HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA**
**MELBOURNE REGISTRY**

**BETWEEN:** **ABDUL NACER BENBRIKA**
Applicant

and

**MINISTER FOR HOME AFFAIRS**
First Respondent

**COMMONWEALTH OF AUSTRALIA**
Second Respondent

# SUBMISSIONS OF THE APPLICANT

## I. CERTIFICATION

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

## II. CONCISE STATEMENT OF ISSUES

2. The issue arising in the cause removed is whether s 36D of the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**) is invalid because it impermissibly confers upon the first respondent (**Minister**) the exclusively judicial power of imposing punishment for criminal conduct.

3. In ***Alexander*** *v Minister for Home Affairs*,[1] this Court struck down s 36B of the Citizenship Act because it purported to confer power on the Minister to revoke a person's citizenship as retribution for certain proscribed conduct. By parity of reasoning with *Alexander*, the applicant submits that s 36D purports to authorise involuntary deprivation or cessation of citizenship (*i.e.* expatriation) as punishment, or additional punishment, for certain criminal conduct, but does not confer that power or function upon a court that is part of the federal judicature, as is required by Ch III of the *Constitution*.

4. The applicant submits that the "legislative purpose" of s 36D is no different to the legislative purpose of s 36B, namely, retribution for "reprehensible" conduct in the form of deprivation of the rights conferred by Australian citizenship, including the entitlement

[1] (2022) 96 ALJR 560 ***(Alexander)***.

to be at liberty in Australia. The fact that a court determines some, though not all, of the facts and circumstances that are relevant to engaging the power under s 36D does not deny that the Minister has purportedly been authorised to punish a person by way of involuntary deprivation of citizenship.

## III. SECTION 78B NOTICES

5. The applicant has given notice pursuant to s 78B of the *Judiciary Act 1903* (Cth).

## IV. FACTS

6. Until 20 November 2020, the applicant was a citizen of Australia. He acquired Australian citizenship by grant on 13 January 1988 pursuant to s 13(1) of the *Australian Citizenship Act 1948* (Cth) as then in force.[2] He is also a citizen of Algeria.[3]

7. On 20 November 2020, pursuant to a determination purportedly made by the Minister under s 36D of the Citizenship Act, the applicant ceased to be an Australian citizen. The Minister's determination followed the applicant's conviction of offences under ss 102.3(1) (intentionally being a member of a terrorist organisation), 102.2(1) (intentionally directing activities of a terrorist organisation) and 101.4(1) (possession of a thing connected with preparation for a terrorist act) of the *Criminal Code* (Cth).[4]

8. The determination was made shortly after the expiration of the applicant's sentence of imprisonment for that offending on 5 November 2020.[5] Since the expiry of his sentence, the applicant has remained imprisoned pursuant to the continuing detention order regime in Div 105A of the *Criminal Code*.

9. By operation of s 35(3) of the *Migration Act 1958* (Cth), the applicant was taken to have been granted an ex-citizen visa upon the cessation of his Australian citizenship.[6] While he continues to hold that visa, it remains liable to cancellation under the *Migration Act* by reason of his convictions.

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[2] **SCB 32 [4]**. The applicant thus was an Australian citizen for the purposes of the Citizenship Act: Citizenship Act, s 4(1)(b).
[3] **SCB 32 [3]**.
[4] **SCB 32 [5], 33 [9]**.
[5] **SCB 33 [8]**.
[6] **SCB 33 [11]**.

## V. ARGUMENT

### A. Section 36D and the statutory scheme for cessation of citizenship

10. Section 36D was inserted into the Citizenship Act by the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth), as part of the introduction of a suite of provisions which included s 36B.[7]

11. Section 36D relevantly provides:

> **36D Citizenship cessation determination for certain convictions**
>
> *Cessation of citizenship on determination by Minister*
>
> (1) The Minister may determine in writing that a person ceases to be an Australian citizen if:
>
> (a) the person has been convicted of an offence, or offences, against one or more of the provisions specified in subsection (5); and
>
> (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
>
> (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
>
> (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).
>
> Note: A person may seek review of a determination made under this subsection in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*. See also section 36H of this Act (revocation of citizenship cessation determination on application to Minister).
>
> (2) However, the Minister must not make a determination if the Minister is satisfied that the person would, if the Minister were to make the determination, become a person who is not a national or citizen of any country.
>
> (3) The person ceases to be an Australian citizen at the time the determination is made.
>
> (4) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).
>
> …

[7] *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth), Sch 1, item 9. An earlier iteration or predecessor of s 36D – former s 35A – had been introduced into the Citizenship Act by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).

12. The provisions specified in sub-s (5) that enliven the power to make a determination under s 36D include offences against ss 102.3(1), 102.2(1) and 101.4(1) of the *Criminal Code*, each of which is contained in Pt 5.3 of the *Criminal Code* (terrorism).[8]

13. Section 36D is part of Subdiv C of Div 3 of Pt 2 of the Citizenship Act, titled "Citizenship cessation determinations". The purpose of the Subdivision is stated in s 36A, which provides that the 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". As the Court identified in *Alexander*, s 36D is one of the provisions in the Subdivision that gives effect to the policy stated in s 36A.[9]

14. Section 36E sets out considerations to which the Minister must have regard when assessing whether it would be contrary to the public interest for the person to remain an Australian citizen. Those considerations include the severity of the conduct that was the basis of the convictions, and the sentence(s) to which the determination relates;[10] the degree of threat posed by the person to the Australian community;[11] and 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.[12]

15. Section 36H provides that a person who has ceased to be an Australian citizen because of a citizenship cessation determination made under subsection 36B(1) or 36D(1) may apply in writing to have the determination revoked.[13] The Minister also has a non-compellable power to revoke a determination on the Minister's own initiative under s 36J, and s 36K provides for automatic revocation of a determination in specified circumstances (including where the relevant conviction or convictions that enlivened the power under s 36D is or are overturned or the sentence is reduced below the period of imprisonment of 3 years).

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[8] Citizenship Act, s 36D(1)(a), (5)(f). Some (but not all) of these offences overlap with classes of conduct specified under s 36B(5) – *e.g.* under s 36B(5)(d), directing the activities of a terrorist organisation (see s 102.2 of the *Criminal Code*).
[9] *Alexander* (2022) 96 ALJR 560 at [82]-[83] (Kiefel CJ, Keane and Gleeson JJ), [120] (Gageler J), [251] (Edelman J).
[10] Citizenship Act, s 36E(2)(b). Compare s 36E(2)(a), in relation to determinations under s 36B(1).
[11] Citizenship Act, s 36E(2)(c).
[12] Citizenship Act, s 36E(2)(g).
[13] The applicant applied in writing to have the determination revoked pursuant to s 36H on 12 February 2021. No decision has been made by the Minister on that application: **SCB 34 [13]**.

16. Each of ss 36A, 36E, 36H and 36J also applied in respect of s 36B, before that provision was found to be invalid.

17. As developed below, this Court's consideration of the operation of this statutory scheme in *Alexander* bears directly on the characterisation of s 36D for the purpose of assessing its compatibility with Ch III of the *Constitution*. Critically, the conclusion that the legislative purpose of s 36B is retribution for proscribed conduct is equally applicable to the identification of the legislative purpose of s 36D.

## B. *Alexander*

18. In *Alexander*, a majority of this Court declared that s 36B of the Citizenship Act was invalid on the basis that the power which it reposed in the Minister was exclusively judicial and was therefore required by Ch III of the *Constitution* to be exercised by a court that is part of the federal judicature.[14]

19. The following matters were critical to this Court's finding that s 36B was invalid.

20. *First*, all six members of the majority recognised that involuntary deprivation of Australian citizenship is readily characterised as a form of punishment, having regard to the extreme consequences of such a determination, including the removal of the person's entitlement to be at liberty in Australia.[15] As the plurality recognised, "[t]hese entitlements are not matters of private concern; they are matters of public rights of 'fundamental importance' to the relationship between the individual and the Commonwealth".[16] Loss of citizenship involves "the total destruction of the individual's status in organized society".[17]

21. *Second,* the history of involuntary citizenship deprivation has a strong association with punishment. As the plurality observed, "[e]xile has long been regarded as punishment."[18] Edelman J noted that exile had been used as punishment in England and Rome, as well as ancient Babylon and Greece,[19] while Gordon J referred to, among others, the observation of Craies in 1890 that under English law "[t]he purposes for which a subject

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[14] *Alexander* (2022) 96 ALJR 560 at [70], [96] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J), [157] (Gordon J), [247], [254] (Edelman J).
[15] *Alexander* (2022) 96 ALJR 560 at [71]-[79] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J), [166] (Gordon J), [248]-[249] (Edelman J).
[16] *Alexander* (2022) 96 ALJR 560 at [74] (Kiefel CJ, Keane and Gleeson JJ), citing *Lim* (1992) 176 CLR 1 at 53.
[17] *Alexander* (2022) 96 ALJR 560 at [248] (Edelman J), citing *Trop v Dulles* 356 US 86 (1958) at 101.
[18] *Alexander* (2022) 96 ALJR 560 at [73]; see also at [75], [82] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J), [167]-[172] (Gordon J), [250] (Edelman J).
[19] *Alexander* (2022) 96 ALJR 560 at [250] (Edelman J).

could conceivably be required to leave the realm [fell] into two main classes – public service, *and punishment for crime*".[20]

22. *Third*, in light of the harshness of the measure, its history, and the legislative policy underpinning s 36B as expressly stated by Parliament in s 36A, the purpose of the provision (for the purpose of assessing its compatibility with Ch III) was identified as "retribution for conduct deemed to be so reprehensible as to be 'incompatible with the shared values of the Australian community'"[21] and "deterrence of a particular category of extreme, reprehensible conduct".[22] As Gageler J concluded, "the purpose declared in s 36A is properly characterised as one of denunciation and exclusion from formal membership of the Australian community … solely on the basis of past criminal conduct. That purpose can only be characterised as 'punitive'".[23]

23. These three considerations apply equally to s 36D.

24. One point of distinction between ss 36B and 36D, recognised in *Alexander*, is that s 36B did not depend on a prior judicial finding of guilt following a criminal trial.[24] However, even if s 36B had so depended, on the majority's reasoning that would not have saved s 36B from invalidity. The decisive considerations against the validity of s 36B were the nature of the thing being done to a person – namely, involuntary deprivation of citizenship – and the purpose for which it was being done – namely, retribution for conduct deemed to be "reprehensible", a concept with a strong affinity to punishment for crime. The ratio of *Alexander* is that involuntary denationalisation as a form of punishment for engaging in proscribed conduct is an exclusively judicial power.

25. Put another way, the vice identified by the majority in *Alexander* was not just that s 36B conferred on the Minister a power to determine criminality, but that it conferred a power to punish criminality. The *power to punish* criminality is an exclusively judicial power, separate from and in addition to the exclusively judicial power to adjudge or determine criminal guilt.[25]

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[20] *Alexander* (2022) 96 ALJR 560 at [170] (emphasis in original).
[21] *Alexander* (2022) 96 ALJR 560 at [75] (Kiefel CJ, Keane and Gleeson JJ), see also at [82] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J), [163]-[164], [173] (Gordon J), [186], [244], [247] (Edelman J).
[22] *Alexander* (2022) 96 ALJR 560 at [251] (Edelman J).
[23] *Alexander* (2022) 96 ALJR 560 at [120] (Gageler J).
[24] *Alexander* (2022) 96 ALJR 560 at [84], [91], [93] (Kiefel CJ, Keane and Gleeson JJ).
[25] See *Alexander* (2022) 96 ALJR 560 at [235] (Edelman J), referring to ***Falzon*** *v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [15] (Kiefel CJ, Bell, Keane and Edelman JJ)

26. Nevertheless, the Court in *Alexander* did not "chart the metes and bounds of when denationalisation constitutes punishment"[26] and did not directly address the validity of s 36D.

## C. Legislative purpose of s 36D

27. The power to impose punishment for a criminal offence is an exclusively judicial power.[27] This exclusively judicial power is not confined to punishment for criminal *guilt* – it extends to all laws that are characterised as "punitive" in the relevant sense.[28]

28. It is also an "undisputed proposition" that the imposition of an additional or separate punishment as a consequence of criminal guilt is an exclusively judicial power.[29]

29. Accordingly, the critical question in this case is whether the legislative purpose of s 36D is to permit the Minister to impose a punishment (including an additional or separate punishment) on a person by way of involuntary deprivation of citizenship. The applicant submits that, on its proper construction, s 36D of the Citizenship Act confers a power on the Minister to punish a person for their past criminal conduct for the following reasons.

### C-1 The purpose of s 36D is retribution

30. The first and primary matter is that essentially the same features of the Citizenship Act that led to the conclusion that the legislative purpose of s 36B was punitive, in the relevant sense, also apply in relation to s 36D.

31. The purpose of enacting the suite of provisions which included ss 36B and 36D was retribution for and deterrence of conduct of a kind identified by Parliament to be reprehensible and warranting condemnation.[30] As Kiefel CJ, Keane and Gleeson JJ observed in *Alexander*:[31]

> The operative provisions which give effect to the policy stated by s 36A are a response to conduct that is conceived of as being so reprehensible that it is radically incompatible with the values of the community. The response of Parliament to that reprehensible conduct is retribution in the form of the deprivation of the entitlement to be at liberty in Australia. Retribution is characteristic of punishment under the criminal law – it is "punishing an

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[26] *Alexander* (2022) 96 ALJR 560 at [174] (Gordon J).
[27] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Duncan v New South Wales* (2015) 255 CLR 388 at 407-408 [41], [46] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ); *Falzon* (2018) 262 CLR 333 at 340 [14]-[15] (Kiefel CJ, Bell, Keane and Edelman JJ); ***Minogue*** *v Victoria* (2019) 268 CLR 1 at [31].
[28] *Alexander* (2022) 96 ALJR 560 at [236] (Edelman J).
[29] *Minogue* (2019) 268 CLR 1 at [13] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
[30] *Alexander* (2022) 96 ALJR 560 at [82]-[84] (Kiefel CJ, Keane and Gleeson JJ), [163] (Gordon J), [251] (Edelman J).
[31] *Alexander* (2022) 96 ALJR 560 at [82]-[84] (Kiefel CJ, Keane and Gleeson JJ).

> offender 'because he [or she] deserves it'"[32] by reason of the offender's misconduct. Associated with this purpose are notions of denunciation and deterrence of conduct that is regarded as reprehensible by the community.
>
> The statement in s 3A informs both ss 36B and 36D. …
>
> Section 36D, like s 36B, gives practical effect to the policy stated in s 36A. Each provision serves "to shore up the convictions of the law-abiding by demonstrating that the wicked will not go unscathed"[33] for the reprehensible conduct described in ss 36B(5)(h) and 36D(5)(g).

32. Section 36A applies to s 36D in the same way as it did to s 36B. By s 36A, Parliament made express its intention to sanction what it identified to be a breach of norms of conduct by imposing on the person who has engaged in such conduct the consequence of citizenship deprivation. As Gageler J stated:[34]

> When enacting the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) … Parliament chose to explain the purpose of **the whole of the subdivision** within which s 36B is included. Parliament did so in s 36A. Translated to the level appropriate for analysis of the compatibility of s 36B with Ch III of the Constitution, the purpose declared in s 36A is 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. The nature of the conduct understood by the Parliament to be capable of showing that unwillingness or incapacity is elucidated by the operative provisions of the subdivision and is limited to criminal conduct found to have been engaged by a person in the past. **Thus the purpose of denunciation and exclusion from formal membership of the Australian community is solely on the basis of past criminal conduct. That purpose can only be characterised as "punitive"**.

33. Although in the reasons of the plurality the discussion of the legislative purpose of s 36B was followed by a consideration of the points of difference between ss 36B and 36D,[35] that comparison was directed to highlighting the absence of procedural safeguards attending s 36B and why this made it particularly unacceptable for the Minister to determine whether criminal conduct had occurred. This comparative exercise appears to have been, at least partly, a response to an argument advanced by the Minister that the power conferred by s 36B was not judicial because it lacked the typical indicia of judicial power, such as the determination of a controversy as to existing rights and obligations. It was in that context that the plurality observed that s 36B did not contemplate an "orthodox"[36] exercise of judicial power as a precondition to enlivening the power, unlike

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[32] *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473.
[33] *Kennedy v Mendoza-Martinez* 372 US 144 at 190 (1963).
[34] *Alexander* (2022) 96 ALJR 560 at [120] (Gageler J) (emphasis added).
[35] *Alexander* (2022) 96 ALJR 560 at [80]-[93] (Kiefel CJ, Keane and Gleeson JJ).
[36] *Alexander* (2022) 96 ALJR 560 at [93] (Kiefel CJ, Keane and Gleeson JJ).

s 36D. But that culminated in the further observation that this distinction was "entirely beside the point".[37] When the question of compatibility with Ch III arises because a law appears to vest in the executive the exclusively judicial power of punishment, it is not relevant that the power might otherwise have the indicia of administrative, rather than judicial, power – the only inquiry is whether the power conferred is properly characterised as a power to punish.

34. The differences between ss 36B and 36D do not detract from the plurality's earlier observation that the purpose of retribution was applicable to all of the operative provisions in the Subdivision, including s 36D. Nor does it detract from their Honours' characterisation of involuntary deprivation of citizenship as a punitive measure, having regard to the nature of the right affected and the long-held understanding of involuntary expatriation (or exile or banishment) as a form of punishment.

35. The fact that s 36D deploys a criminal conviction and sentence as a "factum of operation" that enlivens the power, whereas s 36B does not, is an insubstantial consideration in the determination of the legislative purpose of s 36D. An administrative power might be "punitive", in the relevant Ch III sense, even if it follows upon a criminal conviction and judicial sentence. A provision which, for example, permitted a Minister to determine that a person should suffer corporal punishment upon having been duly convicted by a court of some crime would plainly be invalid as the conferral of a judicial power upon an institution other than a Ch III court.

36. Similarly, a power to impose a further period of imprisonment on a convicted person in addition to any sentence imposed by a court would be exclusively judicial, at least if it were for the purposes of retribution and deterrence, and such a power could not be conferred on an officer of the executive government. This was explicitly recognised by Edelman J in *Alexander*,[38] who observed that the continuation of punishment beyond that imposed as part of a sentence remains punitive, and that "it is a category error to assume that because those orders have a preventive or protective purpose they do not also serve, at least in part, the purpose of being a sanction for proscribed conduct".

37. In the present case, the deployment of the "factum" of the judicial conviction and sentence does not have any material bearing on the assessment of the legislative purpose of the power under s 36D as "punitive" (in the relevant sense), or at least, does not deny that

[37] *Alexander* (2022) 96 ALJR 560 at [93] (Kiefel CJ, Keane and Gleeson JJ).
[38] *Alexander* (2022) 96 ALJR 560 at [246] (Edelman J); cf at [174] (Gordon J).

conclusion. The power under s 36D remains "specifically linked" with the criminal conduct for which it is regarded as punishment,[39] and the consequence of deprivation of citizenship imposed by the determination remains a sanction for certain proscribed conduct.[40]

38. This highlights why, as this Court in *Alexander* held, it was *not* relevant to the characterisation of s 36B that: the power conferred by s 36B was discretionary;[41] or that s 36B only applied to dual citizens and would not render a person stateless;[42] or that an application for revocation of a determination may be made under s 37H.[43]

39. Indeed, the fact that s 36D attaches to a criminal conviction only makes it more apparent that what is occurring is the imposition of a sanction for breach of a rule or norm of conduct, which is the essence of punishment for criminal conduct.

40. That is a sufficient basis to explain why the differences between ss 36B and 36D do not save s 36D from invalidity. However, there are yet further difficulties with s 36D.

41. Section 36D operates, in part, by reference to court orders, but in part, requires the Minister to find relevant facts.

(a) Section 36D(1)(c) requires the Minister to be satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia. The focus on the "conduct" of the person, and not the offence or conviction(s) *per se*, means that the Minister would be entitled to examine the whole of the evidence at trial, and probably matters beyond those presented in evidence or addressed in sentencing the person, in order to determine whether the underlying conduct constituted a repudiation of allegiance.

(b) Section 36D(1)(d) requires the Minister to be satisfied that it would be contrary to the public interest for the person to remain a citizen, which must be considered according to the mandatory considerations set out in s 36E(2). Sections 36E(2)(b) requires the Minister to consider the *severity* of the conduct. Assessing the *severity* of criminal conduct, and what sanctions should be imposed in response to that conduct, is at the heart of the judicial function.

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[39] *Alexander* (2022) 96 ALJR 560 at [165] (Gordon J).
[40] *Alexander* (2022) 96 ALJR 560 at [238]-[239] (Edelman J).
[41] *Alexander* (2022) 96 ALJR 560 at [93] (Kiefel CJ, Keane and Gleeson JJ).
[42] *Alexander* (2022) 96 ALJR 560 at [94]-[95] (Kiefel CJ, Keane and Gleeson JJ).
[43] *Alexander* (2022) 96 ALJR 560 at [87] (Kiefel CJ, Keane and Gleeson JJ).

42. Essentially, ss 36D(1)(c) and 36D(1)(d) confer a power upon the Minister to make findings of fact relevant to the just punishment to be imposed on a person, and to determine whether to impose the sanction of deprivation of citizenship. The sentencing function is split between the court and the Minister. Deprivation of citizenship under s 36D is neither the automatic consequence of conviction and sentence, nor a consequence that is imposed by the court in the exercise of judicial power. Moreover, the safeguards of due process do not apply in relation to the Minister's consideration of whether the person's conduct demonstrates repudiation of their allegiance to Australia, or whether it would be contrary to the public interest for the person to remain a citizen. The Minister can impose the sanction of deprivation of citizenship, essentially in furtherance of the legislative object of retribution for reprehensible conduct, without providing the person with any form of hearing: see s 36D(9).

43. Whilst s 36B may represent a more severe incursion into the reserved area for Ch III courts because the Minister is authorised to determine whether the actus reus of a crime had occurred, s 36D is still an incursion into exclusively judicial power because it requires the Minister to find facts that are, as a matter of substance, facts relevant to the determination of the appropriate sentence – that is, the punishment imposed for the crime. The punitive nature of the law is therefore revealed by the fact that the Minister is the person upon whom is conferred the discretion to determine whether Australian citizenship should cease,[44] as a measure in retribution for the proscribed conduct.

C-2 Nature of involuntary deprivation of citizenship

44. The majority in *Alexander* recognised that the nature of involuntary deprivation of citizenship, taken together with historical considerations, might support the characterisation of *any* law conferring a power to inflict that particular consequence as being for the principal purpose of punishment.[45] That is, the very nature of denationalisation (or expatriation) itself is strongly indicative of a punitive purpose, at least where it is the consequence for criminal conduct or other proscribed "reprehensible" conduct.

[44] *Alexander* (2022) 96 ALJR 560 at [252] (Edelman J).
[45] *Alexander* (2022) 96 ALJR 560 at [71]-[79] (Kiefel CJ, Keane and Gleeson JJ), [98] (Gageler J), [166] (Gordon J), [248]-[249] (Edelman J); *cf* at [325]-[326] (Steward J), accepting the observation made by the Supreme Court of the United States in *Trop v Dulles* (1958) 356 US 86 at 97, 101-102 that denationalisation could be penal in nature.

45. In the United States, the very point of citizenship is that it is *un*conditional.[46] It provides permanency and security as a member of the body politic. The conferral of those rights is not to be regarded as unstable or vulnerable such that they can be taken away by the executive in the exercise of a statutorily conferred discretionary power:[47]

> [C]itizenship is not a license that expires upon misbehaviour … And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship … I believe his fundamental right of citizenship is secure.

46. Further, in the United States, the use of denationalisation as punishment for criminal offending is prohibited under the Eighth Amendment as a form of cruel and unusual punishment. Denationalisation was described starkly in *Trop v Dulles* in the following terms (part of which was cited by two members of this Court in *Alexander*):[48]

> [U]se of denationalisation as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. … [H]is enjoyment of even the limited rights of an alien might be subject to termination any time by reason of deportation. In short, the expatriate has lost the right to have rights.
>
> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people.

47. Denationalisation being regarded as cruel and unusual punishment implies that it is necessarily regarded as a form of *punishment*.

C-3 The notion of further or additional punishment, and the "factum" doctrine

48. A question referred to, but not determined, in *Alexander* was whether the power conferred on the Minister by s 36D is a power to impose "a new or additional punishment for a person committing an offence".[49]

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[46] Notwithstanding the contentious yet increasing trend in liberal democracies over the past decade, exemplified in s 36D of the Citizenship Act, to treat naturalised and dual citizens as less deserving of the protections of citizenship than others: see also s 34(2)(b) of the Citizenship Act, and see generally Zedner, "Citizenship Deprivation, Security and Human Rights" (2016) 18 *European Journal of Migration Law* 222.
[47] *Trop v Dulles* 356 US 86 (1958) at 593-594 (Warren CJ). See *Alexander* (2022) 96 ALJR 560 at [172] (Gordon J), [248] (Edelman J).
[48] *Trop v Dulles* 356 US 86 (1958) at 101-102 (Warren CJ). See *Alexander* (2022) 96 ALJR 560 at [172] (Gordon J), [325] (Steward J).
[49] *Alexander* (2022) 96 ALJR 560 at [174] (Gordon J).

49. In a series of decisions involving challenges to legislative modification of parole conditions by State Parliaments, this Court has emphasised the distinction between laws which render a sentence imposed by a court for criminal offending more punitive or severe, so as to constitute *additional* punishment, and those that do not.[50] Legislative restriction of the circumstances in which a person may be released on parole does not alter a person's sentence, and therefore does not, without more, constitute a further punishment. But these decisions make equally clear that where the effect of a law is to impose a consequence for criminal offending that inflicts "greater punishment for the offence of which [a person] was convicted"[51] or renders the original punishment "more punitive or burdensome to liberty", the law may not be valid.[52]

50. A principle emerging from these cases is that the legislature may, in some cases, validly select an objective criterion connected to a person's past criminal offending, which gives rise to detrimental consequences, without infringing Ch III of the *Constitution*.[53] The same reasoning has been invoked in decisions of this Court upholding the validity of control order and preventative detention regimes. As Gummow J stated in *Fardon*:[54]

> It is accepted that the common law value expressed by the term "double jeopardy" applies not only to determination of guilt or innocence, but also to the quantification of punishment. However, the making of a continuing detention order with effect after expiry of the term for which the appellant was sentenced … did not punish him twice, or increase his punishment for the offences of which he had been convicted. **The Act operated by reference to the appellant's status deriving from that conviction, but then set up its own normative structure**.

51. Applying these principles, this Court found in *Falzon* that Parliament may validly designate a person's conviction of certain offences as a trigger enlivening the mandatory cancellation of a person's visa under s 501(3A) of the *Migration Act* (thus changing the person's status from a lawful to an unlawful non-citizen and rendering the person liable to mandatory detention and deportation). The plurality concluded:[55]

> The power to cancel a visa by reference to a person's character, informed by their prior offending, is not inherently judicial in character. It operates on the status of the person deriving from their conviction. By selecting the objective facts of conviction and imprisonment, Parliament does not seek to impose an additional punishment.

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[50] ***Baker*** *v The Queen* (2004) 223 CLR 513; *Crump v New South Wales* (2012) 247 CLR 1; *Knight v Victoria* (2017) 261 CLR 306; *Minogue* (2019) 268 CLR 1.
[51] *Minogue* (2019) 268 CLR 1 at [32] (Gageler J).
[52] *Baker* (2004) 223 CLR 513 at [29] (McHugh, Gummow, Hayne and Heydon JJ).
[53] See especially *Baker* (2004) 223 CLR 513 at [9] (Gleeson CJ).
[54] *Fardon* (2004) 233 CLR 575 at [74] (emphasis added).
[55] *Falzon* (2018) 262 CLR 333 at [48] (Kiefel CJ, Bell, Keane and Edelman JJ), see also at [89] (Gageler and Gordon JJ).

52. What is apparent from the parole cases, preventative detention cases and the visa cases is that the question whether a law imposes punishment for a criminal offence, or merely designates certain conduct as a factum which informs a decision to impose a consequence for a separate (non-punitive) purpose, is ultimately a question of characterisation – turning on both the measure being imposed and the reason for which it is imposed.

53. In *Falzon*, for instance, s 501(3A) of the *Migration Act* was held to be valid precisely because a legitimate non-punitive purpose could be identified as the purpose of the provision (namely, protection of the community as an incident of Australia's sovereign right to admit or exclude non-citizens).[56] This purpose was to be understood against the background of the fact that "whilst an alien present in this country enjoys the protection of our law, his or her status, rights and immunities under the law differ from those of an Australian citizen in a number of important respects. Relevantly, the most important difference lies in the vulnerability, arising under the common law and provisions of the Constitution, of an alien to exclusion or deportation".[57]

54. In the control order and preventative detention cases, on the other hand, validity depended on the conferral of the relevant decision-making functions upon a court.[58]

55. There is no real similarity between the parole cases and the present situation, since in those cases, the amendment of the possibility of parole did not affect the convicted person's sentence.

56. Accordingly, any reliance on the parole cases, the preventative detention cases, or the visa cases, does not assist the respondents in the present case.

57. In the present case, the punitive purpose of s 36D is demonstrated by s 36A, by the extreme consequence of deprivation of citizenship and its effect on the person's entitlement to be at liberty in Australia, by the linkage between the imposition of that consequence and past criminal conduct, and by the historical antecedents of exile as punishment for criminal conduct. It does not detract from that conclusion that s 36D might also be said to have aspects of a protective purpose (in the sense of protection of the Australian community), because any such protective aspects do not deny the punitive purpose of the power conferred on the Minister, nor do they prevent the Minister's

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[56] *Falzon* (2018) 262 CLR 333 at [47], [52] (Kiefel CJ, Bell, Keane and Edelman JJ), [88]-[89] (Gageler and Gordon JJ), [93]-[94] (Nettle J). See also *Alexander* (2022) 96 ALJR 560 at [75] (Kiefel CJ, Keane and Gleeson JJ).
[57] *Falzon* (2018) 262 CLR 333 at [39] (Kiefel CJ, Bell, Keane and Edelman JJ).
[58] Compare the line of valid control order regimes stretching from *Thomas v Mowbray* (2007) 233 CLR 307 and *Fardon* (2004) 233 CLR 575 through to *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, with, eg, *South Australia v Totani* (2010) 242 CLR 1.

determination from involving the imposition of punishment as a sanction for past criminal conduct.[59]

C-4 Issues that do not arise

58. No part of the applicant's case requires this Court to consider whether a power to impose involuntary expatriation could *ever* be validly reposed in the executive, or whether it is a power of a kind that could only be exercised by a Ch III court.[60]

59. Nor is it necessary to consider the quite different Ch III issue that might arise if Parliament should ever seek to confer a power on a court to deprive a person of Australian citizenship as punishment for criminality (or for other purposes).[61]

## VI. ORDERS SOUGHT

60. The applicant seeks declarations that:

(a) section 36D of the Citizenship Act is invalid, and did not authorise the purported determination made by the Minister in respect of the applicant on 20 November 2020; and

(b) the applicant is an Australian citizen.

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[59] *Alexander* (2022) 96 ALJR 560 at [75] (Kiefel CJ, Keane and Gleeson JJ), [99], [106]-[107], [110], [112] (Gageler J), [164] (Gordon J), [246] (Edelman J).

[60] Cf *Damache v Minister for Justice* [2020] IESC 63; Casey, "Citizenship Stripping, Fair Procedures, and the Separation of Powers: A Critical Comment on *Damache v Minister for Justice"* (2021) 84 *Modern Law Review* 1399. The Irish Supreme Court found that citizenship revocation was an executive and not a judicial function. Compare the position in the United States: notwithstanding that *in*voluntary expatriation is unconstitutional as contrary to the Eighth Amendment (and thus cannot be imposed by any arm of government), expatriation proceedings in respect of voluntary expatriation occur by way of administrative act, but with rights of a trial de novo before a court: *Vance v Terrazas* 444 US 252 (1980). The Supreme Court found it was not beyond the power of Congress to prescribe the evidentiary standards to govern expatriation proceedings. Similarly, in Canada, pursuant to s 10 of the *Citizenship Act* (RSC 1985, c C-29), which provides that the Minister may revoke a person's citizenship on the basis of fraud or misrepresentation, the Minister must provide written notice advising the individual "that the case will be referred to the Court unless the person requests that the case be decided by the Minister": see s 10(3)(d). The provision guarantees the right of an individual to have a revocation decision referred to the Federal Court.

[61] Cf *Fardon* (2004) 223 CLR 575 at [184]-[185] (Kirby J): "[i]n my view, it is essential to the nature of judicial power that, if a prisoner has served in full the sentence imposed by a court as final punishment it is not competent for the legislature to require another court, later, to impose additional punishment by reference to previous, still less the same, offences. Such a requirement could not be imposed upon Ch III courts."

## VII. ESTIMATE OF TIME

61. The applicant estimates that 75 minutes will be required for presentation of his oral argument.

**Dated:** 6 April 2023

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**IN THE HIGH COURT OF AUSTRALIA**
**MELBOURNE REGISTRY**

**BETWEEN:** **ABDUL NACER BENBRIKA**
Applicant

and

**MINISTER FOR HOME AFFAIRS**
First Respondent

**COMMONWEALTH OF AUSTRALIA**
Second Respondent

## ANNEXURE TO THE SUBMISSIONS OF THE APPLICANT

Pursuant to Practice Direction No 1 of 2019, the Applicant sets out below a list of the constitutional provisions and statutes referred to in these submissions.

| No. | Description | Version | Provisions |
|---|---|---|---|
| | ***Constitutional provisions*** | | |
| 1. | *Commonwealth Constitution* | Current | Ch III |
| | ***Statutory provisions*** | | |
| 2. | *Australian Citizenship Act 2007* (Cth) | As at 20 November 2020 | ss 36A, 36B, 36D, 36E, 36H, 36J |
| 3. | *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) | As enacted | Sch 1, item 9 |
| 4. | *Criminal Code* (Cth) | As at 15-16 September 2008 | ss 102.3(1), 102.2(1), 101.4(1) |
| 5. | *Migration Act 1958* (Cth) | As at 20 November 2020 | ss 35(3), 501(3A) |
| 6. | *Australian Citizenship Act 1948* (Cth) | As at 13 January 1988 | s 13 |