IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR KATY GALLAGHER (C32/2017)

Date referred to Full Court: 14 February 2018

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes is (in s 44(i)) being a subject or a citizen of a foreign power.

Senator Katy Gallagher was sworn in as a Senator for the Australian Capital Territory on 26 March 2015, filling a vacancy left by the resignation of Senator Kate Lundy. In May 2015, the Australian Labor Party, ACT Branch, pre-selected Senator Gallagher as a candidate for the position of ACT Senator in an upcoming election. The Prime Minister called a double dissolution election to be held on 2 July 2016.

On 31 May 2016 Senator Gallagher was nominated in a group of ACT candidates endorsed by the ALP for the Senate for the general election to be held on 2 July 2016. Senator Gallagher was then returned as a Senator for the ACT after the election.

Senator Gallagher was born in Australia in 1970 and has been an Australian citizen from birth. Her father was born in England in 1939 of an Irish-born father and an English-born mother. Her mother was born in Ecuador in 1943 of UK-born parents. Senator Gallagher's parents married in England on 17 December 1966.

Unbeknown to Senator Gallagher, at the time of her birth she had acquired the status of a Citizen of the United Kingdom and Colonies by descent. On commencement of the *British Nationality Act 1981* (UK), citizens with Senator Gallagher's status were re-classified as British citizens.

On 20 April 2016, having become aware that there was a possibility of her having British citizenship, Senator Gallagher applied to renounce any British citizenship she may have held by submitting the prescribed form (together with some accompanying documents and an authority to debit her credit card for the requisite renunciation fee) to the UK Home Office. On 6 May 2016, the fee was debited by the Home office from her credit facility. On 20 July 2016, Senator Gallagher received a letter dated 1 July 2016 from the Home Office. It acknowledged receipt of the Declaration of Renunciation of British citizenship and said "Before we can proceed further please send us all of the following original documents …by 1/08/16". The documents specified included 'evidence that you are a British citizen' or "alternatively if you are a British citizen by descent…please provide the relevant certificates of birth…and marriage to establish a claim…". Ms Gallagher wrote back to the Home Office on 20 July 2016 supplying the original versions of her own and her father's Birth Certificates and her parents' Marriage Certificate.

Senator Gallagher's renunciation was registered by the Home Office on 16 August 2016. The issue is whether, her UK citizenship not having been renounced until then, Senator Gallagher was under the disability of s 44(i) of the Constitution by remaining a British citizen at the time of her nomination and her subsequent election.

The following questions were transmitted to the High Court by the Senate on 7 December 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of the Australian Capital Territory in the Senate for the place for which Katy Gallagher was returned;

(b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(d) what, if any, orders should be made as to the costs of these proceedings.

On 14 February 2018 the Chief Justice directed that the questions referred by the Senate be set down for a hearing by the Full Court of the High Court on 14 March 2018.

A Notice of a Constitutional Matter has been filed by Senator Gallagher.

It is common ground in the proceedings that notwithstanding that Senator Gallagher's paternal grandfather was born in Ireland and her mother was born in Ecuador, there are no issues of Senator Gallagher's having a disability under s 44(i) of the Constitution in regard to those matters.

Each of the parties has sought the advice of an expert on British citizenship. The essential difference between the experts is as to whether the Home Office was obliged (and could have been compelled by mandatory order) to register the Declaration of Renunciation based on the documents sent by Senator Gallagher on 20 April 2016 without asking for further documents, or whether the Home Office was entitled to seek further evidence from Senator Gallagher and was therefore not obliged to, and could not have been compelled to, register her renunciation before that evidence was provided. .

The Commonwealth Attorney-General submits that given that it is conceded that Senator Gallagher was a British citizen when she nominated and was elected, the issue is whether the exception to the ordinary operation of s 44 (i) identified by the High Court in *Re Canavan* applies, such that she was capable of being chosen notwithstanding that she was a British citizen during the process of choice. It is argued that *Re Canavan* is authority for the proposition that it is necessary to read s 44(i) as subject to an 'implicit qualification' that where the operation of foreign law makes it impossible, or not reasonably possible, to renounce their foreign citizenship, a candidate can avoid the strict (disqualification) effect of s 44(i). It is not the reasonableness of the steps which a candidate takes which can relieve them from

the disqualification provision of s 44(i) but rather the reasonableness of the foreign law setting out those steps. It follows that "except in cases where the renunciation is impossible or not really achievable, then it is always achievable. If achievable it should be achieved."

Alternatively, even if it is necessary to determine whether Senator Gallagher took all reasonable steps prior to nomination, she failed to do so as she did not allow reasonable time (she did not apply until over one year after she was pre-selected as a candidate) nor did she ask for expedition of her application, nor did she supply sufficient documents to the Home Office to oblige it to register the renunciation without further enquiry.

Alternatively, even if it is necessary to determine whether Senator Gallagher took all reasonable steps prior to nomination, she failed to do so as she did not allow reasonable time (she did not apply until over one year after she was pre-selected as a candidate) nor did she ask for expedition of her application, nor as Mr Fransman has advised, did she supply sufficient documents to the Home Office to oblige it to register the renunciation without further enquiry.

Senator Gallagher submits that it is common ground between the experts that the material provided by Senator Gallagher on 20 April 2016 was "sufficient" there and then to satisfy the requirements imposed by the law of Britain for cessation of her citizenship and that her renunciation was "in the correct form". The dispute between the experts is whether it merely became "open" to the Home Office to allow an indefinite period in which the Home Office could exercise a "wide discretion" to consider the quality of information provided and requisition further information if desired, or whether Senator Gallagher had an entitlement there and then to have her citizenship terminated, enforceable by a mandatory order.

Senator Gallagher submits that by no later than 6 May 2016 (when the fee was debited), she "had taken *every* step, as a matter of British law, to terminate her citizenship" by the nomination date. The *Re Canavan* parties are distinguishable because they had taken "no step" to terminate their citizenship by the nomination date. Those parties invoked "reasonable steps" to seek to excuse taking *any* steps. The test in *Re Canavan* was not expressed as a reasonable steps test but rather as follows: "where it can be demonstrated that the person has taken all steps that are reasonably required… and are within his or her power." Further that: "the Attorney-General's interpretation of the test wrongly diverts its focus *away* from what is required by foreign law and what is within the power of a citizen; towards what is *not required* by foreign law and what *rests within* the power of a foreign official. It is argued that the unsatisfactory logic of the Attorney-General's case is that potential candidates cannot know if they can take up their prima facie legal qualification to nominate until all the discretionary processes which are not "within their power" are exhausted. This allows for discriminatory outcomes and would be an example of "where the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government" (*Re Canavan*").