ALJR 560 at 583 [98]; 401 ALR 438 at 461.

involving the loss of "public rights" of "fundamental importance"[26]. Gordon and Edelman JJ each described it, in the language of Warren CJ in *Trop v Dulles*[27], as involving "the total destruction of the individual's status in organized society"[28].

23 As to the purpose of the power identified in s 36A, the plurality described it as one of "[r]etribution ... characteristic of punishment under the criminal law" associated with which "are notions of denunciation and deterrence of conduct that is regarded as reprehensible by the community"[29]. Gageler J described it as one of "denunciation and exclusion from formal membership of the Australian community ... solely on the basis of past criminal conduct", which "can only be characterised as 'punitive'"[30]. To similar effect, Gordon J said that s 36A confirms that citizenship cessation in the context of s 36B(1) "is a measure taken in the name of society to exact just retribution on those who have offended against the laws of society by engaging in past conduct that is identified and articulated wrongdoing"[31] and Edelman J referred to s 36A as indicating that "s 36B, like s 36D, has a purpose of deterrence of a particular category of extreme, reprehensible conduct"[32].

24 The plurality also identified a comparison of s 36B with s 36D as a consideration pointing to "the conclusion that the power reposed in the Minister by s 36B(1) is a power which Ch III of the *Constitution* requires to be exercised by a court that is part of the federal judicature"[33]. The plurality went on in undertaking that comparison to note differences between s 36B and s 36D[34] but also to note that an exercise of power under each provision resulted in the "same

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**26** (2022) 96 ALJR 560 at 579 [74]; 401 ALR 438 at 454-455.

**27** (1958) 356 US 86 at 101.

**28** (2022) 96 ALJR 560 at 598 [172], 613 [248]; 401 ALR 438 at 480, 500.

**29** (2022) 96 ALJR 560 at 580 [82]; 401 ALR 438 at 457.

**30** (2022) 96 ALJR 560 at 587 [120]; 401 ALR 438 at 466.

**31** (2022) 96 ALJR 560 at 596 [163]; 401 ALR 438 at 477 (citations and internal quotation marks omitted).

**32** (2022) 96 ALJR 560 at 614 [251]; 401 ALR 438 at 501.

**33** (2022) 96 ALJR 560 at 578 [70]; 401 ALR 438 at 454.

**34** (2022) 96 ALJR 560 at 581 [85]-[87], 582 [93]; 401 ALR 438 at 458, 460.

outcome by way of deprivation of citizenship"[35] and imposed "relevantly the same punishment"[36]. The only point the plurality ultimately drew from the comparison uniquely adverse to the validity of s 36B(1) was that "[w]hile s 36D affords a citizen the due process of a criminal trial before the Minister's discretion arises, a significant feature of s 36B is that it operates without due process at all"[37].

25 The plurality summarised its conclusion in terms that s 36B(1) purported to authorise a deprivation of Mr Alexander's "entitlement to enter and live at liberty in Australia ... upon satisfaction of the Minister that Mr Alexander engaged in conduct that is so reprehensible as to be deserving of the dire consequence of deprivation of citizenship and the rights, privileges, immunities and duties associated with it" and that "[t]he power to determine the facts which enliven the power to impose such a punishment is one which, in accordance with Ch III of the *Constitution*, is exercisable exclusively by a court that is a part of the federal judicature"[38]. That summary statement was not in tension with the formally stated conclusion of the plurality in its answer to the determinative question reserved in relation to Mr Alexander to the effect that the power to impose such a punishment is itself one which, in accordance with Ch III of the *Constitution*, is exercisable exclusively by a Ch III court.

26 Counsel for Mr Benbrika submitted that the power purportedly conferred on the Minister by s 36D(1) is indistinguishable from that purportedly conferred on the Minister by s 36B(1) to the extent that both of the two principal considerations relied on by the majority in *Alexander* to characterise the power purportedly conferred by s 36B(1) as punitive apply with equal force to the power purportedly conferred by s 36D(1).

27 That submission is unanswerable. Indeed, the Solicitor-General of the Commonwealth, who appeared for the respondents, frankly conceded that the power purportedly conferred by s 36D(1) is properly characterised as punitive in accordance with the reasoning of the majority in *Alexander*. His argument was that the characterisation of the power as punitive is insufficient to engage the principle in *Lim*.

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**35** (2022) 96 ALJR 560 at 581 [87]; 401 ALR 438 at 458.

**36** (2022) 96 ALJR 560 at 582 [93]; 401 ALR 438 at 460.

**37** (2022) 96 ALJR 560 at 582 [91]; 401 ALR 438 at 459.

**38** (2022) 96 ALJR 560 at 583 [96]; 401 ALR 438 at 460.

28 The Solicitor-General argued that the principle in *Lim* relevantly applies only to a Commonwealth law which authorises the Commonwealth Executive to engage in the adjudgment *and* punishment of criminal guilt as distinct from a Commonwealth law which authorises the Commonwealth Executive to engage in the adjudgment *or* punishment of criminal guilt. He pointed out that it has long been accepted that the Commonwealth Executive can be empowered to adjudge criminal guilt so long as that adjudgment does not result in punishment[39]. He also pointed out that it has been recognised to be open to the Parliament to select a prior conviction as a "factum" which enlivens a power on the part of an officer of the Executive to inflict on a convicted person a further detriment not amounting to punishment[40]. He emphasised that, although the reasoning of the majority in *Alexander* supports the characterisation of s 36D(1) as authorising the Minister to punish criminal guilt, s 36D(1) materially differs from s 36B(1) in that s 36D(1) does not authorise the Minister to adjudge criminal guilt. Instead, s 36D(1) relies for the adjudgment of criminal guilt on prior conviction by a court.

29 The Solicitor-General argued in the alternative for recognition of what in effect would be an exception to the principle in *Lim*. He argued that, though deprivation of citizenship consequent upon a finding of criminal guilt by a court might be characterised as a form of punishment, it should not be seen to be a form of punishment which Ch III of the *Constitution* commits exclusively to the judicial power. The argument was developed by reference to both historical and functional considerations. The historical considerations were the absence of any precedent for a court having been empowered to make an order terminating a person's citizenship as well as the existence of precedents both in Australia[41] and in the United States[42] for a person's citizenship being automatically terminated by operation of law upon the person engaging in or being convicted of conduct which constituted an offence. The functional considerations were the obvious interest of

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**39** *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 37, 68, 149-152; *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371-372 [33], 380-381 [63]-[64].

**40** *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 348 [48].

**41** Section 19 of the *Nationality and Citizenship Act 1948* (Cth); s 35 of the *Australian Citizenship Act 2007* (Cth), repealed by the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth).

**42** 8 USC §1481(7).

the Commonwealth Executive in ensuring that such cessation of citizenship as might occur is not in breach of Australia's international obligations combined with the evaluative decision as to whether to terminate a person's citizenship by reference to the broader range of legitimate public interest considerations identified in s 36E being more suited to executive determination than to judicial determination.

30 Neither argument can be accepted.

**The principle in *Lim***

31 The argument that the principle in *Lim* is relevantly confined to a Commonwealth law which authorises the Commonwealth Executive to engage in the adjudgment *and* punishment of criminal guilt, and therefore has no application to a Commonwealth law which authorises the Commonwealth Executive to engage in the punishment of criminal guilt consequent upon the adjudgment of criminal guilt by a court, has been made somewhat belatedly. As Edelman J recorded in *Alexander*[43], no similar argument was raised in *Falzon v Minister for Immigration and Border Protection*[44].

32 The argument is founded on an incomplete reading of *Lim* and an incomplete appreciation of the principle there expounded.

33 The statement of principle in *Lim*, as has been noted, was not simply in terms of "the adjudgment and punishment of criminal guilt under a law of the Commonwealth" constituting a single composite "function" that pertains exclusively to the judicial power of the Commonwealth[45]. The statement of principle critically included the proposition that "Ch III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s 51 of the Constitution, of any law purporting to vest *any part of that function* in the Commonwealth Executive"[46].

34 Moreover, it was explained in *Lim* that the concern of the *Constitution* in "exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth

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**43** (2022) 96 ALJR 560 at 611 [235]; 401 ALR 438 at 497.

**44** (2018) 262 CLR 333 at 340-341 [15]-[16], 357 [88].

**45** (1992) 176 CLR 1 at 27.

**46** (1992) 176 CLR 1 at 27 (emphasis added).

... is with substance and not mere form" such as to make it "beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt"[47]. "The reason why that is so", as explained, was that, putting "exceptional cases" to one side, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[48].

35 The presently relevant significance of that more specific application of principle in *Lim* lies not in its "[d]efault characterisation"[49] of custodial detention of a citizen as penal or punitive in character. Its presently relevant significance lies rather in its assignment of the power to impose a measure that is properly characterised as penal or punitive to the exclusively judicial function of adjudging and punishing criminal guilt.

36 Through that operation of Ch III of the *Constitution* to assign the power to impose a measure properly characterised as penal or punitive to the exclusively judicial function of adjudging and punishing criminal guilt, as it was put in *Lim* in the words of Albert Venn Dicey, "[e]very citizen is 'ruled by the law, and by the law alone' and 'may with us be punished for a breach of law, but he can be punished for nothing else'"[50].

37 The connection so recognised in *Lim* between the operation of Ch III of the *Constitution* and the rule of law was elaborated by Gageler J, albeit in dissent in the result, in *Magaming v The Queen*[51]:

> "The separation of the judicial power of the Commonwealth by Ch III of the *Constitution* ensures that no individual can be deprived of life or liberty at the instance of an officer of the Commonwealth executive as punishment

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**47** (1992) 176 CLR 1 at 27.

**48** (1992) 176 CLR 1 at 27.

**49** *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 111 [73]. See also at 99-100 [40].

**50** (1992) 176 CLR 1 at 27-28, quoting Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215.

**51** (2013) 252 CLR 381 at 400 [63].

> for an asserted breach by the individual of a Commonwealth criminal prohibition, except as a result of adjudication by a court of the controversy between the executive and the individual as to whether that breach has occurred and if so whether that deprivation of life or liberty is to occur. Whether guilt is to be found, and if so what, if any, punishment is to be imposed, are questions which arise sequentially in the resolution of that single justiciable controversy."

38 His Honour drew attention to a statement of Ó Dálaigh CJ of the Supreme Court of Ireland in *Deaton v Attorney-General (Ire)*[52] which was picked up by Lord Diplock in the Privy Council in *Hinds v The Queen*[53]. The statement was to the effect that "[t]he Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts" and that "the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive"[54].

39 That statement by Ó Dálaigh CJ is appropriate to express a limitation on the legislative power of the Commonwealth Parliament which arises from the separation of the judicial power of the Commonwealth by Ch III of the *Constitution*. It is consistent with the acceptance by the majority in *Magaming* of the proposition couched in terms drawn directly from *Lim* that "adjudging and punishing criminal guilt is an exclusively judicial function"[55] and is unaffected by the conclusions of the majority that legislative prescription of a mandatory minimum term of imprisonment for an offence was not, and is not, inconsistent with Ch III and that prosecutorial choice between charges of offences carrying different mandatory minimum terms of imprisonment is not, without more, an exercise of judicial power[56].

40 The Solicitor-General was correct in pointing out that an officer of the Commonwealth Executive does not trespass upon the exclusively judicial function of adjudging and punishing criminal guilt merely by conducting an inquiry and

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**52** [1963] IR 170 at 182-183.

**53** [1977] AC 195 at 226-227.

**54** *Deaton v Attorney-General (Ire)* [1963] IR 170 at 182-183, quoted in *Magaming v The Queen* (2013) 252 CLR 381 at 409 [85].

**55** (2013) 252 CLR 381 at 396 [47].

**56** (2013) 252 CLR 381 at 394 [39], 396 [49].

determining that a person has engaged in criminal conduct. But he was wrong in asserting that is so because the adjudgment and punishment of criminal guilt are exclusively judicial only if undertaken in combination. The reason there is no trespass upon the exclusively judicial function is that a power of inquiry and determination takes its legal character from the purpose for which the inquiry and determination are undertaken[57]. That is to say, "the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up": "[t]he nature of the final act determines the nature of the previous inquiry"[58]. If the purpose of the inquiry into and determination of criminal guilt is to punish criminal guilt, the inquiry and determination are exclusively judicial.

41 The principle in *Lim* is not confined in the manner for which the Solicitor-General argued. The effect of Ch III of the *Constitution* is to make punishment of criminal conduct exclusively judicial even if the punishment is separated from the adjudication of that criminal guilt. Consistently with Ch III, the Commonwealth Parliament cannot repose in any officer of the Commonwealth Executive any function of sentencing persons convicted by Ch III courts of offences against Commonwealth laws. Nor can the Commonwealth Parliament vest in any officer of the Commonwealth Executive any power to impose additional or further punishment on persons convicted by Ch III courts of offences against Commonwealth laws. Section 36D(1) purports to vest such a power to impose additional or further punishment in the Minister.

**The absence of an applicable exception**

42 There remains to address the alternative argument advanced by the Solicitor-General to the effect that, if the principle in *Lim* means that Ch III of the *Constitution* makes imposition of punishment consequent upon a finding of criminal guilt by a court exclusively judicial, punishment by means of termination of citizenship should be recognised as an exception to that principle.

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**57** *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 380 [64] and the cases there cited.

**58** *Prentis v Atlantic Coast Line Co* (1908) 211 US 210 at 227, quoted in *R v Davison* (1954) 90 CLR 353 at 370 and *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 152.

43 *Attorney-General (NT) v Emmerson*[59], on which the Solicitor-General relied, does not assist the argument. The legislative scheme there held not to infringe the principle associated with *Kable v Director of Public Prosecutions (NSW)*[60] imposed punishment by way of forfeiture of property consequent upon a finding of criminal guilt by a court only upon a further exercise of judicial power by a court[61].

44 To the extent that the argument was sought to be advanced by reference to historical considerations, the argument must be evaluated with caution. There is no doubt that "the historical or traditional classification of a function is a significant factor to be taken into account in deciding whether there is an exercise of judicial power involved"[62]. The historical or traditional classification of a function, if any, can be relevant to, although not determinative of, the question of "how the particular function is now to be characterised having regard to the systemic values on which the framers can be taken to have drawn in isolating the judicial power of the Commonwealth and in vesting that power only in courts"[63].

45 The fundamental difficulty with the argument lay in the level of generality at which the argument was pitched. Once it is accepted that Ch III of the *Constitution* makes imposition of punishment consequent upon a finding of criminal guilt exclusively judicial and once it is further accepted, as it was by the Solicitor-General, that the termination of citizenship purportedly authorised by s 36D(1) is punitive in character, the absence of any precedent for a court being empowered to order this kind of punishment is not to the point. Chapter III requires a punishment to be imposed by a court if it is to be imposed at all.

46 Another difficulty with the argument lay in the paucity and inconstancy of the precedents for the legislative empowerment of executive deprivation of citizenship or nationality consequent upon a finding of criminal guilt by a court on which the argument relied. Notably, all were confined to powers of revocation of nationality or citizenship conferred by a process of naturalisation or registration. None could be characterised in that context as punitive. Those which empowered

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**59** (2014) 253 CLR 393.

**60** (1996) 189 CLR 51.

**61** See *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 419-420 [24]-[27], 431 [60], 434 [69].

**62** *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 627.

**63** *Palmer v Ayres* (2017) 259 CLR 478 at 504 [69].

revocation in circumstances of a person being convicted of a serious crime within a specified period after being granted a certificate of naturalisation or registration[64] can be seen to have involved the outworking of a condition of the legislated process of naturalisation which did not come to completion until the end of that specified period. Others can be seen to have had the purpose of empowering the winding back of the grant of citizenship in circumstances where the integrity of the process by which that citizenship was granted was shown by a subsequent conviction to have been compromised[65].

47 Nor was the argument assisted by the existence of legislative precedents for a person's citizenship or nationality being automatically terminated by operation of law upon the person engaging in conduct constituting an offence. Legislative power is relevantly distinguished from judicial power in so far as the principal concern of the former is the laying down of rules and the principal concern of the latter is the binding resolution of controversies as to the existence and consequences of their breach. A legislature does not usurp judicial power merely by enacting a rule of general application which provides for the automatic termination of a right or status by operation of law upon the occurrence of a specified event. As was explained in *Duncan v New South Wales*[66]:

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

48 To the extent that the argument was sought to be advanced by reference to functional considerations, the argument failed to show why considerations of peculiarly executive concern could not be accommodated within the curial

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**64** See s 12(2)(b) of the *Nationality Act 1920* (Cth); and s 21(1)(e) of the *Nationality and Citizenship Act 1948* (Cth) until its repeal by s 7 of the *Nationality and Citizenship Act 1958* (Cth).

**65** See s 21(a) of the *Nationality and Citizenship Act 1948* (Cth) after the enactment of s 7 of the *Nationality and Citizenship Act 1958* (Cth) until its omission by s 15 of the *Australian Citizenship Amendment Act 1984* (Cth); and s 21(1)(a)(i) and (ii) of the *Australian Citizenship Act 1948* (Cth) as substituted by s 15 of the *Australian Citizenship Amendment Act 1984* (Cth).

**66** (2015) 255 CLR 388 at 408 [43] (citations omitted).

paradigm by the simple and common legislative expedient of requiring executive application or certification as a precondition to a court making an order for cessation of citizenship as a component of the punishment the court might impose as a consequence of conviction of an offence[67].

**Formal answers to questions**

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

(1) Is s 36D of the Citizenship Act invalid in its operation in respect of the applicant because it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt?

Answer: Yes.

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

Answer: It should be declared that:

(a) s 36D of the Citizenship Act is invalid; and

(b) the applicant is an Australian citizen.

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

Answer: The respondents.

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**67** Compare *Palling v Corfield* (1970) 123 CLR 52 at 58-59. See also *Magaming v The Queen* (2013) 252 CLR 381 at 391 [27], 407 [80]; *Kuczborski v Queensland* (2014) 254 CLR 51 at 121 [236]-[237].

50 GORDON J. The facts and statutory framework are set out in the reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ. I gratefully adopt them. I agree with the answers to the questions in the special case. Subject to what appears below, I generally agree with the reasons given for those answers. I write separately to emphasise that the principle in *Chu Kheng Lim v Minister for Immigration*[68] – that the adjudgment and punishment of criminal guilt is exclusively judicial – is underpinned by two key constitutional values or rationales for Ch III's strict separation of federal judicial power from executive and legislative power.

51 Those two key constitutional values or rationales are: first, the historical judicial protection of liberty against incursions by the legislature or the executive; and second, the protection of the independence and impartiality of the judiciary so as to ensure the judiciary can operate effectively as a check on legislative and executive power[69].

52 The first of those values or rationales is of particular significance in this case. The Blackstonian[70] common law conception of liberty lies at the heart of our inherited constitutional tradition[71]. The right to personal liberty – described as

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**68** (1992) 176 CLR 1 at 27.

**69** *Minister for Home Affairs v Benbrika* ("*Benbrika [No 1]*") (2021) 272 CLR 68 at 131 [136], 132-134 [138]-[142], see also 108-111 [67]-[72]; *Garlett v Western Australia* (2022) 96 ALJR 888 at 921 [163], 923 [169]-[170], 924-925 [173]-[174]; 404 ALR 182 at 218, 221, 222-223. See also *Garlett* (2022) 96 ALJR 888 at 915-917 [125]-[133]; 404 ALR 182 at 211-213. See also *R v Davison* (1954) 90 CLR 353 at 380-382; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 390-393; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 579-581; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 684-685; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10-12; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* ("*NAAJA*") (2015) 256 CLR 569 at 610 [94]-[95]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 275-276 [140]-[142].

**70** See Blackstone, *Commentaries on the Laws of England* (1765), Bk 1, Ch 1 at 130-133.

**71** *Benbrika [No 1]* (2021) 272 CLR 68 at 132 [138], citing *Trobridge v Hardy* (1955) 94 CLR 147 at 152, *Williams v The Queen* (1986) 161 CLR 278 at 292, *Magaming v The Queen* (2013) 252 CLR 381 at 400-401 [63]-[67], *NAAJA* (2015) 256 CLR 569 at 610-611 [94]-[97] and *Vella* (2019) 269 CLR 219 at 276 [141]-[142]. See also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11; *Lim* (1992) 176 CLR 1 at 28-29; *Benbrika [No 1]* (2021) 272 CLR 68 at 91 [19].

"the most elementary and important of all common law rights"[72] – cannot be impaired or taken away without lawful authority. And "[i]t is the judiciary, the 'bulwark of freedom', which traditionally and historically adjudges the most basic of rights upon the determination of criminal guilt"[73].

53 The respondents properly accepted that, in light of *Alexander v Minister for Home Affairs*[74], the power in s 36D of the *Australian Citizenship Act 2007* (Cth) for the Minister to "determine ... that a person ceases to be an Australian citizen" should be characterised as punitive. The respondents submitted that, notwithstanding that s 36D is punitive, there are two pathways for the Court to find that s 36D is valid. The *first pathway* is that this Court should hold that the imposition of punishment for criminal guilt under our constitutional system is not exclusively judicial – it is always an evaluative assessment based on the particular power in question. The *second pathway* is that this Court should identify a new exception to the *Lim* principle for this particular function – involuntary denationalisation and deprivation of citizenship following conviction – for historical and functional reasons. Both pathways should be rejected. Both are contrary to *Lim* and both would undermine the constitutional values or rationales that underpin Ch III's strict separation of federal judicial power from executive and legislative power.

**First pathway – punishment is exclusively judicial**

54 In *Lim*, Brennan, Deane and Dawson JJ held that "the adjudgment *and* punishment of criminal guilt" is an exclusively judicial function under the *Constitution*[75]. That canonical statement has been approved in many decisions of

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**72** *Trobridge* (1955) 94 CLR 147 at 152; *Williams* (1986) 161 CLR 278 at 292. See also *Bunning v Cross* (1978) 141 CLR 54 at 75; *Baker v Campbell* (1983) 153 CLR 52 at 95; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 125; *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 212 [45].

**73** *Benbrika [No 1]* (2021) 272 CLR 68 at 132 [138], quoting *Quinn* (1977) 138 CLR 1 at 11.

**74** (2022) 96 ALJR 560 at 580-581 [82]-[84], 587 [120], 596 [163], 614 [251]; 401 ALR 438 at 457, 466, 477, 501.

**75** (1992) 176 CLR 1 at 27 (emphasis added).

this Court[76]. It was on the basis of the *Lim* principle that a majority of this Court last year held that s 36B of the *Australian Citizenship Act* was invalid[77].

55 The respondents sought to argue that this statement from *Lim* is conjunctive, rather than disjunctive. That is, they ventured to submit that Parliament or the executive crosses the line into the exercise of exclusively judicial power if it purports to *both* adjudge and punish criminal guilt. The respondents did not seek to deny that a power to impose punishment alone *can* be an exclusively judicial power. Rather, they sought to establish that a power to punish criminal guilt separate from the adjudgment of guilt is not *necessarily* exclusively judicial in nature.

56 In *Lim*, the Court was asked to determine whether provisions of the *Migration Act 1958* (Cth) that provided for the mandatory detention of certain aliens were invalid for infringing Ch III of the *Constitution*. Brennan, Deane and Dawson JJ observed that it was "well settled" that, under the *Constitution*, Parliament cannot confer any part of the judicial power of the Commonwealth on any organ of the executive government, or make a law requiring judicial power to be exercised by a federal court in a manner inconsistent with the essential character of a court or with the nature of judicial power[78]. Their Honours observed[79]:

> "There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. *The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth.* That function appertains exclusively to[80] and 'could not be

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**76** See, eg, *Magaming* (2013) 252 CLR 381 at 396 [47], 399-400 [61]-[63]; *Kuczborski v Queensland* (2014) 254 CLR 51 at 120 [233]; *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [15]; *Benbrika [No 1]* (2021) 272 CLR 68 at 90-91 [18]-[19], 108 [65], 111 [72], 133 [140], 141 [160], 159-160 [207]-[208]. See also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258, 269; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40].

**77** *Alexander* (2022) 96 ALJR 560 at 583 [97], 588 [127], 599 [175], 614 [254]; 401 ALR 438 at 460-461, 467, 481, 502.

**78** *Lim* (1992) 176 CLR 1 at 26-27; see also 10, 53.

**79** *Lim* (1992) 176 CLR 1 at 27 (emphasis added).

**80** *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

excluded from"[81] the judicial power of the Commonwealth[82]. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the subsections of s 51 of the Constitution, of any law purporting to vest *any part* of that function in the Commonwealth Executive."

57 Their Honours emphasised that the *Constitution* is concerned with substance and not mere form, and that "[i]t would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt"[83]. That is, the example given by the plurality in *Lim* was of a law that involved no adjudication of guilt – only punishment, as a matter of substance, by arbitrary detention.

58 Their Honours explained that "[t]he reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[84]. Their Honours identified exceptional cases that are *non-punitive* in character, being committal of a person to custody awaiting trial and involuntary detention in cases of mental illness or infectious disease[85]. Their Honours also identified two exceptional cases that are *punitive* but are nevertheless not exclusive to the judicial power of the Commonwealth, being the traditional powers of Parliament to punish for contempt and of military tribunals to punish for breach of military discipline[86].

59 In holding that the provisions for mandatory administrative detention were valid, their Honours emphasised that an alien has, in comparison to a citizen[87],

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**81** *Davison* (1954) 90 CLR 353 at 368, 383.

**82** See also *War Crimes Act Case* (1991) 172 CLR 501 at 536-539, 608-610, 613-614, 632, 647, 649, 685, 705-707, 721.

**83** *Lim* (1992) 176 CLR 1 at 27.

**84** *Lim* (1992) 176 CLR 1 at 27.

**85** *Lim* (1992) 176 CLR 1 at 28.

**86** *Lim* (1992) 176 CLR 1 at 28.

**87** Their Honours treated alien and citizen as antonyms: *Lim* (1992) 176 CLR 1 at 25. However, see *Pochi v Macphee* (1982) 151 CLR 101 at 109, 112, 116; *Love v The Commonwealth* (2020) 270 CLR 152 at 192 [81], 236-237 [236], 261-262 [295], 288 [394].

significantly diminished protection against imprisonment otherwise than pursuant to judicial process[88]. That was because it has been consistently recognised that Parliament has power to make laws not only for the expulsion or deportation of aliens, but also for the detention of aliens in custody to the extent necessary to make the deportation effective[89]. Such a limited authority to detain an alien in custody for the purposes of expulsion or deportation can be conferred on the executive without infringing Ch III, because "*to that limited extent*, authority to detain in custody is *neither punitive in nature nor part of the judicial power* of the Commonwealth"[90].

60 Three matters evident in the plurality's reasons in *Lim* should be emphasised. First, a law purporting to vest in the executive *any part* of the function of adjudging and punishing criminal guilt under a law of the Commonwealth will be invalid. That is, a law purporting to empower the executive to punish criminal guilt will be invalid for that reason alone. That is consistent with many statements in decisions of this Court, before and after *Lim*[91].

61 Second, the concern is with the substance and practical operation of the law, not merely its form. As McHugh J explained in *Re Woolley; Ex parte Applicants M276/2003*[92], "[a] law may infringe [Ch III] even if the punitive or penal sanction is not imposed for breach of the law or the existence of the fact or reason for the punishment is not transparent. If the purpose of the law is to *punish* or *penalise* the detainee without identifying the fact, reason or thing which gives rise to the

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**88** *Lim* (1992) 176 CLR 1 at 29, 34.

**89** *Lim* (1992) 176 CLR 1 at 30-31.

**90** *Lim* (1992) 176 CLR 1 at 32 (emphasis added; footnote omitted).

**91** *Waterside Workers'* (1918) 25 CLR 434 at 444; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 95-96; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 240; *Re Tracey* (1989) 166 CLR 518 at 580; *War Crimes Act Case* (1991) 172 CLR 501 at 536; *Brandy* (1995) 183 CLR 245 at 258, 269; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 35 [82]; *Crump v New South Wales* (2012) 247 CLR 1 at 16 [27]-[28]; *Magaming* (2013) 252 CLR 381 at 401 [66]; *Falzon* (2018) 262 CLR 333 at 340 [14]-[15], 347 [47]; *Minogue v Victoria* (2019) 268 CLR 1 at 15 [13]; *Private R v Cowen* (2020) 271 CLR 316 at 379 [168]; *Benbrika [No 1]* (2021) 272 CLR 68 at 161 [210]; *Alexander* (2022) 96 ALJR 560 at 611 [235]; 401 ALR 438 at 497; *Garlett* (2022) 96 ALJR 888 at 902-903 [46]; 404 ALR 182 at 193-194.

**92** (2004) 225 CLR 1 at 35 [82] (emphasis in original).

punishment or penalty, then, as a matter of substance it gives rise to the strong inference that it is a disguised exercise of judicial power."

62 Third, there are exceptions to the proposition that involuntary detention under a law of the Commonwealth is exclusive to the judicial power of the Commonwealth, but these are limited only to those exceptional cases that can be properly characterised as *non-punitive*, and to those (even more) exceptional cases that, although punitive, stand outside of Ch III of the *Constitution* (punishment by Parliament for contempt[93], and punishment by military tribunals for breach of military discipline[94]).

63 The respondents argued that *Lim* has only limited relevance to the present proceeding because *Lim* dealt with provisions regarding detention in custody, which this Court has recognised as a detriment or hardship of such a kind that there is a "default characterisation" that it is punitive, and can, subject to exceptions where the detention is justified for another reason, be imposed only in the exercise of judicial power[95]. This attempted distinction between involuntary detention, and involuntary denationalisation and citizenship deprivation, should not be adopted. Like detention – 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 in which the individual had enjoyed equal participation in the exercise of political sovereignty[96], "destroy[ing] for the individual the political

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**93** See *Constitution*, s 49, discussed in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 166-167.

**94** See *Private R* (2020) 271 CLR 316 at 333 [46], 355 [111], 366-367 [133]-[134], 374 [154], 377-381 [163]-[170]. See also *Re Tracey* (1989) 166 CLR 518 at 540-541, 564-565, 572-573, 580-582, 598; *Benbrika [No 1]* (2021) 272 CLR 68 at 161 [209].

**95** *NAAJA* (2015) 256 CLR 569 at 611 [98], see also 610 [94]; *Falzon* (2018) 262 CLR 333 at 342 [23]-[24]; *Benbrika [No 1]* (2021) 272 CLR 68 at 111 [73], see also 99-100 [40].

**96** *Unions NSW v New South Wales* (2019) 264 CLR 595 at 614 [40]; see also 646 [137], 660 [178]. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136-137, 174; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7], 198-199 [83]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202 [27], 226 [110]-[111], 257 [215]-[216], 284 [318].

existence that was centuries in the development"[97]. It involves loss of fundamental rights of nationality and citizenship with immediate effect and permanently[98]. The individual is made vulnerable to exclusion or deportation from the territory (with no right of return), and to detention in custody to the extent necessary to make the deportation effective[99].

64 As observed by the plurality in *Alexander*, "the fundamental value accorded to the liberty of the individual provides the rationale for the strict insistence in the authorities that the liberty of the individual may be forfeited for misconduct by that person only in accordance with the safeguards against injustice that accompany the exercise of the judicial power of the Commonwealth"[100]. Their Honours observed that the case for the strict insistence on these safeguards is, if anything, stronger in relation to deprivation of nationality and citizenship than detention[101].

65 Those observations by the plurality in *Alexander* are consistent with an understanding of the *Lim* principle as underpinned by both the strict separation of Commonwealth judicial power from executive and legislative power inherent in the text and structure of the *Constitution*, and the constitutional values protected by that separation[102].

66 In oral submissions, the respondents rightly accepted that they did not embrace any notion of an "Executive Sentencing Act". But, taken to its logical conclusion, if the respondents' submission were correct that *Lim* should be read only as conjunctive, then the constitutional limitation might be avoided by a

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**97** *Trop v Dulles* (1958) 356 US 86 at 101, quoted in *Alexander* (2022) 96 ALJR 560 at 598 [172]; 401 ALR 438 at 480. See also *Alexander* (2022) 96 ALJR 560 at 613-614 [248]-[250]; 401 ALR 438 at 500-501.

**98** *Alexander* (2022) 96 ALJR 560 at 597 [166], cf 578-579 [73]-[74]; 401 ALR 438 at 478, cf 454-455.

**99** *Lim* (1992) 176 CLR 1 at 29-32; *The Commonwealth v AJL20* (2021) 273 CLR 43 at 83 [78]-[79]. See also *Migration Act 1958* (Cth), ss 13(1), 14(1), 189(1), 196(1), 198, 200.

**100** (2022) 96 ALJR 560 at 578 [73]; 401 ALR 438 at 454, citing *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 179 [56] and *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [79], 632-633 [150]-[151].

**101** *Alexander* (2022) 96 ALJR 560 at 578 [73]; 401 ALR 438 at 454. See also *Alexander* (2022) 96 ALJR 560 at 597 [165], 598 [171]-[172], 613 [248]-[249]; 401 ALR 438 at 478, 480, 500-501.

**102** See [50]-[52] above.

drafting technique of conferring the power to adjudge on a court and the power to punish on the executive. The executive could set up a "Sentencing Committee" – an administrative body with the function of sentencing for Commonwealth offences. Or the Parliament could vest a power in the executive to resentence or impose additional or further punishment on a convicted offender for the purposes of retribution, denunciation and deterrence – for example, if the executive is not satisfied with the sentence imposed by a court. Such scenarios are contrary to fundamental constitutional principle.

67 Accepting the respondents' submission would erode a key constitutional value underpinning the separation of judicial power – the historical judicial protection of liberty against incursions by the legislature or the executive. It may be trite to observe that judicial power "involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process"[103]. But such standard non-exhaustive descriptions of the nature of judicial power have a basic significance that should not be overlooked; they "apply to the determination of criminal punishment *no less* than to the determination of criminal guilt"[104]. There is a need for legal control of punishment irrespective of whether the punisher also adjudges guilt; "in the absence of legal control of punishments ... there is the risk of administrative arbitrariness"[105]. For example, a court is required to provide reasons for sentence. The Minister is not obliged under s 36D to (and did not in this case) provide reasons for their decision. Procedural fairness is an essential characteristic of a Ch III court[106] – "[t]he method of 'administering justice' that lies at the heart of the common law tradition requires that courts adopt 'a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests'"[107]. In contrast, s 36D(9) of the *Australian Citizenship Act* specifies that the rules of natural justice do not apply in relation to making a decision under s 36D.

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**103** *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56], and the authorities there cited.

**104** *Magaming* (2013) 252 CLR 381 at 401 [66] (emphasis added).

**105** *Pollentine v Bleijie* (2014) 253 CLR 629 at 643 [21], referring to *Fardon* (2004) 223 CLR 575 at 606-607 [62].

**106** See, eg, *SDCV v Director-General of Security* (2022) 96 ALJR 1002 at 1019 [50], 1030 [106], 1041-1042 [172]-[173]; 405 ALR 209 at 221, 236, 251-252.

**107** *SDCV* (2022) 96 ALJR 1002 at 1042 [173]; 405 ALR 209 at 252, quoting *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 46 [1] and *Wilson* (1996) 189 CLR 1 at 17.

68 The standard incidents of the exercise of judicial power in the adjudgment and punishment of criminal guilt for an offence are "founded on deeply rooted notions of the relationship of the individual to the state going to the character of the national polity created and sustained by the *Constitution*"[108]. The characteristics of judicial power are "deeply rooted in a tradition within which judicial protection of individual liberty against legislative or executive incursion has been a core value"[109]. The Court therefore must be cognisant of, and vigilant to protect against, laws that are corrosive to or erode the key constitutional values or rationales that underpin the separation of judicial power[110].

69 The Court would be taking a grave misstep if it were to accept the respondents' submission.

**Second pathway – no new exception to the *Lim* principle**

70 The *second pathway* put forward by the respondents was that this Court should identify an exception to the *Lim* principle for this particular function – involuntary denationalisation and deprivation of citizenship as punishment following a conviction – for historical and functional reasons. If such an exception were identified, it would join the very limited category of exceptional cases of permissible punishment outside of Ch III of the *Constitution*[111]. That submission of the respondents should also be rejected.

71 While there is a long history of banishment and exile over thousands of years in various societies[112], there is no long history in Australia of denationalisation and citizenship deprivation by the executive in retribution for, or as a sanction for, past criminal conduct. The provisions for "citizenship cessation" for terrorism-related conduct and offences introduced in 2015[113],

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**108** *Benbrika [No 1]* (2021) 272 CLR 68 at 110 [70], quoting *Magaming* (2013) 252 CLR 381 at 400 [63]. See also *Garlett* (2022) 96 ALJR 888 at 916 [127], 924 [173]; 404 ALR 182 at 211, 222.

**109** *Vella* (2019) 269 CLR 219 at 276 [141]. See also *Garlett* (2022) 96 ALJR 888 at 924-925 [174]; 404 ALR 182 at 222-223.

**110** *Garlett* (2022) 96 ALJR 888 at 925 [174]; 404 ALR 182 at 223.

**111** See [62] above.

**112** See *Alexander* (2022) 96 ALJR 560 at 578 [72], 597-598 [167]-[172], 613-614 [250]; 401 ALR 438 at 454, 479-480, 501.

**113** *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).

and then significantly amended in 2020[114], were a new development in our constitutional history.

72 The respondents submitted that there are functional reasons why courts may not be suited to making orders depriving a person of nationality and citizenship. The respondents emphasised that such orders may have foreign relations ramifications and will also involve a value judgment as to whether a person has engaged in conduct so inimical as to be inconsistent with continuing membership of the political community. But punishment – involuntary denationalisation and deprivation of citizenship as punishment following a conviction – cannot be permitted as a non-judicial function simply by combining it with some other function or consideration that is said to be more suited to the executive.

73 The respondents further submitted that, on the authority of *Alexander*, there is no way of drafting a provision that excludes a person from citizenship who has engaged in conduct repudiating allegiance, for example, by fighting in a war against Australia, without that power being exercised by a court[115]. That overstates the position. Nothing in *Alexander* suggested that it is impossible to denaturalise or denationalise a person for non-punitive purposes or that such a power must always be reposed in a court. Objective renunciation was accepted as something that could be legislated under s 51(xix)[116]. The question of whether a law providing for denationalisation and deprivation of citizenship contravenes Ch III, however, will always be one of characterisation of the law and whether it is limited to what is reasonably capable of being seen as necessary for a legitimate non-punitive purpose[117].

74 The provisions in Subdiv C of Div 3 of Pt 2 of the *Australian Citizenship Act* can be contrasted with §1481(a) of Title 8 of the *United States Code*. Under §1481(a), a person shall lose their nationality by "voluntarily performing" any of a number of specified acts "with the intention of relinquishing United States nationality" (and such intention may be inferred[118]). Those specified acts include

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**114** *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth).

**115** The respondents referred to *Nationality and Citizenship Act 1948* (Cth), s 19, which provided that "[a]n Australian citizen who, under the law of a country other than Australia, is a national or citizen of that country and serves in the armed forces of a country at war with Australia shall, upon commencing so to serve, cease to be an Australian citizen".

**116** *Alexander* (2022) 96 ALJR 560 at 575-576 [50]-[51], 594 [154]-[156], 610-611 [231]-[234], 622 [289]; 401 ALR 438 at 450, 474-475, 496-497, 512.

**117** *Jones v The Commonwealth* [2023] HCA 34 at [38]-[39], [63], [148]-[149], [188].

**118** See *Vance v Terrazas* (1980) 444 US 252 at 260.

"entering, or serving in, the armed forces of a foreign state if ... such armed forces are engaged in hostilities against the United States" and "committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States ... if and when [a person] is convicted thereof by a court martial or by a court of competent jurisdiction". Whenever the loss of United States nationality is put in issue in an action or proceeding, the burden shall be upon the person claiming that such loss has occurred to establish the claim by a preponderance of evidence[119]. Such a provision has significant differences to s 36D.

75 There is no reason why a new exception to the *Lim* principle should be identified. Expediency cannot be elevated above constitutional principle, particularly where, as here, that constitutional principle is founded on deeply rooted notions of the relationship between the individual and the State, and the consequences for the individual of involuntary denationalisation and citizenship deprivation are so grave – the severing of their mutual relationship with the State and the loss of rights and liberty.

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**119** 8 USC §1481(b).

EDELMAN J.

## Introduction

76 The issue in this special case is this. Can the Commonwealth Parliament legislate to empower the Executive to punish citizens by revoking all of the rights and privileges consequent upon their citizenship and also potentially stripping them of their constitutional status as people of the Commonwealth of Australia, leaving them only with a precarious statutory privilege to remain in Australia that could be removed at any time? The answer is "No".

77 The premise of this question is that the challenged provision in this special case, s 36D of the *Australian Citizenship Act 2007* (Cth), is punitive. The line between punitive and non-punitive laws can sometimes be very fine. But, for the reasons below, s 36D, like s 36B, is punitive. If it were not punitive, then the provision would likely be valid. As Steward J concludes, the Executive can be empowered by a non-punitive law to determine that a person ceases to be an Australian citizen and also loses their ability to remain in or return to Australia, in circumstances in which that person acts in such an extreme way as effectively to repudiate their allegiance to Australia.

## The issue

78 The facts and background to this case are set out in the joint reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ and in the reasons of Steward J. That factual background reveals that this case is a sequel to the decision of this Court in *Alexander v Minister for Home Affairs*[120]. In *Alexander*, s 36B of the *Australian Citizenship Act* was held to be invalid by a majority of this Court (Steward J dissenting) on the basis that it purported to repose in the Minister the generally exclusive judicial power to punish criminal guilt by deprivation of citizenship, contrary to Ch III of the *Constitution*[121].

79 Section 36B, which was invalidated in *Alexander*, fell within Subdiv C ("Citizenship cessation determinations") of Div 3 ("Cessation of Australian citizenship") of Pt 2 of the *Australian Citizenship Act*. The purpose of Subdiv C is set out in s 36A: "This Subdivision is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia." In broad terms, s 36B

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**120** (2022) 96 ALJR 560; 401 ALR 438.

**121** (2022) 96 ALJR 560 at 583 [97], 588 [127], 599 [175], 614 [254]; 401 ALR 438 at 460-461, 467, 481, 502.

empowered the Minister to determine in writing that a person ceases to be an Australian citizen in circumstances which included conduct by that person that satisfies the physical element of certain serious offences, primarily related to terrorism[122].

80 This special case concerns s 36D. Section 36D is also contained within Subdiv C of Div 3 of Pt 2 of the *Australian Citizenship Act*. It empowers the Minister to determine personally[123], without any requirement of natural justice[124], that a person ceases to be an Australian citizen if the following conditions are met: the Minister is satisfied that the person is a national or citizen of another country[125]; the person has been convicted of a particular offence or offences from a list of serious offences[126]; the person has been sentenced to a period of imprisonment, individually or cumulatively, of at least three years[127]; the Minister is satisfied that the conduct to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia[128]; and the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen[129].

81 The submissions of the respondents essentially concerned two matters. First, as a matter of principle, the power in s 36D is not exclusively judicial power and is not, therefore, contrary to Ch III of the *Constitution*. Secondly, because s 36D does not concern an exclusively judicial power, as a matter of authority the reasoning in the decision in *Alexander* does not apply to s 36D.

**Constraints of principle upon revocation of statutory citizenship**

*The implied power to denationalise*

82 In written and oral submissions the parties treated the power of revocation of statutory citizenship under s 36D as also giving rise to a power of

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**122** *Australian Citizenship Act 2007* (Cth), ss 36B(1)(a), 36B(5).

**123** *Australian Citizenship Act 2007* (Cth), s 36D(7).

**124** *Australian Citizenship Act 2007* (Cth), s 36D(9).

**125** *Australian Citizenship Act 2007* (Cth), s 36D(2).

**126** *Australian Citizenship Act 2007* (Cth), s 36D(1)(a) read with s 36D(5).

**127** *Australian Citizenship Act 2007* (Cth), s 36D(1)(b).

**128** *Australian Citizenship Act 2007* (Cth), s 36D(1)(c).

**129** *Australian Citizenship Act 2007* (Cth), s 36D(1)(d).

denationalisation. But if denationalisation is understood as a power to convert a member of the political community—one of the people of the Commonwealth—into an alien who is vulnerable to deportation, then the power to revoke a person's statutory citizenship is not necessarily co-extensive with a power to denationalise. The power to revoke statutory citizenship does not imply a power to deprive a person of constitutional rights or freedoms. The ability to remain in Australia as a member of the Australian political community, and perhaps also "[t]he ability to move freely in and out of the country"[130], may be more fundamental than the constitutional ability to vote, recognised in ss 7 and 24 of the *Constitution*, which cannot be removed without substantial justification or reason[131]. At the least, "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*"[132]. In any event, there is no express constitutional head of power by which the Commonwealth Parliament can authorise the transformation of any or all of the people of the Commonwealth who are members of the Australian political community into aliens.

83 However, at least in extreme circumstances, the *Constitution* impliedly empowers legislation that would remove, by denationalisation, even the ability to remain in Australia that might be associated with being one of the people of the Commonwealth[133]. It was assumed in this special case that the applicant's terrorism-related conduct fell within the extreme circumstances by which the *Constitution* impliedly empowers denationalisation of one of the people of the Commonwealth. In that sense, the purported revocation of the applicant's citizenship, leaving the applicant with only an ex-citizen visa, was assumed by the parties to amount also to denationalisation, rendering the applicant vulnerable to deportation and banishment.

84 Without any issue concerning a distinction between revocation of citizenship and denationalisation that can lead to deportation, the sole question in this special case is whether the exercise of the power in s 36D of the *Australian Citizenship Act*, leading to the loss of the statutory rights and privileges consequent upon citizenship and to denationalisation, is invalid because it involves non-

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**130** Rubenstein, "Citizenship and the Centenary—Inclusion and Exclusion in 20th Century Australia" (2000) 24 *Melbourne University Law Review* 576 at 597.

**131** *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7]. See also at 199 [83], [85].

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

**133** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 589-590 [135]-[137], 601 [185], 622 [289]-[290]; 401 ALR 438 at 469-470, 484, 512.

judicial punishment contrary to the separation of powers implied by the *Constitution*.

*The* Lim *principle of separation of powers*

85 The implication of a Commonwealth separation of powers in Ch III of the *Constitution* is based upon the "dominant principle of demarcation" established by the text and structure of Ch III[134]. That implication has the effect that the Commonwealth Parliament can only invest the judicial power of the Commonwealth in a federal, State or Territory court in accordance with the provisions of Ch III[135].

86 The purpose of a separation of powers, to avoid the aggregation of power in one branch of government, can also be stated at a higher level of generality as concerning the protection of liberty[136]. A consequence of the separation of powers may also be the protection of some aspects of personal liberty. Thus, the extent to which liberty is infringed can affect whether a provision is regarded as punitive and therefore whether a power is within the exclusive province of the judiciary[137]. But although personal liberty has this role in the application of the separation of powers, it is not a proper method of constitutional interpretation to use a higher-level purpose of a separation of powers implication that is heavily based upon constitutional structure as a means to supply an independent implication capable of direct application, such as a right to personal liberty[138].

87 So too, a consequence, and even a purpose, of the separation of powers may be the protection of some aspects of the rule of law, particularly where the separation of powers requires punitive measures to be imposed only by the judiciary[139]. But, again, a purpose of an implication in protecting an aspect of the

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**134** *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 90.

**135** *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26.

**136** Montesquieu, *The Spirit of Laws* (Nugent trans, 1873), bk 11, ch 6 at 174. See also Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 7 at 259-260.

**137** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 613 [248]; 401 ALR 438 at 500.

**138** *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 164-166 [215]-[219].

**139** *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-28, quoting Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 202.

rule of law cannot be used to supply an independent constitutional implication of "the rule of law" that is capable of direct application[140]. If such an approach to interpretation were legitimate, then primarily historical justifications of exceptions such as the punishment of contempt of Parliament[141] or the punishment for breach of military discipline[142] may need to be revisited because it would be difficult for extra-constitutional history alone to prevail over an implication of "the rule of law". Moreover, it is hard to see how express provisions in the *Constitution*, such as ss 47 and 49, would be compatible with the content of an independent implication of "the rule of law" requiring the powers of adjudication or punishment to be exclusively judicial[143].

88 The better view is that the principle of the separation of powers has elastic boundaries which might sometimes be difficult to apply with precision, but it does not assist in that application to deconstruct the principle of the separation of powers into separate constitutional implications capable of independent application.

89 In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[144], the joint judgment of Brennan, Deane and Dawson JJ (with which Gaudron J relevantly agreed) considered one aspect of the boundaries of the separation of powers: the content of the judicial power of the Commonwealth, which the Commonwealth separation of powers requires to be reposed only in a Ch III court. Their Honours said that the function of "adjudgment and punishment of criminal guilt" had become established as exclusively judicial in character[145]. That was not a new proposition. Many years earlier, in a case cited by the joint judgment in *Lim*, Griffith CJ had said that "convictions for offences and the

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**140** *Palmer v Western Australia* (2021) 274 CLR 286 at 297-301 [19]-[25].

**141** See discussion of s 49 of the *Constitution* in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167. See also *Burdett v Abbot* (1811) 14 East 1 at 159-160 [104 ER 501 at 561-562]; *Kielley v Carson* (1842) 4 Moo PC 63 at 89 [13 ER 225 at 235].

**142** *Private R v Cowen* (2020) 271 CLR 316 at 377-387 [163]-[180].

**143** See *Private R v Cowen* (2020) 271 CLR 316 at 387 [180]. See also *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 166-167; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 574.

**144** (1992) 176 CLR 1.

**145** (1992) 176 CLR 1 at 27. See also at 53.

imposition of penalties and punishments are matters appertaining exclusively to [judicial] power"[146].

90 Contrary to the submissions of the respondents on this special case, but consistently with the previous expression of the exclusivity of judicial power by Deane J[147], the reference by Brennan, Deane and Dawson JJ to "adjudgment and punishment of criminal guilt" has correctly been assumed to be disjunctive[148]. Their Honours in *Lim* were not suggesting that legislation could empower the Commonwealth Executive to adjudicate on guilt provided that the judiciary imposed the penalty. Nor were they suggesting that legislation could permit an adjudication of guilt by a court with the consequent punishment to be imposed by the Executive. And nor were they suggesting that adjudication or punishment of criminal guilt by the Executive was permissible if it were combined with some other purpose. It would be a triumph of form over substance to permit the generally exclusive judicial power to adjudicate and punish criminal guilt to be undermined in any of these ways.

91 A fundamental aspect of the reasoning of the joint judgment in *Lim* was that questions concerning whether a power of adjudication of guilt or punishment of guilt has been created and vested in a body other than a court must be decided as a matter of substance rather than form[149]. There can sometimes be fine lines that must be drawn in the course of applying this principle of the separation of powers but those lines must be drawn as a matter of the substance (including the reasonably anticipated effect) of the impugned law rather than its mere form.

92 There can sometimes be a fine line between, on the one hand, the consequence of a breach of a condition that regulates a person's right and, on the other hand, the punishment that follows a finding that a person is guilty of an offence. An example of the former is the decision of this Court in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*[150], where it was held that an administrative body's decision to suspend or cancel a commercial radio broadcasting licence where a condition had been breached was not

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**146** *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

**147** *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580.

**148** See *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340-341 [15]-[16], 357 [88]; *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 611 [235]; 401 ALR 438 at 497.

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

**150** (2015) 255 CLR 352 at 371-372 [33]-[34], 386 [78]-[79].

punishment even if that breach were determined by reference to the commission of a criminal offence[151]. So too, in *Falzon v Minister for Immigration and Border Protection*[152] it was held that it was not punitive for Parliament to choose the fact that the person does not have a substantial criminal record and is not serving a custodial sentence as a "factum", or condition, for the continued operation of a visa (held by a person who was assumed to be an alien).

93 Another fine line can exist between legislation that concerns an adjudication of guilt for an offence and legislation that concerns an inquiry as to whether an offence has been committed for reasons other than immediately achieving justice. Adjudication is a process directed at achieving justice. If legislation establishing an inquiry provides for harsh consequences upon a finding of guilt of an offence then that may be a strong indicator that the inquiry involves the exercise of judicial power or has a purpose of "interfer[ing] with the course of justice"[153]. So too, it will be a strong indication of the exercise of judicial power if legislation "purport[s] to remove the common law inhibition on the exercise of ... discretionary executive power"[154] such as to charge a person with a criminal offence. By contrast, there will usually be no exercise of judicial power where "[t]he legal consequences are no different from those which would follow were some private person to choose to inquire of [their] own motion into the circumstances of a crime and then to inform the executive"[155].

94 There can also be a fine line that must be drawn between whether legislation validly empowers punishment by the judiciary or whether it purports to impose punishment by the legislature or the Executive. This is particularly so because punishment by the judiciary, considered as a matter of substance, is not always part of the formal sentencing process[156]. The concept of a punitive law is also

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**151** See further *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 579 [77], 585 [109], 612 [243]; 401 ALR 438 at 455, 463-464, 499.

**152** (2018) 262 CLR 333 at 347 [46], 357 [89].

**153** *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 67, quoting *Clough v Leahy* (1904) 2 CLR 139 at 161.

**154** *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 162.

**155** *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 68.

**156** *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 133 [140] fn 321, 148-150 [182]-[185]; *Garlett v Western Australia* (2022) 96 ALJR 888 at 926 [179],

broader than the traditional criminal concept of punishment as just desert. It extends to laws that are not proportionate to, or sufficiently connected with, an otherwise legitimate purpose. Hence, the joint judgment in *Lim* described, as an example of a punitive law, a law that provided for the detention of an alien for a period that was not "limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered"[157].

95 In oral submissions in this case there was considerable focus upon whether the forfeiture regime considered by this Court in *Attorney-General (NT) v Emmerson*[158] was an example of a legislative, executive or judicial punishment. Broadly, that regime empowered the Supreme Court of the Northern Territory, on an application by the Director of Public Prosecutions and in the discretion of the Court, to make a restraining order over property in circumstances that included the person being charged, or being about to be charged, with certain offences. If the person was found guilty of those offences, and if the Director chose to make a further application for a declaration, the combined effect of the restraining order and the declaration made by the Court would be the forfeiture of property.

96 In the present special case in this Court, the respondents argued that the punishment of forfeiture in *Emmerson* was an example of a valid act of legislative punishment (due to the mandatory nature of the forfeiture at the conclusion of the court process) or executive punishment (due to the discretion of the Director in making the application). But, although one issue in that case concerned whether the institutional integrity of the Supreme Court was undermined[159], the precise character of the forfeiture order as a legislative, executive or judicial act was not directly in issue in that case. In any event, the forfeiture of property in that case (i) was contingent on a judicial order, (ii) was part of the judicial process, and (iii) involved judicial consideration by ordinary judicial processes[160], including whether statutory criteria for punishment had been satisfied[161]. It would have been, at least, strongly arguable that the imposition of the punishment of forfeiture was

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942-943 [249]-[255]; 404 ALR 182 at 224-225, 244-246. See also *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 145 [32]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [82]; *Minogue v Victoria* (2019) 268 CLR 1 at 26 [47].

**157** (1992) 176 CLR 1 at 33.

**158** (2014) 253 CLR 393.

**159** *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

**160** (2014) 253 CLR 393 at 433 [65].

**161** (2014) 253 CLR 393 at 431 [60].

a judicial act, just as a court order of forfeiture of property as a deodand was a result of a judicial act even if it was sometimes loosely described as a "pretextual tax"[162].

*A new exception to the separation of powers?*

97 The respondents submitted that punishment by revocation of citizenship should be recognised as a new exception to the content of the generally exclusive judicial power of punishment identified in *Lim*. The premise of that submission—that the separation of powers generally, and any definition of the content of exclusive judicial power, is neither precise nor free from exceptions—can be accepted. But the submission is wrong. It would turn the notion of the separation of powers on its head to create an ahistorical exception which would fundamentally undermine the general exclusivity of the judicial power to punish by permitting executive punishment of a type that is one of the most severe that can be ordered. Each of these points is considered in turn below, namely (i) the ahistorical nature of the suggested exception, and (ii) the content of the proposed exception as undermining the general exclusivity of the judicial power to punish.

98 As to history, it can be accepted that, as Professor Harrison Moore wrote, there are exceptions to the separation of powers where "logical consistency may have to yield something to history"[163]. But, unlike the exceptions that exist for punishment by the Executive through a military tribunal or punishment by Parliament for contempt, an exception for executive punishment by denationalisation for the commission of an offence has no deep historical roots[164]. The roots of this extreme punishment lie in the exercise of judicial power.

99 An early historical analogue of a denationalisation power might be seen in English statutes from at least the sixteenth century which provided for the punishment of banishment by transportation "beyond the Seas"[165]. The analogy is loose because the banished person was not stripped of their nationality. Nevertheless, the power was judicial. The punishment was imposed by Justices of

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**162** Pervukhin, "Deodands: A Study in the Creation of Common Law Rules" (2005) 47 *American Journal of Legal History* 237 at 256. See also Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 8 at 290; Baker (ed), *The Oxford History of the Laws of England* (2010), vol 12 at 996.

**163** Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 315.

**164** cf *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 541-543, 554-563; *Private R v Cowen* (2020) 271 CLR 316 at 372-373 [150].

**165** *Vagabonds Act 1597* (39 Eliz c 4), s 4. See also *Poor Relief Act 1662* (14 Car II c 12), s 23.

the Peace sitting in Quarter Sessions[166]. During the course of the eighteenth and early nineteenth centuries "an immense number of Acts were passed" by which the consequences of an offence were "various terms of transportation, with alternative terms of imprisonment, and power, in some cases alternative and in others cumulative, to order whipping"[167]. In every such instance the power was judicial with "wide though capriciously restricted discretion left to the judge"[168].

100 The historical committal to the judiciary of this banishment power of punishment is not undermined by the Crown prerogative to pardon upon condition of transportation. This conditional pardon by the Executive was not punishment at all, but a form of agreed relief from punishment. The conditional pardon "depended on the consent of the prisoner, since the Crown by its prerogative cannot, without such consent change or commute a sentence"[169].

101 As to the content of the proposed exception to the general exclusivity of the judicial power to punish, since citizenship "is the source from which ... additional rights flow, and is itself essential to protecting th[o]se rights"[170], the statutory revocation of the citizenship of a person of the Commonwealth, where valid, results in the removal of many of the civil, political and social rights of one of the people of the Commonwealth. The revocation of citizenship, and (as was assumed to be the case here) the associated denationalisation, as a sanction for an offence is one of the harshest forms of punishment that could be imposed upon a person. One of its consequences, a potential liability to be banished, has been described, when given effect, as "tantamount to civil death"[171]. And it has been observed that, until recently, the revocation of citizenship was generally eschewed by contemporary democracies because it was considered "so fundamentally harmful [that it is] 'no longer considered an acceptable form of punishment for citizens, even heinous

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**166** See *Vagabonds Act 1597* (39 Eliz c 4), s 4; *Poor Relief Act 1662* (14 Car II c 12), s 23. See also Holdsworth, *A History of English Law*, 3rd ed (1938), vol 11 at 570.

**167** Stephen, *A History of the Criminal Law of England* (1883), vol 1 at 480. See especially the consolidation in *Transportation Act 1824* (5 Geo IV c 84).

**168** Stephen, *A History of the Criminal Law of England* (1883), vol 1 at 481.

**169** Holdsworth, *A History of English Law*, 3rd ed (1938), vol 11 at 571.

**170** Lenard, "Democracies and the Power to Revoke Citizenship" (2016) 30 *Ethics and International Affairs* 73 at 75.

**171** 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.

criminals'"[172]. In no sense can the revocation of citizenship, when imposed as a punishment, be seen as something that sits close to the margin between punishment and regulation. An exception for such an extreme punishment by the Executive would undermine most of the rule concerning the general exclusivity of the judicial power to punish.

**Does the reasoning in *Alexander* apply to s 36D?**

102 The application of these principles to determine the validity of s 36D of the *Australian Citizenship Act* is made easier by the decision of this Court in relation to s 36B in *Alexander*.

103 The background to this Court's decision in *Alexander* was the purported revocation of Mr Alexander's citizenship by the Executive in reliance upon s 36B of the *Australian Citizenship Act*. A majority of the Court held that the principal purpose of s 36B was "retribution for conduct deemed to be so reprehensible as to be 'incompatible with the shared values of the Australian community'"[173]. Since a new exception to the separation of powers should not be recognised for the reasons explained above, the only remaining question is whether s 36D of the *Australian Citizenship Act* has the same punitive purpose as s 36B. If so, then it is invalid, since it is an exclusively judicial power that the Commonwealth Parliament cannot validly confer upon the Executive.

104 On its face, the power in s 36D appears to have the same purpose as that in s 36B. As explained above, both provisions are contained within Subdiv C ("Citizenship cessation determinations") of Div 3 ("Cessation of Australian citizenship") of Pt 2. Both powers have the same stated legislative purpose, set out in s 36A, to which reference has been made above. Both powers must be exercised by the Minister personally[174]. Both powers take effect when the determination is made[175]. Both powers exclude the requirements of natural justice[176]. Both powers apply to natural-born and naturalised citizens alike[177]. Both powers apply only to

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**172** Lenard, "Democracies and the Power to Revoke Citizenship" (2016) 30 *Ethics and International Affairs* 73 at 75-76, quoting Carens, *The Ethics of Immigration* (2013) at 101.

**173** (2022) 96 ALJR 560 at 579 [75]; 401 ALR 438 at 455, quoting *Australian Citizenship Act 2007* (Cth), s 36A.

**174** *Australian Citizenship Act 2007* (Cth), ss 36B(9), 36D(7).

**175** *Australian Citizenship Act 2007* (Cth), ss 36B(3), 36D(3).

**176** *Australian Citizenship Act 2007* (Cth), ss 36B(11), 36D(9).

**177** *Australian Citizenship Act 2007* (Cth), ss 36B(4), 36D(4).

people who are also citizens of other countries[178]. Both powers require the Minister to be satisfied that the relevant conduct demonstrates that the person has repudiated their allegiance to Australia[179] and that it would be contrary to the public interest for the person to remain an Australian citizen[180]. Both powers are subject to broadly the same rules for revocation of the citizenship cessation determination[181].

105 The only substantial difference between the two powers is that the power in s 36B is conditioned upon the Minister's satisfaction that the person has engaged in certain (principally terrorism-related[182]) conduct[183], whereas the power in s 36D is conditioned upon the conviction of the person for a particular (generally terrorism-related[184]) offence[185] and the person having been sentenced to a minimum term of three years' imprisonment[186]. This is not a distinction of relevance for the purpose of the separation of powers.

106 The respondents nevertheless submitted that a distinction between s 36B and s 36D had been recognised in *Alexander*, particularly in paragraph [70] of the joint reasons of Kiefel CJ, Keane and Gleeson JJ, with which Gageler J agreed in substance[187]. That paragraph should not be understood as drawing such a distinction.

*The meaning of paragraph [70] of the joint reasons in* Alexander

107 There was much dispute in oral submissions on this special case about the meaning of paragraph [70] of the joint reasons in *Alexander*. In that paragraph, Kiefel CJ, Keane and Gleeson JJ addressed a submission that s 36B was not an exclusively judicial power because it is a discretionary power which is subject to

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**178** *Australian Citizenship Act 2007* (Cth), ss 36B(2), 36D(2).

**179** *Australian Citizenship Act 2007* (Cth), ss 36B(1)(b), 36D(1)(c).

**180** *Australian Citizenship Act 2007* (Cth), ss 36B(1)(c), 36D(1)(d).

**181** *Australian Citizenship Act 2007* (Cth), ss 36H, 36J, 36K.

**182** *Australian Citizenship Act 2007* (Cth), s 36B(5).

**183** *Australian Citizenship Act 2007* (Cth), s 36B(1)(a).

**184** *Australian Citizenship Act 2007* (Cth), s 36D(5)(f).

**185** *Australian Citizenship Act 2007* (Cth), s 36D(1)(a).

**186** *Australian Citizenship Act 2007* (Cth), s 36D(1)(b).

**187** (2022) 96 ALJR 560 at 578 [70], 583 [98]; 401 ALR 438 at 453-454, 461.

judicial review and which contains conditions of ministerial satisfaction (i) of conduct by a person that shows repudiation of allegiance to Australia and (ii) that it is contrary to the public interest for the person to remain an Australian citizen. Their Honours responded to that submission as follows[188]:

> "The submissions of the defendants should not be accepted. [**First**,] [t]he consequences of a determination under s 36B for the citizen, [**secondly**,] the legislative policy which informs the operation of s 36B, and [**thirdly**,] a comparison of the operation of s 36B with the provisions of s 36D (which authorise the same consequences for the citizen only upon conviction after a trial), all point to the conclusion that the power reposed in the Minister by s 36B(1) is a power which Ch III of the *Constitution* requires to be exercised by a court that is part of the federal judicature."

108 The respondents to this special case relied on these three considerations, as enumerated, as a basis for asserting a distinction between s 36B and s 36D. Each is addressed below.

(1) The consequences of revocation of citizenship

109 As to the first consideration, the harshness of consequences is a central, although not sufficient, indicator of punishment[189]. The respondents sought to minimise the extent of the consequences of the stripping of citizenship by pointing out that the people who are stripped of their citizenship are automatically granted ex-citizen visas upon their citizenship ceasing[190].

110 The consequences of involuntary termination of citizenship should not be minimised or understated. As I have explained above, the revocation of citizenship is one of the harshest forms of punishment that can be imposed. It results in the loss of many civil, political and social rights. Following revocation, in the extreme circumstances in which a person can also then be treated as an alien, a person's ability to remain in this country is precariously held as a mere statutory privilege. There is a vast difference between the consequence of removal of a statutory visa—a conditional permission—to remain in Australia, and the removal of a

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**188** (2022) 96 ALJR 560 at 578 [70]; 401 ALR 438 at 453-454.

**189** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 611 [238]; 401 ALR 438 at 498, referring to, amongst other things, Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 4-5 and *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [265].

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

constitutional entitlement to remain in or return to Australia as one of the people of the Commonwealth.

111 In any event, however, this first factor concerning the consequences of s 36B applies in identical terms to the consequences of s 36D. Both involve citizenship cessation from the date of the Minister's determination[191].

(2) The legislative policy that informs s 36B

112 As to the second consideration, the respondents properly accepted that the purpose of s 36B and the purpose of s 36D were identical. Both are stated in s 36A. Both are punitive.

(3) A comparison between s 36B and s 36D

113 It is unnecessary to resolve the dispute about the point that was being made when the joint judgment compared s 36B with s 36D and relied upon this comparison as a basis for concluding that s 36B was invalid. It is true that, as the Solicitor-General of the Commonwealth pointed out in oral submissions, their Honours later referred to the power of the Minister under s 36D as arising with the benefit of a fair hearing and "the other safeguards of a criminal trial"[192]. But their Honours also said in the next paragraph: "And yet the process under s 36B may result in the same outcome by way of deprivation of citizenship as under s 36D, where the protections afforded by a criminal trial have been afforded to the citizen."[193]

114 Whatever the rationale of this third factor in paragraph [70] of *Alexander*, in the context of their Honours' reasons in that case as a whole the third factor does not justify treating the punitive power conferred by s 36D any differently from that conferred by s 36B. And, for the reasons explained above, once it is accepted (as it properly was) that s 36D involves an exercise of executive power to punish, then there is no principled justification for treating the power differently merely because it is consequent upon a judicial finding of guilt.

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**191** *Australian Citizenship Act 2007* (Cth), ss 36B(3), 36D(3).

**192** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 581 [86], see also at 582 [91]; 401 ALR 438 at 458, see also at 459.

**193** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 581 [87]; 401 ALR 438 at 458.

**Conclusion**

115 I agree with the answers to the questions in the special case as expressed by Kiefel CJ, Gageler, Gleeson and Jagot JJ.

116 STEWARD J. On 15 and 16 September 2008, Mr Benbrika ("the applicant") was found guilty of three offences under Pt 5.3 of the *Criminal Code* (Cth) ("the Code"), namely:

(a) intentionally being a member of a terrorist organisation, knowing that it was a terrorist organisation (s 102.3(1) of the Code);

(b) intentionally directing activities of a terrorist organisation, knowing it was a terrorist organisation (s 102.2(1) of the Code); and

(c) possession of a thing, connected with preparation for a terrorist act, knowing of that connection (s 101.4(1) of the Code).

117 On appeal, the Court of Appeal of the Supreme Court of Victoria upheld the applicant's convictions under ss 102.3(1) and 102.2(1) of the Code. It reduced his sentence for his offending under s 102.3(1) to five years but upheld his sentence of 15 years for his offending under s 102.2(1).

118 The foregoing bare description of the applicant's offending tells one very little about the applicant's behaviour as a citizen of Australia. The reasons of the Court of Appeal and the trial judge shed some light on how he has conducted himself. The Court of Appeal found that the evidence before the trial judge established that the applicant was the amir (leader) of an organisation, referred to as "the jama'ah", whose members he encouraged to train for violent jihad. Training included the use of execution videos[194]. The Court of Appeal succinctly described the applicant's teachings to the members of the jama'ah as follows[195]:

> "His teachings on the true meaning of jihad, the legitimacy and rewards of martyrdom operations, the rewards of arrest and imprisonment in Allah's cause, and that the blood and wealth of the kuffar were lawful targets, appear to have been regarded as authoritative by members of the organisation, and to have informed their activities. Any challenge to his teaching was dismissed out of hand."

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**194** *Benbrika v The Queen* (2010) 29 VR 593 at 704-705 [526] per Maxwell P, Nettle and Weinberg JJA.

**195** *Benbrika v The Queen* (2010) 29 VR 593 at 704-705 [526] per Maxwell P, Nettle and Weinberg JJA (footnotes omitted).

119 The reasons of the Court of Appeal also set out extracts of recordings of conversations that the applicant had with members of the jama'ah. They include the following[196]:

> "Now, they kill our kids. It's our right according to the first verse you read to take out revenge."

120 Here is another example[197]:

> "That's why we need to revive these kind of things. Especially now the best thing now is to be as a Moujahed prepared. Has – everyone has to prepare himself. Or to die or to be jailed Allah knows best. I don't want this kind of life. Give that to them. But we have to be careful. If we want to die for jihad we do maximum damage, maximum damage. Damage their buildings with everything, and damage their lives, just to show them. That's what we waiting for. You be careful [inaudible] trust no one."

121 The trial judge (Bongiorno J) made the following findings about the applicant[198]:

> "The essence of Benbrika's criminality, with respect to the Count of directing the [activities] of a terrorist organisation lies in his exercising an enormous influence over the young men who followed him, and imbuing, or seeking to imbue in them, a fanatical hatred of non-Muslims and, even, those vast majority of Muslims who abhor violence as much as anyone else. The degree of his criminality, both with respect to his membership and direction of the organisation, must be judged in light of the fact that the existence of that organisation and his leadership of it created a significant risk that a terrorist act would be committed in this community. Where and when such an act might have been committed, how devastating it would have been, or how many people would have been killed or injured as a result of it is impossible to say ...
>
> There is no evidence before the Court that Benbrika has, in any way, renounced his commitment to violent jihad and hence to terrorism. On the contrary, on one occasion, which has already been noted, he said that if 'the brothers' were arrested, as he thought likely, the jemaah should continue in

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**196** *Benbrika v The Queen* (2010) 29 VR 593 at 700 [512] per Maxwell P, Nettle and Weinberg JJA.

**197** *Benbrika v The Queen* (2010) 29 VR 593 at 703 [521] per Maxwell P, Nettle and Weinberg JJA.

**198** *R v Benbrika* (2009) 222 FLR 433 at 446-447 [68], 448 [77].

> gaol. No submission was made on Benbrika's behalf that he had resiled from his former position, nor was there any evidence upon which such a submission could have been based. Indeed, all of the evidence points inexorably to a conclusion that he maintains his position with respect to violent jihad which was demonstrated over and over in his own words on the intercepted conversations."

122 The applicant's sentence expired on 5 November 2020. On 4 September 2020, the Minister for Home Affairs made an application in the Supreme Court of Victoria seeking the applicant's continuing detention in prison under Div 105A of the Code. Pursuant to s 105A.7, a Supreme Court may make an order for continuing detention in relation to a "terrorist offender" where the Court is satisfied, to a high degree of probability, that the offender poses an unacceptable risk of committing a "serious Part 5.3 offence" if the offender were to be released into the community, and where the Court is further satisfied that there is no other, less restrictive measure that would be effective in preventing that unacceptable risk. A serious Part 5.3 offence includes the two offences for which the applicant's convictions were upheld by the Court of Appeal. The validity of Div 105A was upheld by this Court in *Minister for Home Affairs v Benbrika*[199].

123 An order for the applicant's continuing detention for a period of three years was made by the Supreme Court on 24 December 2020. In making that order, Tinney J rejected the applicant's contention that he had changed his ideology as a "convenient fiction" made "in an effort to persuade the authorities to release him"[200]. Tinney J was also satisfied that the applicant had not renounced or changed his previous beliefs which justified terrorist violence in the name of Allah[201]. His Honour found[202]:

> "Fifteen years after his arrest for terrorism offending, the defendant exhibits no real signs of regret or remorse for his actions. He maintains the same extremist views which governed his offending and led to his incarceration, in spite of all efforts to shift them ...
>
> The defendant has a proven track-history of using his position of moral and religious authority or leadership in the community to form a dangerous organisation which had at its core a belief in the validity and desirability of wreaking violence in support of an extreme view of religion,

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**199** (2021) 272 CLR 68.

**200** *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [430]-[431].

**201** *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [431].

**202** *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [461]-[462].

> no matter what the consequences. There is nothing to indicate that the personality features or extreme views which led to this occurring have changed or diminished. Indeed, there may be further risk factors which have arisen or been magnified by the passage of time and the experiences of the defendant during that long period. For one, he may have an even more negative view of the system and the government which he sees as responsible for his long incarceration."

124 This is the context which led to the cancellation of the applicant's citizenship.

**The issue for determination**

125 The Minister cancelled the applicant's citizenship on 20 November 2020. He did so pursuant to s 36D(1) of the *Australian Citizenship Act 2007* (Cth) ("the Citizenship Act"), the terms of which are set out below. Relevantly, the Minister was satisfied:

(a) that the conduct of the applicant to which his convictions related demonstrated that he had repudiated his allegiance to Australia; and

(b) that it would be contrary to the public interest for the applicant to remain an Australian citizen (having regard to the factors set out in s 36E(2)).

126 The issue for determination in this case does not concern the correctness of the Minister's state of satisfaction about these issues. Section 36H of the Citizenship Act permits a person whose citizenship has been cancelled to seek to have that decision revoked in defined circumstances. Moreover, the decision to cancel citizenship can also be subject to judicial review and the applicant has been given notice of this matter.

127 Rather, the issue for determination is whether Parliament may validly pass a law which confers on a member of the executive a power to cancel a person's citizenship of Australia in the circumstances prescribed by s 36D. For that purpose, and in order to test the validity of s 36D, it must be assumed that the conditions for the exercise of that power have here been satisfied. That includes that it is correct that the Minister has been lawfully satisfied both that a person has repudiated his or her allegiance to Australia, and that it is in the public interest to cancel his or her citizenship. It is in those particular circumstances that one must assess, consistently with what was said in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[203], whether the purpose of the power to cancel citizenship is the punishment of a person.

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**203** (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

128 It follows that the matter for consideration is not whether the cancellation of citizenship, untethered from the criteria set out in s 36D, can constitute a form of punishment, whether or not having regard to historical analogues. In that respect, it can be accepted that the cancellation by the executive of the citizenship of a law-abiding natural born citizen, without more, might well constitute a form of punishment and thus offend Ch III of the *Constitution*[204]. Ultimately, validity will depend upon an assessment of the particular purpose of the actual law which confers the power of cancellation. That purpose will principally be derived from a close examination of the applicable criteria for the cancellation of a person's citizenship.

**The applicable legislative regime**

129 As I described in my reasons in *Alexander v Minister for Home Affairs*[205], the Citizenship Act confers a range of different powers to denationalise a person in Div 3 of Pt 2 of the Act. Some of these are contained in Subdiv B of Div 3 of that Part. For example, s 33 enables a person to apply to the Minister to "renounce" that person's citizenship. No one has suggested that this constitutes a form of punishment. Section 34, the subject of this Court's decision in *Jones v The Commonwealth*[206], permits the Minister to cancel a naturalised person's citizenship where, in general terms, that person has committed certain offences associated with applying to become a citizen. It is thus now established that the purpose of s 34(2)(b)(ii), which is concerned with the cancellation of the citizenship of a person who has been convicted, at any time after he or she has applied to become a citizen, of a serious offence committed before that person became a citizen, is not to punish that person. Instead, the purpose of s 34(2)(b)(ii) is to protect the integrity of the naturalisation process[207]. Section 34A permits the Minister to cancel certain classes of citizenship where the applicable person will not be, or has not been, ordinarily resident in Australia during a period of two years from the day that person became a citizen or will not be, or has not been, present in Australia for at least 180 days during that two-year period. Again, no one has suggested that an exercise of this power is a form of punishment. Finally, s 36 confers a power on the Minister to cancel, in defined circumstances, the citizenship of a child of a person whose citizenship had been cancelled under s 33, s 34 or s 34A.

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**204** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 629 [326] per Steward J; 401 ALR 438 at 521-522.

**205** (2022) 96 ALJR 560 at 622-623 [292]; 401 ALR 438 at 513.

**206** [2023] HCA 34.

**207** *Jones v The Commonwealth* [2023] HCA 34 at [50] per Kiefel CJ, Gageler, Gleeson and Jagot JJ.

130 What is common to the foregoing statutory powers is that, save in the case of children, citizenship is lost because of conduct which is inconsistent with ongoing membership of the Australian polity. In the case of s 33, the act of inconsistency is express; it is the act of renunciation. In the case of s 34, the inconsistency arises from the person dishonestly procuring citizenship in the ways prescribed, or by the person committing an undisclosed serious offence prior to the grant of citizenship, thus revealing a lack of good character. In the case of s 34A, the inconsistency arises from persistent and prolonged absence from Australia in the period immediately following the conferral of citizenship.

131 Section 36D is contained in Subdiv C of Div 3 of Pt 2 of the Citizenship Act. Subdivision C is concerned with another type of inconsistency with membership of the Australian community: repudiation of allegiance to this country. It is convenient, and important, to set out the express purpose of Subdiv C, which is described in s 36A. That provision states:

> "This Subdivision is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia."

132 Subdivision C confers upon the Minister two powers to cancel citizenship, namely ss 36B and 36D. Section 36B was considered by this Court in *Alexander*[208]. A majority held that the purpose of this provision is to confer on the Minister a power to punish. I disagreed. In any event, both provisions require, amongst other things, the Minister to be satisfied that the relevant person had "repudiated their allegiance to Australia"[209]. But both provisions have other elements. In the case of s 36B, it requires the Minister to be satisfied that the person had carried out prescribed conduct[210], such as, for example, engaging in international terrorist activities[211]. In the case of s 36D, it requires the person to have been convicted of an offence, or offences[212], against one or more of the following provisions[213]:

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**208** (2022) 96 ALJR 560; 401 ALR 438.

**209** Citizenship Act, ss 36B(1)(b) and 36D(1)(c).

**210** Citizenship Act, s 36B(1)(a).

**211** Citizenship Act, s 36B(5)(a).

**212** Citizenship Act, s 36D(1)(a).

**213** Citizenship Act, s 36D(5).

(a) a provision of Subdiv A of Div 72 of the Code (explosives and lethal devices);

(b) a provision of Subdiv B of Div 80 of the Code (treason);

(c) a provision of Div 82 of the Code (sabotage), other than s 82.9;

(d) a provision of Div 91 of the Code (espionage);

(e) a provision of Div 92 of the Code (foreign interference);

(f) a provision of Pt 5.3 of the Code (terrorism), other than s 102.8 or Div 104 or Div 105;

(g) a provision of Pt 5.5 of the Code (foreign incursions and recruitment);

(h) s 6 or s 7 of the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

133 Here, the applicant had been convicted of offences under Pt 5.3 of the Code.

134 Both ss 36B and 36D also require that the Minister be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen[214]. In considering the "public interest" for the purposes of s 36D the Minister must consider a number of matters pursuant to s 36E(2). These are, amongst other things, the severity of the conduct giving rise to the convictions; the degree of threat posed by the person to the Australian community; the age of the person; the best interests of the child as a primary consideration, if the person is aged under 18; the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person; Australia's international relations; and any other matters of public interest. As I observed in *Alexander*, what is in the public interest is a matter more usually, but not invariably, reserved to the executive branch of government[215].

135 Other features of the applicable statutory scheme include the following: the power cannot be exercised where the Minister is satisfied that it would result in the

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**214** Citizenship Act, ss 36B(1)(c) and 36D(1)(d).

**215** (2022) 96 ALJR 560 at 631-632 [336]; 401 ALR 438 at 524-525, citing *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 399-400 per Windeyer J and *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 597 [168] per Crennan and Kiefel JJ.

person becoming a person who is not a national or a citizen of any country[216]; the power to cancel may only be exercised by the Minister personally[217]; the rules of natural justice do not apply when exercising the power[218]; the Minister must give written notice to the person whose citizenship has been cancelled save in the circumstances prescribed in s 36G[219]; a person whose citizenship has been cancelled may seek revocation of that determination[220] and the Minister, amongst other things, may revoke the determination if satisfied that this would be in the public interest[221]; the Minister may, on his or her own initiative, revoke a cancellation determination if satisfied that this would be in the public interest[222]; and a cancellation determination is taken to be revoked where, amongst other things, a court has overturned or quashed an applicable conviction to which the determination relates[223]. Both a decision to make a cancellation determination and a decision not to revoke such a determination are amenable to judicial review.

**The legislative power to denationalise**

136 All the Justices in *Alexander* agreed that the *Constitution* authorises Parliament to pass a denationalisation law for cases where, by reasons of extreme conduct, a person has shown that they have renounced their allegiance to Australia or shown that they should no longer be considered to be a part of the Australian community. I wrote[224]:

> "Because membership to the Australian body politic is inextricably bound up with the concept of allegiance to this country, the power to denationalise must be limited to laws that recognise and accept a loss of citizenship arising from actions or steps that are indelibly inconsistent with that allegiance and with membership of that community. That conclusion is

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**216** Citizenship Act, s 36D(2).

**217** Citizenship Act, s 36D(7).

**218** Citizenship Act, s 36D(9).

**219** Citizenship Act, s 36F.

**220** Citizenship Act, s 36H(1).

**221** Citizenship Act, s 36H(3).

**222** Citizenship Act, s 36J(1).

**223** Citizenship Act, s 36K(1).

**224** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 621 [286]; 401 ALR 438 at 511 (footnotes omitted).

> consistent with how the law of denationalisation had developed in the United Kingdom and the United States by the time of Federation. It explains Isaacs J's observation in *Ex parte Walsh* that the Federal Parliament had the power to pass a law that eliminated from 'communal society' any person, whether born in Australia or not, who was 'inimical' to the 'existence' of that society. His Honour referred to 'plotting with foreign powers against the safety of the country' and even being 'suspected of being a spy or a traitor'. No doubt there are many ways a person may act that are enduringly antithetical to allegiance to Australia, or to membership of the 'people of the Commonwealth' that comprise this nation."

137 Whether s 51(xix) is the only, or proper, source of the power to cancel a person's citizenship need not be decided in this case. But the better view may yet emerge, that because the founding fathers debated the inclusion of an express citizenship head of power in the *Constitution*, and then decided not to include any such power, authority to pass laws concerning citizenship may arise, not just from s 51(xix) of the *Constitution*, but also as an implication[225] from the *Constitution*'s reference to the "people of [each] State"[226]; to the "people of the Commonwealth"[227]; to the "people"[228]; and to a "subject of the Queen, resident in any State"[229]. Those "people" or those "subjects" are the Australian polity or community[230]. Such an implication would vindicate John Quick, who, when advocating for the inclusion of such a legislative power at the 1898 Australasian

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**225** *Singh v The Commonwealth* (2004) 222 CLR 322 at 378-379 [134]-[138], 382 [149] per McHugh J; *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 128-130 [10]-[18] per McHugh J; 222 ALR 83 at 86-89. See also Rubenstein, "Citizenship and the Constitutional Convention Debates: A Mere Legal Inference" (1997) 25 *Federal Law Review* 295; Arcioni, "That vague but powerful abstraction: The concept of 'the people' in the Constitution", Sydney Law School Research Paper No 14/15 (2014).

**226** *Constitution*, s 7.

**227** *Constitution*, s 24.

**228** *Constitution*, s 53.

**229** *Constitution*, s 117. See also s 34(ii); *Singh v The Commonwealth* (2004) 222 CLR 322 at 342-343 [35], 367 [105] per McHugh J, 382 [149] per Gummow, Hayne and Heydon JJ.

**230** See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 957-958.

Federal Convention, famously said, in what yet might be seen as a premonitory rumbling[231]:

> "Again, I ask are we to have a Commonwealth citizenship? If we are, why is it not to be implanted in the Constitution? Why is it to be merely a legal inference?"

138 In any event, in the case of naturalised Australians there can be no doubt that the word "naturalization" in s 51(xix) supplies ample power to denationalise such a person in circumstances where the person has acted in such an extreme way as to repudiate their allegiance to Australia.

**Cancellation is not an exercise of judicial power**

139 If the purpose of s 36D is to authorise the imposition of a detriment or punishment as a sanction, or as retribution, for proscribed conduct, then, as the applicant submitted, it would offend the principle established by this Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[232]. As the applicant also submitted, that principle is not confined to a law which authorises both the adjudgment of guilt for specified conduct and the imposition of punishment of some kind. As Kiefel CJ, Bell, Keane and Edelman JJ accepted in *Falzon v Minister for Immigration and Border Protection*[233], the adjudging and punishing of guilt for an offence are separate functions each of which is relevantly and exclusively reserved to the Ch III judiciary.

140 But is the purpose of s 36D to authorise the imposition of a punishment or a penal consequence when it permits the cancellation of a person's citizenship? In *Al-Kateb v Godwin*[234], Hayne J said:

> "H L A Hart identified the standard or central case of punishment in terms of five elements:
>
> '(i) It must involve pain or other consequences normally considered unpleasant.

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**231** *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 2 March 1898 at 1767.

**232** (1992) 176 CLR 1.

**233** (2018) 262 CLR 333 at 340 [15]. See also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 611 [235] per Edelman J; 401 ALR 438 at 497.

**234** (2004) 219 CLR 562 at 650 [265], quoting Hart, *Punishment and Responsibility* (1968) at 4-5.

(ii) It must be for an offence against legal rules.

(iii) It must be of an actual or supposed offender for his offence.

(iv) It must be intentionally administered by human beings other than the offender.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.'"

141 In *Alexander*, Edelman J adopted this definition as well, but noted that the five elements did not constitute a conclusive test; they did, however, illustrate the "usual characteristics of the core case of punishment"[235]. I agree with Hayne J and Edelman J. I also agree with Edelman J that an important aspect of the concept of punishment is that it acts "as a sanction for certain proscribed conduct"[236].

142 To take the first of Professor Hart's propositions, can it be said that the cancellation of an individual's citizenship of Australia results in unpleasant – or, to use the language of Edelman J, "harsh" – consequences[237]? Without more, the answer must be "yes". Citizenship, at least as a constitutional concept, for example, confirms and guarantees that an individual has a home. As Griffith CJ observed in *Potter v Minahan*[238]:

> "[E]very person becomes at birth a member of the community into which he is born, and is entitled to remain in it until excluded by some competent authority. It follows also that every human being (unless outlawed) is a member of some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort when he thinks fit ...
>
> At birth he is, in general, entitled to remain in the place where he is born. (There may be some exceptions based upon artificial rules of territoriality.) If his parents are then domiciled in some other place, he perhaps acquires a right to go to and remain in that place. But, until the right to remain in or return to his place of birth is lost, it must continue, and he is

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**235** (2022) 96 ALJR 560 at 611 [238]; 401 ALR 438 at 498.

**236** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 611 [239]; 401 ALR 438 at 498.

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

**238** (1908) 7 CLR 277 at 289.

> entitled to regard himself as a member of the community which occupies that place. These principles are self-evident, and do not need the support of authority."

143 Citizenship, as a statutory concept created by the Citizenship Act, also supplies valuable statutory and other rights, such as rights to vote, to social welfare and to participation in our system of justice[239].

144 Elimination of the foregoing benefits would plainly be a harsh outcome. But we are not here considering the act of cancellation of citizenship in a vacuum. We are considering it in a particular context and for a particular purpose. That context is that the person in question has by their conduct demonstrated a repudiation of their allegiance to Australia and cancellation of that person's citizenship is in the public interest. In those circumstances, it would be wrong to conclude that the cancellation of citizenship has harsh consequences. The person in question has, by their conduct, objectively disavowed membership of the "people of the Commonwealth". It matters not whether such a person subjectively wishes to retain the benefits of Australian citizenship. As Frankfurter J observed in *Perez v Brownell*[240]:

> "Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. See *Mackenzie v Hare*, 239 US 299, 311-312. But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so."

145 In that respect it is a fundamental feature of the statutory regime in s 36D that conviction for one of the offences listed in s 36D(5) is not a sufficient basis for cancellation. Nor does conviction necessarily result in a finding of repudiation of allegiance. The Minister must be satisfied that the conviction "demonstrates" repudiation. It is the presence of repudiation which is the touchstone: it exhibits a similar nature to the act of renunciation for the purposes of s 33 of the Citizenship Act. Renunciation is a subjective rejection of citizenship; repudiation by conduct is an objective denial of citizenship. That similar nature is a state of inconsistency with membership of the Australian community.

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**239** cf *Potter v Minahan* (1908) 7 CLR 277 at 305 per O'Connor J.

**240** (1958) 356 US 44 at 61. The Supreme Court of the United States overturned *Perez* in *Afroyim v Rusk* (1967) 387 US 253. Because this Court holds that the aliens power in s 51(xix) authorises Parliament to pass laws concerning denationalisation (subject to Ch III) regardless of the consent of the person whose citizenship is cancelled, *Afroyim* cannot be considered to be good law in this country.

146 Whatever be the precise source of the power to pass laws concerning citizenship, allegiance is the central pillar of membership of the Australian polity. In 1900, being a member of the British Empire meant that one owed allegiance to an undivided British Crown and not to a foreign sovereign power. In other words, an alien was a person who owed allegiance to a foreign power and a non-alien was a person who owed allegiance to the Crown[241]. Thus, and following consideration of this Court's early decision in *Potter v Minahan*[242], McHugh J concluded in *Singh v The Commonwealth* that the first five Justices of this Court, "all of whom can fairly be said to have been present at the creation of the *Constitution*"[243]:

> "accepted that a person who was born in Australia came under an obligation of permanent allegiance to the King that made him or her a subject of the King and a member of the Australian community. They also accepted that a person who was a natural born subject of the King could not be an alien."

147 Thus, Holdsworth has written[244]:

> "[I]t is the duty of allegiance, owed by the subject to the crown, which differentiates the subject from the alien. This doctrine has its roots in the feudal idea of a personal duty of fealty to the lord from whom land is held; and, though it has necessarily developed with the development of the position of the king, its origin in this idea has coloured the whole modern law on this topic."

148 The foregoing is consistent with the definition of "alien" found in s 5 of the *Nationality Act 1920* (Cth); an "alien" was a "person who is not a British subject". Similar definitions of the word "alien" were enacted in the *Nationality and*

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**241** *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 652-653 [97]-[100] per Steward J. See also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; *Singh v The Commonwealth* (2004) 222 CLR 322 at 398 [200] per Gummow, Hayne and Heydon JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458-459 [35] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

**242** (1908) 7 CLR 277.

**243** (2004) 222 CLR 322 at 371 [113].

**244** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 72, quoted in *Singh v The Commonwealth* (2004) 222 CLR 322 at 386-387 [164] per Gummow, Hayne and Heydon JJ.

*Citizenship Act 1948* (Cth)[245], and in the *Aliens Act 1947* (Cth)[246], which adopted part of the definition from the *Nationality Act 1920*.

149 More recently, Nettle J confirmed that the concept of allegiance was fundamental to the original concept of alienage. His Honour said in *Love v The Commonwealth*[247]:

> "In common law systems, alienage was and remains about the want of a permanent allegiance to the sovereign in question ... In *Calvin's Case*, the Justices of the King's Bench and Common Pleas, Lord Chancellor and Barons of the Exchequer concluded, by reference to the law of nature, that this right of the soil (jus soli) extended to those born in a territory after it was acquired personally by the King (postnati). Thus, it transpired that anyone born in the King's dominions archetypically owed permanent allegiance to, and was therefore a subject of, His Majesty. By contrast, anyone born abroad archetypically did not owe such allegiance, and – because variants of the jus soli were recognised in continental Europe before the *Code Napoléon* recognised citizenship by blood (jus sanguinis) – he or she could be regarded as belonging to another (alienus).
>
> ...
>
> In the decades leading up to Federation, judicial statements in England, the United States, Canada and the Australian colonies confirmed that the essence of alienage was the want of permanent allegiance to the sovereign, albeit as a political institution rather than a natural person."

150 Consistently with the foregoing, s 42 of the *Constitution* obliges every senator and member of the House of Representatives to "make and subscribe ... an oath or affirmation of allegiance". That oath, contained in the schedule to the *Constitution*, unsurprisingly is directed at bearing true allegiance to the then Queen and her heirs and successors. Allegiance is thus a precondition to membership of the federal Parliament. In contrast, by s 44 of the *Constitution*, "acknowledgement of allegiance ... to a foreign power" renders a person incapable of being a member of Parliament.

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**245** Section 5.

**246** Section 4.

**247** (2020) 270 CLR 152 at 240-241 [246], 242 [248] (footnotes omitted).

151 In *Singh*, Gummow, Hayne and Heydon JJ expressed the central concept of allegiance in the following terms[248]:

> "These reasons seek to demonstrate that a central characteristic of the status of 'alien' is, and always has been, owing obligations to a sovereign power *other than* the sovereign power in question."

152 If an alien is someone who owes allegiance to a foreign power, it must follow that a citizen, or a member of the people of the Commonwealth, is someone who owes allegiance to Australia. The concept of allegiance – as a means of identifying who belongs and who does not belong to the Australian polity – is not limited to some form of overt patriotism. It can be more passive than that. It may be a quality which is merely innate. But at the very least it means fidelity to the people of Australia, its institutions, its democratic system of government and the rule of law.

153 After *Singh*, this Court continued to endorse the importance of the concept of allegiance to the meaning of alienage. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*, the plurality observed[249]:

> "[T]he legal status of alienage has as its defining characteristic the owing of allegiance to a foreign sovereign power."

154 It follows from the foregoing that a way of describing the central characteristic of a person who is an alien is that such a person does not owe obligations of allegiance to the Crown in right of Australia[250], or, more pragmatically, to Australia itself. Logically, and in contrast, a non-alien is someone who does owe such obligations of allegiance to Australia. Parliament may pass laws about "aliens", properly understood as persons who do not owe allegiance to Australia. The power remains, as Gleeson CJ and Heydon J observed in *Koroitamana v The Commonwealth*, a "wide power" within which Parliament may pass valid laws[251]. In that respect, Parliament is free to adopt one or both of the two theories of alienage referred to in *Singh*: one of which attaches controlling importance to descent, whilst the other attaches controlling importance to place of

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**248** (2004) 222 CLR 322 at 383 [154] (emphasis added).

**249** (2005) 222 CLR 439 at 458 [35] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ (footnote omitted).

**250** *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 653-654 [100]-[102] per Steward J.

**251** (2006) 227 CLR 31 at 38 [11].

birth[252]. Application of either theory should explain why a given person should be taken to have allegiance to Australia.

155 Consistently with the foregoing, the preamble to the Citizenship Act now appropriately places emphasis on a commitment to Australian values and loyalty to this country as the basis for citizenship:

> "The Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.
>
> The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:
>
> (a) by pledging loyalty to Australia and its people; and
>
> (b) by sharing their democratic beliefs; and
>
> (c) by respecting their rights and liberties; and
>
> (d) by upholding and obeying the laws of Australia."

156 Also consistently with the above, the "Pledge of commitment as a citizen of the Commonwealth of Australia", now found in Sch 1 to the Citizenship Act, is in the following terms (in the case of an oath being taken):

> "From this time forward, under God,
>
> I pledge my loyalty to Australia and its people,
>
> whose democratic beliefs I share,
>
> whose rights and liberties I respect, and
>
> whose laws I will uphold and obey."

157 Repudiation of allegiance to Australia must mean in substance, especially in relation to a naturalised Australian, renunciation of the foregoing pledge. For s 36D to be engaged, the conduct comprising the conviction must be such that the Minister is satisfied that it demonstrates such a rejection. Upon carrying out the act or acts which demonstrate repudiation, the person will be taken to hold with disdain the benefits of citizenship described above. Of course, they may

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**252** (2004) 222 CLR 322 at 340-341 [30] per Gleeson CJ, 359 [81], 376 [128] per McHugh J, 413-414 [251] per Kirby J.

subjectively wish to retain some or all of the benefits of citizenship. But the purpose of citizenship cancellation in this specific context is not to sanction proscribed conduct; the person is not being denied the benefits of citizenship as retribution for what they have done. Rather, cancellation of citizenship is a recognition that by extreme conduct that person has inexorably separated themselves from the people as a community and from Australia itself. In such circumstances, it is not correct to conclude that the cancellation of the citizenship of such a person must result in harsh consequences in the nature of a punishment; the consequences are an acknowledgment of the permanent breaking of the common bonds that mark citizenship of Australia where the break was initiated by the actions of the person. As I pointed out in *Alexander*, cancellation here is simply the de jure acknowledgment of something which has in fact already occurred: a person's rejection of membership of the Australian body politic[253]. That is the true purpose of s 36D.

158 It follows that the first and critical element of the concept of punishment is not satisfied here. It is therefore unnecessary to consider the other four elements of Professor Hart's concept of punishment.

**Trop v Dulles**

159 In *Alexander*, both Gordon J[254] and Edelman J[255] referenced the majority opinion of the Supreme Court of the United States in *Trop v Dulles*[256]. The plurality in *Jones v The Commonwealth* also rely upon this decision[257]. *Trop v Dulles* was narrowly decided. Five out of nine Justices of the Supreme Court of the United States decided that §401(g) of the *Nationality Act of 1940*[258] was unconstitutional, at least as it applied to native-born citizens who had not abandoned their citizenship in any way or become involved with a foreign country. Section 401(g) provided that a citizen shall "lose his nationality" by "[d]eserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service". Trop had been found guilty of deserting the army in 1944 whilst serving in North Africa. Like s 36D, §401(g) turned on conviction of an identified crime; unlike s 36D, it had no additional repudiation and public interest limbs. The

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**253** (2022) 96 ALJR 560 at 632 [337]; 401 ALR 438 at 525.

**254** (2022) 96 ALJR 560 at 598 [172]; 401 ALR 438 at 480.

**255** (2022) 96 ALJR 560 at 613 [248]; 401 ALR 438 at 500.

**256** (1958) 356 US 86.

**257** [2023] HCA 34 at [46]-[48] per Kiefel CJ, Gageler, Gleeson and Jagot JJ.

**258** Pub L No 76-853, 54 Stat 1137 at 1168-1169.

majority decided that §401(g) imposed "cruel and unusual punishment" for the purposes of the Eighth Amendment to the Constitution of the United States.

160 Frankfurter J delivered a dissenting opinion. Burton, Clark and Harlan JJ agreed with Frankfurter J. With respect, I also agree with Frankfurter J. But why is it important to note this man's opinion? Sir Owen Dixon supplied the answer. In 1957, he wrote a "tribute" to Frankfurter J in the *Yale Law Journal*. Amongst other things, Sir Owen wrote[259]:

> "You will see Frankfurter's name again and again in the reports of the constitutional decisions of the High Court. When you find in judicial writings repeated reliance upon the words of a contemporary judge, especially of another country, you may safely infer that his opinions tend to throw new light in dark places and to comfort other judicial wayfarers by giving apt and reassuring pointers to a true deliverance."

161 In *Trop v Dulles*, Frankfurter J decided that because the purpose of §401(g) was found to be in the need to regulate the military forces of the United States, the denationalisation it authorised could not be characterised as a species of punishment. He said[260]:

> "Loss of citizenship entails undoubtedly severe – and in particular situations even tragic – consequences. Divestment of citizenship by the Government has been characterized, in the context of denaturalization, as 'more serious than a taking of one's property, or the imposition of a fine or other penalty.' However, like denaturalization, expatriation under the Nationality Act of 1940 is not 'punishment' in any valid constitutional sense. Simply because denationalization was attached by Congress as a consequence of conduct that it had elsewhere made unlawful, it does not follow that denationalization is a 'punishment,' any more than it can be said that loss of civil rights as a result of conviction for a felony, is a 'punishment' for any legally significant purposes. The process of denationalization, as devised by the expert Cabinet Committee on which Congress quite properly and responsibly relied and as established by Congress in the legislation before the Court, was related to the authority of Congress, pursuant to its constitutional powers, to regulate conduct free from restrictions that pertain to legislation in the field technically described as criminal justice. Since there are legislative ends within the scope of Congress' war power that are

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**259** Dixon, "Mr Justice Frankfurter – A Tribute from Australia" (1957) 67 *Yale Law Journal* 179 at 183. Republished as "The Honourable Mr Justice Felix Frankfurter – A Tribute from Australia", in Crennan and Gummow (eds), *Jesting Pilate and Other Papers and Addresses*, 3rd ed (2019) 104 at 107.

**260** *Trop v Dulles* (1958) 356 US 86 at 124-125 (citations and footnotes omitted).

> wholly consistent with a 'non-penal' purpose to regulate the military forces, and since there is nothing on the face of this legislation or in its history to indicate that Congress had a contrary purpose, there is no warrant for this Court's labeling the disability imposed by §401(g) as a 'punishment.'"

162 Here, we are not concerned with the regulation of the army. But we are concerned, in a broader sense, with the regulation of membership of the people of the Commonwealth. The purpose of s 36D, like that of s 36B, is set out in s 36A, reproduced above. That purpose is to ensure that membership of the Australian body politic does not include those who have acted in a way incompatible with the shared values of the Australian community, and who have thereby demonstrated that they have severed their bond with that community by repudiating their allegiance to Australia. That purpose involves no species of punishment.

**Alexander**

163 I otherwise refer to what I said in *Alexander* about this issue. I remain of the views there expressed[261]. It would be counter-productive to describe them in any detail. In essence, three reasons were given for my conclusion that denationalisation in the circumstances of s 36B, and now also s 36D, did not involve punishment:

(a) First, consistently with the importance legal history can have in determining the scope of judicial power[262], it has never been an essentially judicial function to make orders which denationalise a person[263]. None of the early British or Australian legislation regulating denationalisation conferred power on courts to do so[264].

(b) Secondly, no part of the Minister's function under s 36B is to determine whether any particular crime had been committed. That is clearer under

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**261** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 628-633 [325]-[343]; 401 ALR 438 at 512-527.

**262** *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 67 per McHugh J.

**263** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 630-631 [332]; 401 ALR 438 at 523.

**264** See, eg, *Aliens Act 1864* (SA); *Naturalization Act 1870* (UK); *Naturalization Act 1903* (Cth), s 11; *Immigration Act 1901-1925* (Cth), s 8AA.

s 36D, where conviction by a court is a factum for the exercise of the Minister's power[265].

(c) Thirdly, for similar reasons to those given above, the purpose of s 36B, as with s 36D, is not punishment but recognition of the objective act of renunciation of allegiance to Australia – here, by a person convicted of terrorism-related offences[266].

164 In *Trop v Dulles*, Frankfurter J made another, more general observation, which I also endorse, about the role of a court charged with guardianship of a Constitution in a democracy. He said[267]:

> "This legislation is the result of an exercise by Congress of the legislative power vested in it by the Constitution and of an exercise by the President of his constitutional power in approving a bill and thereby making it 'a law.' To sustain it is to respect the actions of the two branches of our Government directly responsive to the will of the people and empowered under the Constitution to determine the wisdom of legislation. The awesome power of this Court to invalidate such legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint."

165 The questions of law posed by the further amended special case should be answered as follows:

(1) Is s 36D of the Citizenship Act invalid in its operation in respect of the Applicant because it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt?

Answer: No.

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

Answer: None.

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**265** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 631-632 [336]; 401 ALR 438 at 524-525.

**266** *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 632 [337]-[338]; 401 ALR 438 at 525-526.

**267** *Trop v Dulles* (1958) 356 US 86 at 128.

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

Answer: The Applicant.