# Subjects of a foreign power

Diana Tang reports on the s 44 cases, Re: Canavan; Re: Ludlam; Re: Waters; Re: Roberts (No 2); Re: Joyce; Re: Nash; Re: Xenophon [2017] HCA 45

## Background

After the federal election in July 2016, questions arose concerning the qualifications of six senators (Senator the Hon Matthew Canavan, Mr Scott Ludlam, Ms Larissa Waters, Senator Malcolm Roberts, Senator the Hon Fiona Nash, Senator Nick Xenophon) and one member of the House of Representatives (the Hon Barnaby Joyce MP) to be chosen or to sit as a member of parliament by reason of holding dual citizenship, and whether by reason of s 44(i) of the Constitution, there was a vacancy in the place for which each person was returned. The questions were referred to the High Court sitting as the Court of Disputed Returns. The answer turned on the proper construction of s 44(i) of the Constitution.

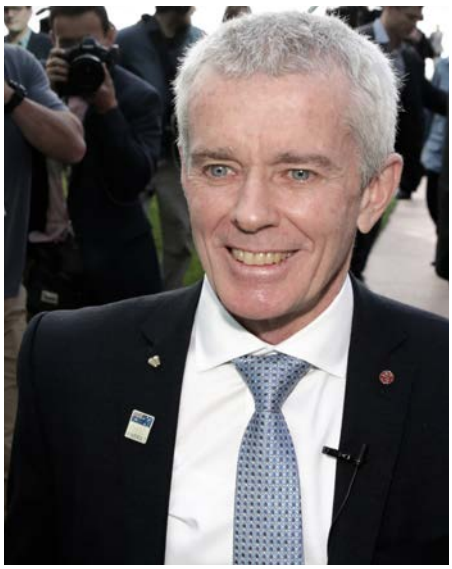
Section 44(i) of the Constitution provides:

> Any person who:
>
> is under any acknowledgement 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.

There was material to suggest that each of the senators and member of House of Representatives held dual citizenship at the date they nominated for election. However, at the time, they each believed that they were Australian citizens only and were unaware of circumstances that made them dual citizens.[1] The submissions made by the parliamentarians therefore focussed on an interpretation of s 44(i) which requires a degree of knowledge of foreign citizenship by the individual, and that s 44(i) would disqualify them where the individual fails to take reasonable steps to renounce that citizenship.[2]

The court rejected those submissions and favoured the approach put forward by the amicus appearing in the references for Senators Canavan, Nash and Xenophon, and Mr Windsor.[3] The court held that s 44(i) operates to render 'incapable of being chosen or of sitting' persons who have by voluntary act acquired foreign citizenship, or have the status of subject or citizen of a foreign power.

Whether a person has the status of foreign subject or citizen is determined by foreign law. Proof of a candidate's knowledge of their foreign citizenship status (or of facts that might put a candidate on inquiry as to the possibility that they are a foreign citizen) is not necessary to bring about disqualification under s 44(i).



Senator Malcolm Roberts at Parliament House in Canberra on Wednesday 9 August 2017.
Photo: Andrew Meares / Fairfax Photos

A person who, at the time they nominate for election, retains the status of subject or citizen of a foreign power will be disqualified by s 44(i). The only exception is where the operation of foreign law makes it impossible or not reasonably possible to renounce foreign citizenship, such that 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. In those circumstances, where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law and within their power to renounce their citizenship, they will not be disqualified by s 44(i).[4]

The court considered this approach adhered most closely to the ordinary and natural meaning of s 44(i) and to the majority decision in *Sykes v Cleary* (1992) 176 CLR 77 where the court previously considered s 44(i). It was also consistent with the drafting history and avoided the uncertainty and instability that an inquiry into an individual's knowledge of foreign citizenship would create.[5]

## Interpretation of s 44(i)

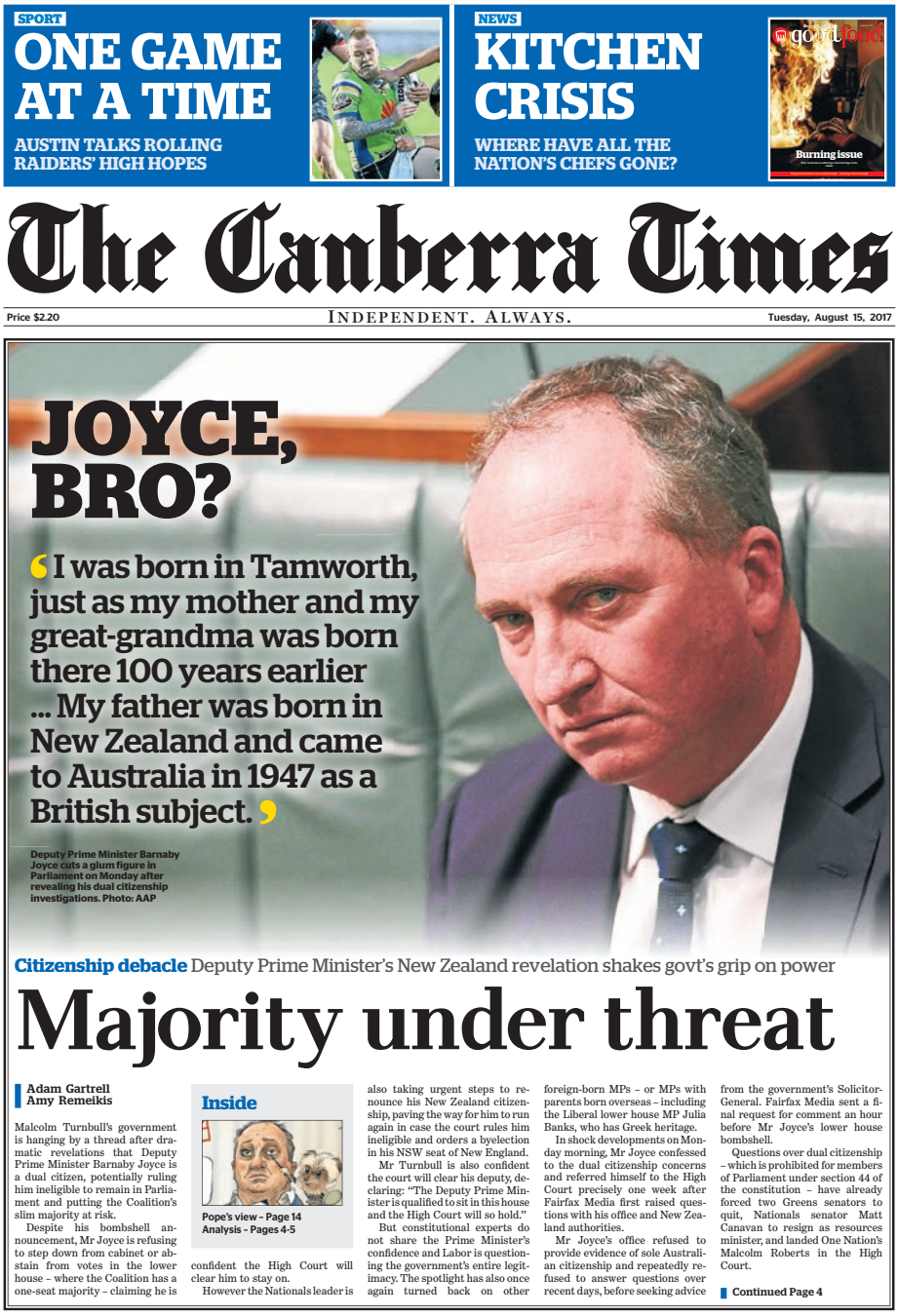
As a starting point, the court held that the relevant time of inquiry for the application of s 44(i) is the date of nomination for election. This arose from the words in s 44, 'shall be incapable of being chosen', as nomination is an essential part of the process of being chosen.[6]

Then, looking at the text and structure of s 44(i), the court concluded that s 44(i) consists of two limbs of disqualification.[7] The first limb disqualifies a person 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power', where 'under any acknowledgment' captures any person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and has not withdrawn that acknowledgment, and 'acknowledgment' connotes an exercise of the person's will.[8] The second limb disqualifies a person on the basis of a state of affairs existing under foreign law, being the status of subjecthood or citizenship or the existence of the rights or privileges of subjecthood or citizenship.[9]

As none of the circumstances of the persons referred concerned voluntary acts of allegiance within the first limb, the court focussed on the second limb.

The court recognised that the purpose of s 44(i) was to ensure that members of parliament did not have a split allegiance.[10] The court observed that the first limb achieved this by looking to the person's conduct. In contradistinction, the second limb is not concerned with the person's conduct, but instead looks at the existence of a duty to a foreign power as an aspect of the status of citizenship.[11] Such an interpretation was consistent with the drafting history, which could not support a narrower purpose sufficient to constrain the ordinary and natural meaning of s 44(i).[12] Moreover, the drafting history did not demonstrate that the mischief s 44(i) sought to address focussed exhaustively on an 'act' done by a person.[13]

The court held that whether a person has the status of a subject or a citizen of a foreign power necessarily depends upon the relevant foreign law.[14] This was because only the foreign law could be the source of the status or of the rights and duties involved in that status.[15] However, following *Sykes v Cleary*, foreign law could not be determinative of the operation of s 44(i).[16] An Australian court would not apply s 44(i) to disqualify a person by reason of foreign citizenship if to do so would under-



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JOYCE, BRO?

'I was born in Tamworth, just as my mother and my great-grandma was born there 100 years earlier ... My father was born in New Zealand and came to Australia in 1947 as a British subject.'

Deputy Prime Minister Barnaby Joyce cuts a glum figure in Parliament on Monday after revealing his dual citizenship investigations. Photo: AAP

**Citizenship debacle** Deputy Prime Minister's New Zealand revelation shakes govt's grip on power

Majority under threat

Adam Gartrell
Amy Remeikis

Malcolm Turnbull's government is hanging by a thread after dramatic revelations that Deputy Prime Minister Barnaby Joyce is a dual citizen, potentially ruling him ineligible to remain in Parliament and putting the Coalition's slim majority at risk.

Despite his bombshell announcement, Mr Joyce is refusing to step down from cabinet or abstain from votes in the lower house – where the Coalition has a one-seat majority – claiming he is confident the High Court will clear him to stay on.

However the Nationals leader is also taking urgent steps to renounce his New Zealand citizenship, paving the way for him to run again in case the court rules him ineligible and orders a byelection in his NSW seat of New England.

Mr Turnbull is also confident the court will clear his deputy, declaring: "The Deputy Prime Minister is qualified to sit in this house and the High Court will so hold."

But constitutional experts do not share the Prime Minister's confidence and Labor is questioning the government's entire legitimacy. The spotlight has also once again turned back on other foreign-born MPs – or MPs with parents born overseas – including the Liberal lower house MP Julia Banks, who has Greek heritage.

In shock developments on Monday morning, Mr Joyce confessed to the dual citizenship concerns and referred himself to the High Court precisely one week after Fairfax Media first raised questions with his office and New Zealand authorities.

Mr Joyce's office refused to provide evidence of sole Australian citizenship and repeatedly refused to answer questions over recent days, before seeking advice from the government's Solicitor-General. Fairfax Media sent a final request for comment an hour before Mr Joyce's lower house bombshell.

Questions over dual citizenship – which is prohibited for members of Parliament under section 44 of the constitution – have already forced two Greens senators to quit, Nationals senator Matt Canavan to resign as resources minister, and landed One Nation's Malcolm Roberts in the High Court.

Continued Page 4

Inside



Pope's view – Page 14
Analysis – Pages 4-5

Canberra Times, 15 August 2017 / Fairfax

mine the system of representative government established under the Constitution.[17] The intent of the Constitution ('the constitutional imperative') is that people of the Commonwealth who are qualified to become members of parliament are not, except perhaps in the case of treason within s 44(ii), to be irremediably disqualified.[18] That is, the role of foreign law in s 44(i) could not be interpreted so as to prevent an Australian citizen who has taken all reasonable steps to renounce the status, rights and privileges carrying the duty of allegiance or obedience from standing for election to parliament.[19]

The court rejected the approaches put forward by the parliamentarians that s 44(i) only operates if the candidate knows of the disqualifying circumstance. While those approaches echoed Deane J in *Sykes v Cleary,* the text and structure of s 44(i) did not support it.[20] The court considered that such an interpretation involved a substantial departure from the ordinary and natural meaning of the text of the second limb.[21] Further, such an interpretation would be inimical to the stability of representative government. The court observed that if s 44(i) operated only where the candidate knew of the disqualifying circumstance, it would present conceptual and practical difficulties. Conceptually, there would be difficulties in determining the nature and extent of knowledge necessary before a candidate will be held to have failed to take reasonable steps to free themselves of foreign allegiance.[22] Practically, there would be difficulty in proving or disproving a candidate's state of mind.[23] Accordingly, the degree of uncertainty that would be introduced by a knowledge requirement would tend to undermine stable representative government, weighing against such an interpretation.

The court also held that s 44(i) is not concerned with whether the candidate has been negligent in failing to comply with its requirements.[24] The court considered that s 44(i) is cast in peremptory terms and the reasonableness of steps taken to ascertain whether disqualifying circumstances exist is immaterial to the operation of s 44(i).[25]

### Application to the facts

The court made individual rulings in respect of each of the parliamentarians. The outcome for four of the parliamentarians was as follows.

**Senator Canavan**[26] – At the time Senator Canavan was nominated for election, he believed he was a citizen of Australia only. The court had to determine whether, at the date of his nomination, Senator Canavan was an Italian citizen by descent. Senator Canavan was born in Australia and his only link to Italy was through his maternal grandparents, who were born in Italy. Senator Canavan had never visited Italy or taken steps to acquire Italian citizenship. However, in 2006, his mother had applied for Italian citizenship for herself, and as a result Senator Canavan was registered by the Italian consulate as an 'Italian citizen abroad'. The joint expert report on Italian citizenship laws explained that Senator Canavan's status as an Italian citizen more likely arose through his maternal grandmother, not from his mother's application for Italian citizenship, because at the date of his mother's birth, his grandmother was an Italian citizen. The joint report also stated that registration as a citizen was a 'separate and more rigorous process' and could be distinguished from a declaration of Italian citizenship. From this, the court concluded that the reasonable view of Italian law was that Italian citizenship requires the taking of positive steps (outlined in the joint report) as conditions precedent to citizenship. Senator Canavan had not taken any such steps. On that basis, the court could not be satisfied that Senator Canavan was an Italian citizen. The court concluded that there was no vacancy in the representation of Queensland in the Senate for the place for which Senator Canavan was returned.

**Senator Malcolm Roberts**[27] – At the time Senator Roberts was nominated, Senator Roberts stated he was an Australian citizen by naturalisation and not incapable of being chosen by virtue of s 44(i). This was the only case with disputed facts. Justice Keane determined the facts in Re Roberts [2017] HCA 39. The facts as found were that Senator Roberts' father was born in Wales, and Senator Roberts was born in India in 1955. From evidence of British citizenship law, Keane J found that, by virtue of his father's nationality, Senator Roberts was born a 'citizen of the United Kingdom and colonies' at the time of his

birth. The evidence turned on Mr Roberts' efforts to identify his citizenship status and to renounce his British Citizenship before and after his nomination and election, and in particular, whether an email sent to the British High Commission on Australia was sufficient renunciation of citizenship. Justice Keane J held that it was not.[28] Justice Keane also found that Senator Roberts knew there was at least a real and substantial prospect that prior to May 1974, when Senator Roberts acquired Australian citizenship, he had been and remained thereafter a citizen of theUK until the registration of his declaration of renunciation of citizenship after his nomination for election.[29] In so finding, Justice Keane quoted Mr Roberts' evidence and made a pertinent observation as to the practical operation of the second limb of s 44:[30]

> 'At the time of my nomination I considered myself Australian and only Australian. This is my sincere belief based upon having grown up in Australia, our family culture and the fact that I had always had an Australian and only an Australian passport. I felt that I had done everything I could think of to rule out any possibility of me unknowingly being a citizen of either India or Britain.'
>
> During the course of his cross-examination, Senator Roberts referred on several occasions to this evidence as the foundation of his claim to be, and always to have been, an Australian and only an Australian. This evidence is the clearest statement of the basis for Senator Roberts' claim that he was not a British citizen at the date of his nomination. Several points may be made here. First, Senator Roberts equates feelings of Australian self-identification with citizenship, and so confuses notions of how a person sees oneself with an understanding of how one's national community sees an individual who claims to be legally entitled to be accepted as a member of that community.

On the basis of these findings the court concluded that Senator Roberts was incapable of being chosen or sitting as a senator under s 44(i) and there was a vacancy in the representation of Queensland in the Senate for the place for which Senator Roberts was returned.

**The Hon Barnaby Joyce MP** – Mr Joyce was nominated for election to the Senate in 2004 and nominated for election to the House of Representatives in 2016. At both times, Mr Joyce believed he was a citizen of Australia only. Mr Joyce's father was a New Zealand citizen and only naturalised as an Australian citizen in 1978. At the time of Mr Joyce's birth in 1967, his father was a New Zealand citizen, and under New Zealand law, Mr Joyce was a New Zealand citizen by descent. As with Mr Ludlum, Mr Joyce's status as a New Zealand citizen could only be lost by renunciation or, in limited circumstances, ministerial order. Mr Joyce had not renounced his New Zealand citizenship prior to his nominations. The court concluded that Mr Joyce was incapable of being chosen or sitting as a member of the House of Representatives and so the place of the member for New England in the House of Representatives was vacant.

**Senator Nick Xenophon** – Senator Xenophon had always considered himself to be an Australian citizen. Senator Xenophon's mother was born in Greece, and his father was born in Cyprus. Prior to Senator Xenophon's first election to the Senate in 2007, Senator Xenophon renounced any entitlement he might have to Greek or Cypriot citizenship. Following enquiries arising from the 2016 election, it became clear that Senator Xenophon was a 'British overseas citizen' (BOC) at the date of his nomination by descent, consequent on Cyprus being in British possession at the time of Senator Xenophon's father's birth. The court considered whether a BOC is a 'subject or a citizen of a foreign power' or a person 'entitled to the rights or privileges of a subject or a citizen of a foreign power' within s 44(i). Following changes to British citizenship laws, Senator Xenophon became a citizen of the UK and colonies by descent without a right of abode in the UK at birth, and following further changes was reclassified as a BOC and remained a BOC at the time of nomination. Senator Xenaphon had never been issued with a BOC passport and never received British consular services. The evidence of British citizenship law before the court was that BOC is a residuary form of nationality different from citizenship. Importantly, BOC status does not confer any right of abode, one of the main characteristics of nationality under international law. It was also relevant that a BOC is not required to pledge loyalty to the UK. The court concluded that BOC status does not confer rights or privileges of a citizen as that term is generally understood. Senator Xenophon was not a subject or citizen of the UK at date of nomination, nor was he entitled to the rights and privileges of a subject or citizen of the UK, and so there was no vacancy in the representation of South Australia in the Senate for the place for which Senator Xenophon was returned.

### Filling the vacancies

For Senator Nash, Senator Roberts, Mr Ludlam and Ms Waters, the court determined there was no need to take a further poll. In each case, votes cast 'above the line' in favour of the party that nominated the candidate were to be counted in favour of the next candidate on the party's list.[31]

For Mr Joyce, the election was void. A by-election was required to elect a member for New England, which Mr Joyce won.[32]

Ms Hollie Hughes was the candidate determined by the special count to be entitled to be elected to the place left unfilled by Ms Nash. However, an issue arose as to whether Ms Hughes was 'incapable of being chosen' by s 44(iv) of the Constitution as holding 'an office of profit under the Crown'. The court dealt with this issue in *Re Nash* [No 2] [2017] HCA 52, finding that her position as part-time member of the Administrative Appeals Tribunal rendered her incapable of being chosen as a Senator.

## END NOTES

1 The only reference in which there were contested issues of fact was concerning Senator Roberts. Those issues were resolved at a hearing before Keane J in Re Roberts [2017] HCA 39.
2 *Re Canavan*, [13]-[19].
3 Mr Kennett SC was appointed amicus curiae in respect of the three Senators that had not resigned their seat, or in respect of whom there was not an effective contradictor (Mr Windsor had joined the reference concerning Mr Joyce MP and there were contested questions of fact concerning Senator Roberts).
4 *Re Canavan*, [71]-[72].
5 *Re Canavan*, [19].
6 *Re Canavan*, [3].
7 In *Sykes v Cleary* (1992) 176 CLR 77, Brennan J considered there were three categories of disqualification in s 44(i). In *Re Canavan*, the court did not consider that much turned on the difference in analysis as set out by Brennan J and the two limb approach put forward by the amicus in the present case, however adopted the two-limb classification for the sake of clarity: [23].
8 *Re Canavan*, [21].
9 *Re Canavan*, [23].
10 *Re Canavan*, [24].
11 *Re Canavan*, [25]-[26].
12 *Re Canavan*, [27].
13 *Re Canavan*, [35], [36].
14 *Re Canavan*, [37].
15 *Re Canavan*, [37]
16 *Re Canavan*, [39].
17 *Re Canavan*, [39].
18 *Re Canavan*, [43].
19 *Re Canavan*, [44]-[46].
20 *Re Canavan*, [49]-[53].
21 *Re Canavan*, [47].
22 *Re Canavan*, [55]-[57].
23 *Re Canavan*, [58]-[59].
24 *Re Canavan*, [61].
25 *Re Canavan*, [61].
26 *Re Canavan*, [74]-[87].
27 *Re Canavan*, [99]-[103].
28 *Re Roberts* [2017] HCA 39 at [98], [102].
29 *Re Roberts*, [116].
30 *Re Roberts*, [110].
31 *Re Canavan*, [136]-[138].
32 *Re Canavan*, [139].