



## HIGH COURT OF AUSTRALIA

8 June 2022

ALEXANDER v MINISTER FOR HOME AFFAIRS & ANOR  
[2022] HCA 19

Today, the High Court answered questions stated in a special case concerning the validity of s 36B of the *Australian Citizenship Act 2007* (Cth). Section 36B empowered the Minister for Home Affairs to determine that a person ceases to be an Australian citizen if satisfied, among other matters, that the person engaged in certain proscribed conduct, including engaging in foreign incursions and recruitment, which demonstrated that the person had repudiated his or her allegiance to Australia. The provision was challenged on grounds including that it was not supported by the power of the Parliament to make laws with respect to "naturalization and aliens" under s 51(xix) of the *Constitution*, and that it was incompatible with Ch III of the *Constitution*.

The plaintiff was born in Australia and acquired Australian citizenship by birth. He also acquired, and still holds, Turkish citizenship by descent. In April 2013, the plaintiff departed Australia for Turkey and, at some point, travelled into Syria. A Qualified Security Assessment ("QSA") provided by the Australian Security Intelligence Organisation to the Minister in June 2021 stated that the plaintiff had joined the Islamic State of Iraq and the Levant, which was a designated "terrorist organisation", by August 2013, and that he had likely engaged in foreign incursions and recruitment by entering or remaining in al-Raqqa Province in Syria, a "declared area", on or after 5 December 2014. In July 2021, the Minister made a determination pursuant to s 36B of the *Citizenship Act*, relying in part on the information provided in the QSA, that the plaintiff ceased to be an Australian citizen. The determination stated that the Minister was satisfied that: the plaintiff had engaged in foreign incursions while outside Australia, which demonstrated a repudiation of his allegiance to Australia; that it would be contrary to the public interest for him to remain an Australian citizen; and that he would not become stateless by reason of the determination.

In answer to the questions stated, a majority of the High Court held that s 36B of the *Citizenship Act* was supported by the aliens power, but that it was invalid on the basis that it reposed in the Minister the exclusively judicial function of adjudging and punishing criminal guilt. Some members of the majority reasoned that it was open to Parliament under s 51(xix) of the *Constitution* to make a law for the exclusion of a person from membership of the body politic for conduct inimical to Australia's interests, so as thereby to make that person an alien. But some members of the majority held that the principal purpose of s 36B was to effect retribution for conduct deemed so reprehensible as to be incompatible with the shared values of the Australian community; and the substantive effect of the Minister's determination under s 36B(1) was to deprive the plaintiff of his entitlement to enter and live at liberty in Australia. This purpose and effect of the law was punitive in character; and in accordance with Ch III of the *Constitution*, the power to determine the facts which enlivened s 36B was exercisable exclusively by a court that is part of the federal judicature. Two Justices reached the same conclusion that s 36B had a punitive character; it conferred power on the Minister to cease citizenship as a sanction for past conduct, akin to historical forms of punishment, with significant consequences for the individual.

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- *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.*