Ch III: The exclusively judicial function of adjudgment or punishment of criminal guilt

Benbrika v Minister for Home Affairs [2023] HCA 33

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The High Court has unanimously affirmed that ch III of the *Constitution* has the consequence that the Commonwealth Executive cannot be empowered to punish criminal guilt, even if that punishment is separated from the adjudgment of criminal guilt.

Accordingly, six members of the court held that s 36D of the *Australian Citizenship Act 2007* (Cth) ('*the Citizenship Act*'), which purported to empower revocation by the Minister of a person's citizenship following conviction of certain offences, is invalid because it reposed in the Minister the exclusively judicial function of punishing criminal guilt.

The statutory scheme: 'Citizenship cessation determinations'

Section 36D appeared in sub-div C of div 3 of pt 2 of the *Citizenship Act*, headed 'Citizenship cessation determinations'. Section 36A explained the purpose of the sub-div:

> This Subdivision is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

Section 36D(1) was expressed to confer a personal power on the Minister to determine that a person ceases to be an Australian citizen. The conditions upon which the power conferred by s 36D(1) could purportedly be exercised were principally that:

(a) the person had been convicted of certain offences (including offences relating to terrorism specified in pt 5.3 of the *Criminal Code* (*Criminal Code Act 1995* (Cth) sch 1)) in respect of which the person has been sentenced to a specified period or periods of imprisonment;

(b) the Minister was satisfied that the person's conduct to which the conviction or convictions related demonstrated repudiation of the person's allegiance to Australia; and

(c) the Minister was satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

Section 36B also appeared in the 'Citizenship cessation determinations' sub-div. Section 36B conferred an essentially identical power to that conferred by s 36D, save that whereas the central condition of s 36D was that the person had previously been convicted and sentenced (by a court) for the specified offences, for s 36B it was merely that the Minister was satisfied that the person has engaged in conduct which satisfied the physical elements of certain offences.

Background: *Lim* and *Alexander*

Mr Benbrika's successful challenge to s 36D stood on, and must be understood in light of, two earlier decisions: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*') and *Alexander v Minister for Home Affairs* [2022] HCA 19 ('*Alexander*').

In *Lim*, Brennan, Deane and Dawson JJ (with whom Gaudron J relevantly agreed) considered whether provisions of the *Migration Act 1958* (Cth) providing for the mandatory detention and removal of certain aliens invalidly reposed judicial power in the Executive. Their Honours relevantly observed that it was 'well settled' that, under the *Constitution*, the Parliament cannot confer any part of the judicial power of the Commonwealth on the Executive: at 26–27. Their Honours continued to hold ('*Lim* principle'):

> There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. *The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth.* That function appertains exclusively to and 'could not be excluded from' the judicial power of the Commonwealth. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the subsections of s 51 of the Constitution, of any law purporting to vest *any part* of that function in the Commonwealth Executive. (emphasis added)

In *Alexander*, being a successful challenge

based on the *Lim* principle to s 36B of the *Citizenship Act*, the court held that involuntary deprivation of Australian citizenship is readily characterised as a form of punishment, having regard to the nature and severity of the consequences of that deprivation (at [70]–[79], [98], [116], [170], [248]–[249]) – being the loss of person's entitlement to enter, be at liberty within and to treat Australia as home. In so doing, the plurality rejected the Commonwealth's argument that the *Lim* principle said nothing about laws empowering consequences otherwise than detention in custody, like denationalisation: at [67].

The plurality in *Alexander* also held that s 36B of the *Citizenship Act* contravened the *Lim* principle. As much was reflected in the statement of legislative purpose in s 36A, which Gordon J, for example, saw as confirming that revocation under s 36B 'is a [punitive] measure taken in the name of society to exact just retribution on those who have offended against the laws of society by engaging in past conduct that is identified and articulated wrongdoing': at [163]; see also [70], [82], [120], [251].

Benbrika: the application of *Lim* and *Alexander*

Mr Benbrika argued that s 36D was indistinguishable from s 36B. Forming part of the same statutory scheme, it empowered the Minister to impose the same consequence for the same purposes: at [26]. Accepting the force of this submission, in light of *Alexander*, the Commonwealth conceded that s 36D was properly characterised as punitive.

However, seeking to resist the consequence of that concession, the Commonwealth advanced two submissions — each of which was rejected by the plurality. (Steward J dissented because of his Honour's differing view as to how s 36D ought be construed, but agreed with the plurality's exposition of principle: at [139].)

First, the Commonwealth argued that the *Lim* principle applies only to a law which authorises the Executive to engage in the adjudgment *and* punishment of criminal guilt (like s 36B), as distinct from a law which authorises the Executive to engage in the adjudgment or punishment of criminal guilt (like s 36D): at [28]. That is, the Commonwealth argued that the *Lim* principle is conjunctive, rather than disjunctive.

This was rejected as inconsistent with *Lim* itself, which enunciated the principle that 'any part' the function of adjudging and punishing criminal guilt was committed exclusively to the judiciary: at [31]–[41], [54]–[69], [85]–[96]. The balance of the reasoning in *Lim* also assumed as much (see especially *Lim*: at 27); so too had subsequent decisions, including *Falzon v MIBP* (2018) 262 CLR 333 (at [15]–[16], [88]). Beyond the precedential force of *Lim*, the plurality explained that acceptance of the Commonwealth's first argument would undermine the fundamental constitutional values that underpin the separation of powers, viz, liberty and the rule of law: at [36]–[37], [66]–[67], [86]–[87].

Second, in the alternative, the Commonwealth argued that though deprivation of citizenship consequent upon a finding of criminal guilt by a court might be characterised as a form of punishment, it should not, having regard to historical and functional considerations, be seen to be an exclusively judicial form of punishment.

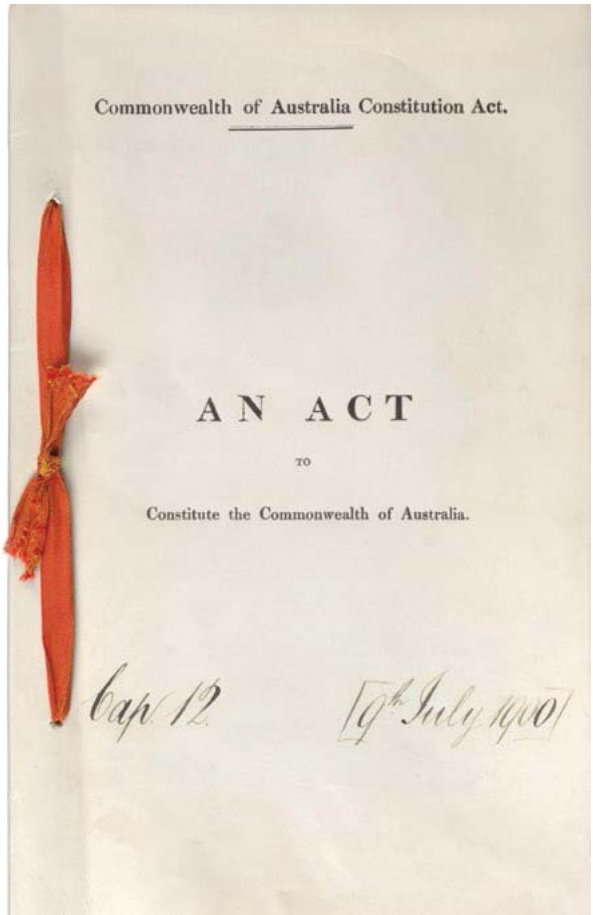
The essence of this argument, insofar as it relied on history, was that there was no precedent for a court being empowered to terminate a person's citizenship, whereas there were precedents for automatic legislative termination following criminal convictions: at [29]. Accepting history as relevant albeit not determinative (at [44], [75]), the plurality rejected the Commonwealth's historical analysis — remarking on the paucity and inconsistency of historical precedents (at [46]–[47]), or finding them to tend against the Commonwealth's submission given the involvement of courts in the relevant historic deprivation (at [71], [97]).

Insofar as it relied on functional considerations, the Commonwealth's submission was that the Executive was better placed to evaluate whether to terminate a person's citizenship was in the public interest than a court: at [29]. This too was rejected by the plurality, the joint judgment observing that there was no reason why considerations unique to the Executive could not be accommodated 'within the curial paradigm by the simple and common legislative expedient of requiring Executive application or certification as a precondition to a court making an order for cessation of citizenship as a component of the punishment the court might impose as a consequence of conviction of an offence': at [48], see also [72].

Foreshadowing what was to come

The outcome in *Benbrika* was in many ways unsurprising. The court affirmed and strictly applied what had been said in *Lim* (and *Alexander*), and in doing so, explicated the constitutional rationale for that strictness. The outcome foreshadowed what would occur just days later in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, when the court overturned the decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 on the basis of the *Lim* principle.

On 8 December 2023, the *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (Cth) replaced div 3 of pt 2 of the *Citizenship Act* with a scheme modelled on 'the simple and common legislative expedient' to which the joint judgment referred. **BN**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Cap. 12 9th July 1900