HIGH COURT OF AUSTRALIA

27 October 2017

IN THE MATTERS OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR THE HON MATTHEW CANAVAN, MR SCOTT LUDLAM, MS LARISSA WATERS, SENATOR MALCOLM ROBERTS, THE HON BARNABY JOYCE MP, SENATOR THE HON FIONA NASH AND SENATOR NICK XENOPHON
[2017] HCA 45

Today the High Court, sitting as the Court of Disputed Returns upon references from the Senate and the House of Representatives, unanimously held that each of Mr Scott Ludlam, Ms Larissa Waters, Senator Malcolm Roberts, the Hon Barnaby Joyce MP and Senator the Hon Fiona Nash was "a subject or a citizen … of a foreign power" at the time of his or her nomination for the 2016 federal election, and that each was therefore incapable of being chosen or of sitting as a senator or a member of the House of Representatives (as applicable) by reason of s 44(i) of the Constitution. The Court unanimously held that neither Senator the Hon Matthew Canavan nor Senator Nick Xenophon was disqualified by reason of that provision.

In each reference, the question whether the referred person was disqualified turned upon the proper construction of s 44(i) of the Constitution, having regard to evidence suggesting that each person held dual citizenship at the time of his or her nomination. The Court appointed an amicus curiae to act as contradictor in the references concerning Senators Canavan, Nash and Xenophon, and Mr Antony Windsor became a party to the reference concerning Mr Joyce MP.

The approach to construction urged by the amicus curiae and by Mr Windsor was to give s 44(i) its ordinary textual meaning, subject only to the implicit qualification in s 44(i) that the foreign law conferring foreign citizenship must be consistent with the constitutional imperative underlying that provision, namely that an Australian citizen not be prevented from participation in representative government where it can be demonstrated that he or she took all steps reasonably required by foreign law to renounce his or her citizenship of a foreign power. Several alternative constructions were proposed by the referred persons and by the Attorney-General of the Commonwealth. At a minimum, each of these involved reading s 44(i) as subject to an implied mental element in relation to the acquisition or retention of foreign citizenship. Those constructions varied with respect to the degree of knowledge required and whether a voluntary act of acquiring or retaining foreign citizenship was necessary.

The Court held that the approach of the amicus and Mr Windsor must be accepted, as it adheres most closely to the ordinary and natural meaning of the language of s 44(i), and accords with the views of a majority of the Justices in *Sykes v Cleary* (1992) 176 CLR 77; [1992] HCA 60. It was held that a consideration of the drafting history of s 44(i) does not warrant a different conclusion. Further, the Court observed that the approach adopted avoids the uncertainty and instability that attends the competing constructions. Applying that approach, the Court held that Mr Ludlam, Ms Waters, Senator Roberts, Mr Joyce MP and Senator Nash were disqualified by reason of s 44(i). Neither Senator Canavan nor Senator Xenophon was found to be a citizen of a foreign power, or entitled to the rights or privileges of a citizen of a foreign power, within the meaning of s 44(i), and therefore neither was disqualified by reason of that provision.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: enquiries@hcourt.gov.au Website: www.hcourt.gov.au