

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No. C32 of 2017

RE SENATOR GALLAGHER
Senate reference under s 376 of the
Commonwealth Electoral Act 1918



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SENATOR GALLAGHER'S OUTLINE OF ORAL ARGUMENT

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Part I:

This outline is in a form suitable for publication on the internet.

Part II:

- 1 **First:** The 2016 election was called on 8 May; writs were issued on 16 May; and nominations closed on 9 June: **CB 172**. Prior to 8 May, there could be no certainty when the election would be called or what shape it would take.
- 10 2 At the date of the election, the requirements of UK law for a British citizen to renounce citizenship were those reviewed in *Re Roberts* (2017) 91 ALJR 1018 at [76]-[80] and set out in full at **CB 186, 203-205, 208-211**.
- 3 By no later than 6 May, Senator Gallagher had taken *every step* required by UK law to secure a release from her UK citizenship and within her power: **CB 254-265**.
- 4 Specifically, under s 12(1) of the *British Nationality Act 1981*:
 - (a) She was a British citizen of full age and capacity: **CB 171**;
 - (b) She made in the prescribed manner a declaration of renunciation of citizenship; the experts agree on this: Berry Opinion at **CB 121-122**; Fransman Opinion at **CB 161-162**;
 - 20 (c) She had provided information capable of satisfying the Secretary that the renunciation would not render her stateless: **CB 171, 263**; and
 - (d) She had paid the requisite, not insubstantial, fee for the service: **CB 173, 265**.
- 5 If it be relevant, by that time Senator Gallagher had also taken *every step* which was indicated in the Home Office Published Guide for renunciation and within her power: **CB 245-252**; Fransman at **CB 161-162**.
- 6 Nothing in the British law (nor the published materials if relevant), informed a person in Senator Gallagher's position that she needed to include with her declaration the Additional Documents that the Secretary first asked for by letter received on 20 July.
- 7 The factual reasons why Senator Gallagher did not cease to be a British citizen prior to
30 9 June lay in matters wholly outside her power – namely the timing and manner in which the Secretary chose to perform the duty in s 12(1) (“the Secretary...shall cause the declaration to be registered”). This was an irremediable impediment to her participation in the election and beyond. On that basis, the constitutional imperative in *Re Canavan* at [72] was engaged, irrespective of the disputes between the experts.
Senator Gallagher Written Submissions (SGWS) [39] – [43].

8 **Second:** The evidence of Mr Berry is that under s12 the Secretary was bound to perform that duty and had no entitlement to delay or refuse registration until further forms of evidence, not stipulated in UK law, were sought or provided. The duty was enforceable by declaration and mandatory order: **CB 124, 281-282.**

9 If that evidence is correct, it confirms that Senator Gallagher satisfies *Re Canavan* at [72]. She had taken all steps reasonably required by the foreign law to renounce the citizenship; her participation in representative government was irremediably prevented by the failure of a foreign official to perform a duty under foreign law.

SGWS [54] - [57].

10 **Third:** The evidence of Mr Fransman:

(a) Converts the mandatory language of s 12(1) (“shall cause”) into a process where the Secretary exercises a “wide margin of discretion” over the evidence in “attaining satisfaction” about the matters in s 12(1);

(b) Without support in the language of s 12(1) or authority (cf *Harrison v Secretary* [2003] EWCA Civ 432 at [31]-[35]), gives the Secretary a discretion to refuse to register a declaration that has complied with s 12(1) because the person has not provided additional evidence sought by the Secretary; and

(c) Would allow the Secretary a period which could be days, months or years in which to make a decision: **CB 152, 154, 163-168.**

20 11 Even if UK law operates as per the Fransman Opinion, that provides a separate reason why the constitutional imperative is engaged. As from 6 May, Senator Gallagher has no remedy, under Australian law or British law, to compel the Secretary to make the choices which would enable her participation in the election. She has no control over how long the Secretary takes to deal with her declaration; what expedition the Secretary chooses to give to some declarations over other; or what additional forms of evidence, beyond those stipulated in UK Law or published information, the Secretary requires. Her participation in representative government was irremediably prevented by the absence of a mechanism to bring her renunciation to a timely and effective close.

30 12 Another way of expressing it is that, from 6 May, her continuing foreign nationality was “involuntary”. She could take the oath or affirmation required by s 42 of the Constitution on the basis that her undivided loyalty was to Australia. (cf *Sykes v Cleary* 176 CLR 77 at 107-8).

SGWS: [58] – [62].

13 **Fourth:** The Court should reject the Attorney-General's primary argument at [35] that under current UK law it is impossible for any British citizen ever to successfully invoke the constitutional imperative.

14 Such a submission:

- (a) Was not "implicit" in *Re Canavan*;
- (b) Departs from the focus first set in *Sykes v Cleary* on what *this person* has done, or had it within their power to do, to sever the relationship with the particular foreign country and on the damage done to representative government in Australia if the continuing foreign nationality of *this person* is recognised;
- 10 (c) Fails to have regard to the full width of the constitutional imperative and its concern to preserve a citizen's right to participate in representative government as a candidate, member and minister;
- (d) Assumes timeframes inconsistent with Constitution and relevant sections of displacing legislation;
- (e) Would lead to real world discriminatory outcomes.

SGWS: [13] – [20], [21] – [31].

15 **Fifth:** The Court should reject the Attorney-General's alternative argument at [38]-[48] that Senator Gallagher failed to take reasonable steps of (a) lodging the declaration earlier; (b) doing a search on UK timeframes; or (c) urging expedition.

20 16 None of these steps were steps which UK law required of a person seeking renunciation. The evidence does not establish that any of them would have produced a different outcome in her case.

SGWS: [44] – [53].

Dated: 14 March 2018


JUSTIN GLEESON SC

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