HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M90/2022
File Title:	Benbrika v. Minister for Home Affairs & Anor
Registry:	Melbourne
Document filed:	Form 27E - Applicant submissions in reply
Filing party:	Applicants
Date filed:	16 May 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

APPLICANT'S REPLY SUBMISSIONS

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

Adjudgment or punishment of criminal guilt is exclusively judicial

2. The statement in *Lim* that "the adjudgment and punishment of criminal guilt" is an exclusively judicial function has been expressly acknowledged to operate disjunctively (cf. **RS [20]**).[1] As Edelman J observed in *Alexander*, it was not in dispute, in either *Alexander* or *Falzon*, that the reference to adjudging and punishing criminal guilt in *Lim* was to "two alternative functions, both of which are exclusively judicial".[2] This should now be accepted as settled law.

3. Thus, punishment of criminal conduct is an exclusively judicial function, even if it is separated from the adjudication of criminal guilt.[3] For that reason, it would be constitutionally impermissible to repose in an administrative body the function of sentencing offenders for Commonwealth offences. Nor could the Parliament vest in the Executive a power to impose additional or further punishment on a convicted offender for the purposes of retribution, denunciation and deterrence of proscribed criminal conduct.

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[1] See, e.g., *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 (Deane J); *Falzon* (2018) 262 CLR 333 at [15]-[16] (Kiefel CJ, Bell, Keane and Edelman JJ), [88] (Gageler and Gordon JJ); *Alexander* (2022) 96 ALJR 560 at [235] (Edelman J).
[2] *Alexander* (2022) 96 ALJR 560 at [235].
[3] Contrary to the Respondent's concession (RS [27], [29]), this proposition cannot be confined to the "core case" of detention in custody on the basis of a "default characterisation" that such detention is punitive in character, subject to limited exceptions. The central question remains one of characterisation. Consistently with *Alexander*, the involuntary deprivation of citizenship as retribution for past criminal conduct (and for the purposes of denunciation and deterrence of such conduct) involves the imposition of punishment.

4. It may be accepted that the imposition of hardship or detriment upon a person does not always amount to punishment (although all punishment involves some hardship or detriment). Whether or not the imposition of hardship or detriment is to be classified as "punishment" for the relevant Ch III purpose depends on the *nature* of what is done and the *reason or purpose* for which it is done. The full parameters of this issue need not be explored. The Court is concerned only to classify or characterise an adverse outcome of the exercise of power under s 36D – the loss of citizenship for reasons that include, but are not limited to, a person's criminal offending. This is "punishment", no less than the imposition of the same consequences for the same purposes under s 36B, and is a function that cannot be conferred on the Minister (cf. **RS [20]–[28]**).

5. If the applicant is wrong on this point, there are two further reasons why s 36D is invalid.

6. *First*, at **RS [26]**, the Respondents suggest that non-judicial infliction of punishment is impermissible only where it is punishment for criminal guilt. Assuming that is the correct understanding of *Re Woolley; Ex parte Applicants M276/2003*,[4] in any case s 36D does contemplate punishment for criminal guilt (see, *e.g.*, **AS [37]**). The present case is therefore distinguishable from previous cases such as *Fardon*[5] or *Falzon*[6] in which a prior conviction operates as a factum that enlivens a power to inflict *non-punitive* hardship or detriment (including solely for a protective purpose).

7. *Second*, there are four conditions on the power under s 36D: (1) the person must have been convicted of a relevant offence (s 36D(1)(a)); (2) the person must have been sentenced to a period of imprisonment of at least 3 years (s 36D(1)(b)); (3) the Minister must be satisfied "the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia" (s 36D(1)(c)); (4) and the Minister must be satisfied it would be contrary to the public interest for the person to remain a citizen (s 36D(1)(d)).

8. As to the third of these conditions, whilst the conviction and sentence meet ss 36D(1)(a) and (b), and their "essential facts" (however they are ascertained) might in some cases be highly probative of the question under s 36D(1)(c), they might be far less probative in other cases. At least, as a point of construction, s 36D(1)(c) contemplates the Minister being satisfied that a person has not repudiated their allegiance to Australia despite their

[4] (2004) 225 CLR 1.
[5] (2004) 223 CLR 575.
[6] (2018) 262 CLR 333.

conviction and sentence for an offence specified in s 36D(5). Indeed, when one examines the offences identified in s 36D(5), it is readily apparent that some are more indicative of a repudiation of a person's allegiance to Australia[7] than others (cf. **RS [13], [50]**).[8] Substantial fact-finding by the Minister might therefore be required, in identifying and assessing "the conduct of the person to which the conviction or convictions relate".[9] In any event, in so far as the Minister's determination under s 36D focuses on the essential factual basis of the conviction and sentence, this supports rather than detracts from the proper characterisation of the citizenship cessation as punishment for criminal conduct.

9. *Contra* **RS [12]–[13]**, it is not "reasonably open"[10] to read s 36D(1)(c) as meaning that
10 satisfaction of the conviction and sentence preconditions necessarily demonstrates the existence of the s 36D(1)(c) precondition, as that would give s 36D(1)(c) no effective operation. Nor can it sensibly be read, whether through s 15A of the *Acts Interpretation Act 1901* (Cth) or otherwise, as meaning that the decision-maker may not go beyond the "essential facts"[11] of a conviction or sentence, however they might be divined.

Consideration of s 36D in *Alexander*

10. The validity of s 36D was not in issue in *Alexander* (**RS [43]**).[12] Because of this, the Court did not consider the provision with a view to assessing its compatibility with Ch III. It is not tenable to imply from the plurality's reasoning that s 36D was considered to be valid.[13] *Contra* **RS [37]-[43]**, the plurality's consideration of ss 36B and 36D was not in

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[7] *Alexander* (2022) 96 ALJR 560 at [48] (Kiefel CJ, Keane and Gleeson JJ), [154]–[155] (Gordon J).

[8] Cf Revised Explanatory Memorandum to the Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 (Cth) at [124]. For instance, Div 82 of the *Criminal Code* includes provisions such as s 82.8 (the offence of introducing vulnerability to an article, thing or software, reckless as to whether prejudice to Australia's national security will occur). It is not apparent that a person convicted of such an offence would necessarily be thought to have engaged in conduct exhibiting "extreme enmity to Australia" or which "seek[s] to destroy or gravely harm the fundamental and basal features of the nation guarded by its Constitution": *Alexander* (2022) 96 ALJR 560 at [35] (Kiefel CJ, Keane and Gleeson JJ), [233] (Edelman J), [289] (Steward J).

[9] In this regard, the language used in s 36D(1)(c) is different to, and arguably broader than, that used in s 36E(2)(b), which refers to "the conduct that was the basis of the conviction or convictions, and the sentence or sentences, to which the determination relates" (emphasis added).

[10] *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[11] See *HZCP v Minister for Immigration and Border Protection* (2019) 273 FCR 121 at [56] (McKerracher J), [182] (Colvin J); *Secretary to the Department of Justice and Regulation v LLF* [2018] VSCA 155 at [42]; *Secretary to the Department of Justice and Regulation v Bhatia* [2018] VSC 500 at [51]-[53], [62] (Richards J). Even in those cases where a prior conviction or sentence is the basis for a decision-maker's jurisdiction, the decision-maker is permitted to consider for himself or herself the circumstances of the conviction for purposes other than impugning the conviction itself (including its "essential factual basis").

[12] See *Alexander* (2022) 96 ALJR 560 at [80] (Kiefel CJ, Keane and Gleeson JJ), [174] (Gordon J).

[13] See, e.g., *Namoa v The Queen* (2021) 271 CLR 442 at [17] (Gleeson J, with Kiefel CJ, Gageler, Keane, Gordon, Edelman and Steward JJ agreeing); *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [42] (Kiefel CJ, Gageler and Gleeson JJ).

order to suggest that the latter was constitutionally valid, but rather to demonstrate and explain why s 36B was constitutionally invalid by comparing the purpose and effect of the two provisions.[14] While the plurality drew attention to some differences between s 36B and s 36D,[15] an exercise of power under each provision resulted in the "same outcome by way of deprivation of citizenship"[16] and imposed "relevantly the same punishment".[17] Similarly, the conclusion reached by Gageler J that "the purpose of denunciation and exclusion from formal membership of the Australian community … solely on the basis of past criminal conduct … can only be characterised as 'punitive'"[18] is equally applicable to both s 36B and s 36D.

10 **Sovereign capacity and historical practice**

11. The invalidity of s 36D does not involve any restriction or reduction in Australia's "sovereign capacity" to exclude citizens who have repudiated their allegiance (cf. **RS [46]**). Rather, it requires that sovereign capacity to be exercised consistently with the separation of powers under the *Commonwealth Constitution*.

12. Nor is the outcome of the present case assisted by a consideration of the history of citizenship cessation legislation (cf. **RS [53], [56]**). In particular, citizenship cessation based on matters regarded by the Parliament as amounting to a repudiation of allegiance (such as service in the armed forces of an enemy country, or becoming a citizen of another country), but not themselves amounting to "criminal guilt" of an offence or other
20 proscribed conduct or wrongdoing regarded as reprehensible by the community, would not ordinarily be characterised as imposing punishment within the exclusive power of the judiciary.

Comparative practice

13. In the United States, a person is regarded as having voluntarily relinquished their nationality upon conviction of certain offences specified by Congress, without further

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[14] See *Alexander* (2022) 96 ALJR 560 at [70], [77], [80] (Kiefel CJ, Keane and Gleeson JJ), observing that the two provisions "authorise the same consequences for the citizen", that the consequences under s 36B are "no different in substance from the punishment meted out pursuant to s 36D", and that "a consideration of the terms of s 36A and a comparison of the operation of s 36B with that of s 36D" confirmed that "s 36B facilitates punishment in the sense of retribution for the conduct described in s 36B(5)(h)".
[15] *Alexander* (2022) 96 ALJR 560 at [85]-[87], [93] (Kiefel CJ, Keane and Gleeson JJ).
[16] *Alexander* (2022) 96 ALJR 560 at [87] (Kiefel CJ, Keane and Gleeson JJ).
[17] *Alexander* (2022) 96 ALJR 560 at [93] (Kiefel CJ, Keane and Gleeson JJ). See also at [95]: "On any view of the situation of such an individual, the involuntary deprivation of rights involved in Australian citizenship by way of retribution for his or her conduct is a serious punishment."
[18] *Alexander* (2022) 96 ALJR 560 at [120] (Gageler J); compare at [157], [164], [173] (Gordon J).

executive fact-finding (see 8 USC §1481(7), as quoted at **RS [54]**). That is unlike s 36D. In other countries, such as Canada and New Zealand, enactments providing for loss of citizenship are not linked with prior criminal conduct at all (and are linked with, for example, fraud or misrepresentation).[19]

14. Also, in the United Kingdom, Canada and New Zealand, a person who has lost their citizenship involuntarily has a right of review by a court or tribunal (all subject to judicial review), as well as other due process safeguards for persons who are subjected to such an exercise of executive power.[20]

15. The position in Australia, through s 36D, is very different from that in comparable nations.

Dated: 16 May 2023

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[19] See *Citizenship Act 1977* (NZ), ss 16–17; *Citizenship Act* (RSC 1985, c C-29), s 10(1).
[20] See *Citizenship Act 1977* (NZ), s 19; *Citizenship Act* (RSC 1985, c C-29), ss 10.1(1), (3); *British Nationality Act 1981* (UK), s 40A(1).