

**IN THE MATTER OF QUESTIONS REFERRED TO THE COURT
OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE
COMMONWEALTH ELECTORAL ACT 1918 (CTH) CONCERNING
SENATOR THE HON FIONA NASH (C17/2017)**

Date referred to Full Court: 15 September 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)) being a subject or a citizen of a foreign power.

Born in Australia in 1965 to an Australian mother, Senator Fiona Nash acquired British citizenship by descent through her father (who was born in Scotland). As a child however she was told that her elder sisters were both British citizens because they were born in England but that she did not have such citizenship and that her parents had not applied for it on her behalf.

In August 2016 Senator Nash was elected as a Senator for New South Wales, as a result of the general election held on 2 July 2016. At that time (and when she nominated as a candidate, in June 2016) Senator Nash was unaware that she had ever been a British citizen.

On 14 August 2017, immediately after the Hon Barnaby Joyce MP made a statement to the House of Representatives about his potentially being a citizen of New Zealand by descent, Senator Nash enquired of the United Kingdom Home Office as to whether she might be a British citizen. The Home Office confirmed that she was indeed a British citizen by descent. On 17 August 2017 Senator Nash received legal advice confirming that she was a British citizen. She formally renounced that citizenship the next day. On 21 August 2017 Senator Nash's renunciation was confirmed as having been registered (and thereby effective).

On 15 September 2017 Chief Justice Kiefel, sitting as the Court of Disputed Returns, referred to a Full Court, under s 18 of the *Judiciary Act* 1903 (Cth), the following questions that had been transmitted by the Senate on 5 September 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

- (a) whether by reason of s 44(i) of the Constitution, there is a vacancy in the representation of New South Wales in the Senate for the place for which Senator Fiona Nash was returned;
- (b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;
- (c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
- (d) what, if any, orders should be made as to the costs of these proceedings.

Chief Justice Kiefel also made orders that Senator Nash and the Attorney-General of the Commonwealth ("the Attorney-General") be heard and

be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act 1918* (Cth).

A Notice of a Constitutional Matter has been filed by the Attorney-General.

The Attorney-General submits that the phrase “is a subject or a citizen ... of a foreign power” in s 44(i) of the Constitution should be construed as referring only to a person who has voluntarily obtained or retained that status. A person who does not know that he or she is, or ever was, a foreign citizen has not voluntarily obtained that status and therefore is not disqualified. Alternatively, where a person became aware that he or she was a foreign citizen (or that there was a prospect of such citizenship) but took all reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it, the person was not disqualified under s 44(i) of the Constitution because he or she did not voluntarily retain that citizenship. The Attorney-General submits that Senator Nash was not disqualified, having acquired British citizenship involuntarily and having taken reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it.

Senator Nash makes similar submissions and submits that she was not disqualified. This is in circumstances where she was unaware of the possibility that she might be a British citizen at the time she nominated as an election candidate and she then renounced such citizenship within four days of becoming aware of it.

On 26 September 2017 Chief Justice Kiefel granted Mr Geoffrey Kennett SC leave to appear as amicus to act as a contradictor in law.

Mr Kennett submits that it ought to have occurred to Senator Nash, by the time of her nomination as a candidate for election to the Senate, that her belief that she did not have British citizenship might be incorrect. It was at that time she should have enquired of the United Kingdom Home Office to ascertain whether she was in fact a British citizen.