

ORIGINAL

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

No. C17 of 2017

**SITTING AS THE COURT OF
DISPUTED RETURNS**

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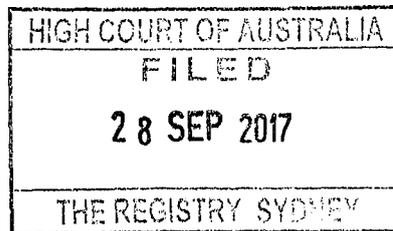
RE SENATOR THE HON FIONA NASH

Reference under s 376 of the
Commonwealth Electoral Act 1918 (Cth)

ANNOTATED

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SUBMISSIONS OF SENATOR THE HON FIONA NASH



Date of Document: 28 September 2017

Filed on behalf of Senator the Hon Fiona Nash
by

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Reference: FYW:JLJ:NRA:1177813

Part I: Publication of submissions

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

Part II: Issues

2. On 4 September 2017, the Senate resolved to refer to the High Court of Australia sitting as the Court of Disputed Returns certain questions relating to the representation of New South Wales in the Senate for the place for which Senator the Hon Fiona Nash was returned.¹
3. The principal issues arising on the reference are:
 - (a) whether, by reason of s 44(i) of the *Constitution*, Senator Nash was incapable of being chosen, and sitting, as a senator. In particular, given Senator Nash's lack of awareness of her British citizenship as at the date of her nomination as a candidate for the Senate representing the State of New South Wales, did her omission to take any steps to renounce that citizenship prior to that date disqualify her from election to the Commonwealth Parliament?
 - (b) if the answer to (a) is yes, by what means and in what manner Senator Nash's vacancy in the Senate should be filled.

Part III: Section 78B Notice

4. The Attorney-General of the Commonwealth has served notices pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

5. There are no reasons for judgment below.

Part V: Facts

Senator Nash's background

6. Senator Nash was born in Sydney on 6 May 1965.²
7. Her father, Raemond Lothian Morton, was born in East Lothian Scotland, in 1927, and her mother, Joy Stuart Hird, in Sydney on 26 January 1928.³
8. Mr Morton and Ms Hird met in the United Kingdom ("**the UK**"), where Ms Hird was working as a doctor, and they married in Essex, England on 2 April 1956.⁴
9. In or around 1960 or 1962, after the birth of Senator Nash's elder sisters in England, her parents and sisters migrated to Australia, residing first in Cronulla and then in Yowie Bay.⁵

¹ CB 566.

² Affidavit of Fiona Joy Nash ("**Nash Affidavit**") at [3]; CB 592.

³ Nash Affidavit at [4]; CB 592.

⁴ Nash Affidavit at [8]; CB 592.

10. As a child, Senator Nash was aware that her father had been born in Scotland and that her sisters were British citizens as a consequence of their having been for in England.⁶
11. Her parents divorced in 1973, after which she was raised by her mother and had little contact with her father until late in his life.⁷
12. Senator Nash was first sworn in as a Senator for the State of New South Wales on 1 July 2005.⁸

The 2016 federal election

- 10 13. On 9 May 2016, the Governor-General, at the request of the Prime Minister and by way of proclamation, dissolved the Senate and the House of Representatives, pursuant to s 57 of the *Constitution*.⁹
14. On 16 May 2016, the Governor of New South Wales issued to the Australian Electoral Officer (“**the AEO**”) for the State of New South Wales a writ for the election of Senators for that State, commanding the AEO to cause an election to be made according to law of 12 Senators for the State of New South Wales.¹⁰
15. On 1 June 2016, Senator Nash nominated for re-election to the Senate. Her recollection is that in completing the required nomination form, she:
 - 20 (a) read the third page of the nomination form which reproduced the text of s 44; and
 - (b) concluded that none of the grounds of disqualification set out in the provision were relevant to her, including s 44(i), given her belief that she was a citizen of Australia and not of any other country.¹¹
16. As Senator Nash deposes, this belief was based on the following facts:
 - (a) she was born in Australia, and was aware that she was a citizen of Australia;
 - (b) her parents had informed her that her sisters were British citizens as a consequence of their being born in England; and
 - (c) her parents had informed her that in order to obtain a British citizenship, an application was required to be filed with the relevant UK authorities, which had not been done on her behalf.¹²
- 30 17. Senator Nash’s nomination for re-election was not rejected under s 172 of the Electoral Act. That being so, on 10 June 2016, being the day after the date for the close of nominations stated in the Governor’s writ, her nomination was declared.¹³

⁵ Nash Affidavit at [9]-[11]; CB 593.

⁶ Nash Affidavit at [12]; CB 593.

⁷ Nash Affidavit at [13]; CB 593.

⁸ Nash Affidavit at [18]; CB 593.

⁹ Affidavit of Andrew Kevin Gately affirmed 8 September 2017 (“**Gately Affidavit**”) at [44]; CB 57.

¹⁰ Gately Affidavit at [115]; CB 65.

¹¹ Nash Affidavit at [20]; CB 593.

¹² Nash Affidavit at [27]; CB 594.

18. In the New South Wales Senate election in 2016:
- (a) there were 151 candidates and 40 groups of candidates;
 - (b) there were 4,492,197 formal votes cast;
 - (c) the quota for election was 345,554 votes;
 - (d) there were two preferences groups that received greater than the quota of “above the line” first preference votes”, as a result of which seven grouped candidates appearing below the line in those two groups were elected on first preference votes;
 - (e) the remaining five successful candidates were elected after the exclusion of candidates and the distribution of transfer of votes;
 - (f) out of the total votes cast, the Liberal & Nationals group, of which Senator Nash was listed as third candidate received 1,544,493 votes cast above the line;
 - (g) Senator Nash received 5,689 first preference votes cast below the line;
 - (h) on the fourth count, Senator Nash was the fifth candidate elected, having reached the quota of 345,554 votes after preferences; and
 - (i) the percentage of above the line votes received by Senator Nash after preference votes was 98.35% of the quota.¹⁴
19. On 4 August 2016, the AEO certified, pursuant to s 283(1)(b) of the Electoral Act, the names of the 12 candidates who had been duly elected as Senators for New South Wales, and returned the writ of 16 May 2017, accompanied by that certificate, to the Governor of New South Wales.¹⁵

Events following the 2016 federal election

20. On 14 August 2017, following a statement by the Hon Barnaby Joyce MP to the House of Representatives concerning the possibility that he might have been a citizen of New Zealand, Senator Nash sought advice from the UK Home Office as to whether it was possible that she was a British citizen.¹⁶
21. This request was answered in an email dated 14 August 2017 from one Ian Page,¹⁷ Deputy Chief Caseworker for Nationality Group within the Home Office, which relevantly stated, “From the information you have provided I can confirm that you are a British citizen by descent.”
22. Thereafter, on 17 August 2017, Senator Nash received an opinion from Mr Laurie Fransman QC dated 16 August 2017 concerning her citizenship status under British

¹³ Gately Affidavit at [117]-[118]; CB 66.

¹⁴ Gately Affidavit at [119]-[123], [129]-[131]; CB 66-67.

¹⁵ Gately Affidavit at [127]-[128]; CB 67.

¹⁶ Nash Affidavit at [22]; CB593.

¹⁷ CB 603.

law. Senator Nash does not contest the correctness of the conclusions reached by Mr Fransman QC. In particular, she accepts that:

- (a) having been born within the Crown's dominions, her father was a British subject by reason of s 1(1)(a) of the *British Nationality and Status of Aliens Act 1914* (UK);¹⁸
- (b) on 1 January 1949, upon the commencement of the *British Nationality Act 1948* (UK) (“the BNA 1948”), her father was reclassified as a “citizen of the UK & Colonies” under s 12(1)(a) of that statute;¹⁹
- (c) on 1 January 1973, upon the commencement of the *Immigration Act 1971* (UK) (“the IA 1971”), her father acquired the immigration status of patriality, which conferred upon him the right of abode in the UK;²⁰
- (d) on 1 January 1983, upon the commencement of the *British Nationality Act 1981* (UK) (“the BNA 1981”), her father became a British citizen pursuant to s 11(1) of that statute;²¹
- (e) as a person born legitimate outside the UK & Colonies to a father who was citizen of the UK & Colonies within the meaning of the BNA 1958, she became a citizen of the UK & Colonies by descent at the moment of her birth under s 5 of that statute;²²
- (f) like her father, she enjoyed the right of abode in the UK under the IA 1971;²³ and
- (g) upon the commencement of the BNA 1981, she became a British citizen by descent.²⁴

23. On 18 August 2017, Senator Nash completed a declaration of renunciation of British citizenship.²⁵

24. Thereafter, on 21 August 2017, she received a letter from the UK Home Office confirming that she had been registered as having renounced her British citizenship.²⁶

Part VI: Argument

Senator Nash's capacity to be chosen as a Senator

25. Senator Nash adopts paragraphs 23 to 59 of the submissions filed on behalf of Mr Joyce concerning the proper construction of s 44(i) of the *Constitution*.

¹⁸ Opinion of Laurie Fransman QC dated 16 August 2017 (“Fransman Opinion”) at [5]; CB 608.

¹⁹ Fransman Opinion at [8]-[9]; CB 609.

²⁰ Fransman Opinion at [14]; CB 610.

²¹ Fransman Opinion at [15]; CB 610-611.

²² Fransman Opinion at [17]; CB 611.

²³ Fransman Opinion at [19]; CB 611.

²⁴ Fransman Opinion at [20]; CB 612.

²⁵ CB 618-619.

²⁶ CB 621-622.

26. The argument advanced in those paragraphs favours the conclusion that:
- (a) Senator Nash was not ineligible for election to the Parliament as at 1 June 2016, when she nominated for re-election as a Senator representing New South Wales, given that, having been born in Australia, she had no awareness at the time of the fact that she was also a British citizen; and
 - (b) at no point during her current in the Senate did Senator Nash become ineligible to sit in the Commonwealth Parliament. This is because, having become aware of her citizenship status under British law on 14 August 2017, she took the necessary steps to renounce her British citizenship a mere four days later.
- 10
27. The opinion by Mr Fransman QC draws attention to s 12 of the BNA 1981, which makes provision for:
- (a) the registration of declarations of renunciation of British citizenship; and
 - (b) the cessation of one's status as a British citizen upon the registration of such a declaration.²⁷
28. Not only has Senator Nash made the requisite declaration, that declaration has since been registered.
29. Like Mr Joyce, Senator Nash submits that there is no scope in this area of discourse for the application concepts akin to constructive knowledge.
- 20 30. Nonetheless, if there were, she would not be amenable to disqualification. This is because:
- (a) her parents had informed her that unlike in the case of her sisters, who were British citizens by birth, she could only become a British citizen upon making an application, which had not occurred; and
 - (b) there is a conspicuous absence of any connection between Senator Nash and the UK beyond the fact that her father and sister were born there. As Senator Nash deposes, she has never even travelled to the UK, and for a substantial period of time, she was estranged from her father.
- 30 31. In the face of these assurances from her parents and her want of connection with the UK, it must be asked whether Senator Nash could reasonably have been expected to undertake, or to cause to be undertaken, inquiries concerning her citizenship status as a matter of British law.
32. Senator Nash further adopts, *mutatis mutandis*, what is said in paragraphs 66 to 69 of Mr Joyce's submissions concerning the content and effect of the nomination form for the 2016 federal election and the Candidates' Handbook.
33. There is accordingly no vacancy in the representation of New South Wales in the Senate for the place for which Senator Nash was returned.

²⁷ Fransman Opinion at [24]; CB 612-613.

Filling any vacancy

34. If, contrary to what is submitted above, there were a vacancy, it should be filled by means of a special count.
35. Paragraph 72 of Mr Joyce's submissions makes clear that the power to order a special count is an incident of the Court's power, under s 360(1)(vi) of the Electoral Act, to "declare any candidate duly elected who was not returned as elected".
36. In *Re Wood*,²⁸ the Court said, in relation to a vote for an unqualified candidate for election to the Senate, that:

10 "[t]he vote is valid except to the extent that the want of qualification makes the particular indication of preference a nullity. It is only to the extent that s 16 of the *Constitution* invalidates the particular indication of preference that effect is denied to the voter's expressed intention. It is as though the unqualified candidate were deceased ... The provision which applies when a deceased candidate's name is on the ballot paper is s 273(27): a vote indicated on a ballot paper opposite the name of a deceased candidate is counted to the candidate next in the order of the voter's preference and the numbers indicating subsequent preferences are treated as altered accordingly. For the purposes of the scrutiny which may now be conducted, a vote for an unqualified candidate is in the same position as a vote for a candidate who has died, and the votes should be treated accordingly."

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37. There is no reason why a similar approach should not be taken on this reference.

Part VII: Applicable provisions

38. Section 44(i) of the *Constitution* relevantly provides:

"Any person who:

- (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power ...

...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

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Part VIII: Orders sought

39. For the reasons outlined above, the questions transmitted by the Senate should be answered as follows:

- (a) No.
- (b) Does not arise.

²⁸ (1988) 167 CLR 145 at 165-166.

- (c) No further orders or directions are required.
- (d) The Commonwealth should pay Senator Nash's costs of the proceedings.

Part IX: Estimate of oral argument

40. Senator Nash joins in estimate given by Mr Joyce that both he and Senator Nash require one and a half hours for the presentation of oral argument.

Date: 28 September 2017



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