HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

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

Re Gallagher
[2018] HCA 17
9 May 2018
C32/2017

ORDER

The questions referred to the Court of Disputed Returns by the Senate be answered as follows:

Question (a)

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

Answer

Yes.

Question (b)

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

Answer

The vacancy should be filled by a special count of the ballot papers. Any direction necessary to give effect to the conduct of the special count should be made by a single Justice.

Question (c)

What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?

Answer

Unnecessary to answer.

Question (d)

What, if any, orders should be made as to the costs of these proceedings?

Answer

Unnecessary to answer.

Representation

J T Gleeson SC with J E Mack appearing on behalf of Senator Gallagher (instructed by Maurice Blackburn Lawyers)

S P Donaghue QC, Solicitor-General of the Commonwealth with P D Herzfeld and J D Watson appearing on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Re Gallagher

Constitutional law (Cth) – Parliamentary elections – Senate – Questions referred to Court of Disputed Returns by Senate – Where senator was foreign citizen at date of nomination for election – Where renunciation of foreign citizenship registered after return as duly elected senator – Whether senator disqualified by reason of s 44(i) of Constitution because of foreign citizenship – Whether foreign law irremediably prevented participation in representative government.

Words and phrases – "a subject or a citizen … of a foreign power", "constitutional imperative", "incapable of being chosen", "irremediably prevent".

Constitution, s 44(i).

1 KIEFEL CJ, BELL, KEANE, NETTLE AND GORDON JJ. On 31 May 2016 Senator Katy Gallagher lodged her nomination as a candidate for election to the Senate in the federal election to be held on 2 July 2016. Senator Gallagher had already served as a senator from 26 March 2015, having filled a vacancy left by the resignation of a senator. On 2 August 2016 Senator Gallagher was returned as a duly elected senator for the Australian Capital Territory.

2 Section 44(i) of the Constitution in relevant part provides:

> "Any person who:
>
> (i) is under any acknowledgment 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; …
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> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

3 The temporal focus for the purposes of s 44(i) is on the date of nomination as the date on and after which s 44(i) applies until the completion of the electoral process[1]. That is because the words in s 44 "shall be incapable of being chosen" refer to the process of being chosen, of which nomination is an essential part[2].

4 It is not in dispute that on and after the date of her nomination for election as a senator, Senator Gallagher was a British citizen. It follows that Senator Gallagher was a citizen of a foreign power within the meaning of s 44(i)[3]. Senator Gallagher retained that status until 16 August 2016, when her declaration of renunciation of that citizenship was registered by the Home Office of the United Kingdom.

5 On 6 December 2017 the Senate resolved that certain questions respecting a vacancy in the representation of the Australian Capital Territory in the Senate, for the place for which Senator Gallagher was returned, should be referred to the

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1 *Re Canavan* (2017) 91 ALJR 1209 at 1213 [3]; 349 ALR 534 at 537; [2017] HCA 45.

2 *Sykes v Cleary* (1992) 176 CLR 77 at 100-101; [1992] HCA 60.

3 *Sue v Hill* (1999) 199 CLR 462 at 492 [65]; [1999] HCA 30.

Court of Disputed Returns. On 7 December 2017, pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth), the President of the Senate transmitted the following questions for the determination of the Court of Disputed Returns:

(a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation for 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.

6 The Commonwealth Attorney-General and Senator Gallagher were each deemed to be a party to the reference pursuant to orders made by Kiefel CJ[4] and made submissions as to the questions.

Sykes v Cleary; *Re Canavan*

7 The words "subject" and "citizen" of a foreign power, which appear in s 44(i), connote the existence of a state of affairs involving the existence of a status, or of rights referable to such a status, under the law of the foreign power[5]. The second limb of s 44(i) is concerned with the existence of a duty by a person to a foreign power as an aspect of the status of citizenship[6].

8 In *Re Canavan*[7] this Court held that, subject only to an implicit qualification in s 44(i), to which reference will shortly be made, the words of

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4 *Commonwealth Electoral Act* 1918 (Cth), s 378.

5 *Sykes v Cleary* (1992) 176 CLR 77 at 107, 110, 131; *Re Canavan* (2017) 91 ALJR 1209 at 1215 [21]; 349 ALR 534 at 540.

6 *Sykes v Cleary* (1992) 176 CLR 77 at 109-110; *Re Canavan* (2017) 91 ALJR 1209 at 1216 [26]; 349 ALR 534 at 541.

7 (2017) 91 ALJR 1209 at 1214 [13], 1215 [19], 1223 [71]-[72]; 349 ALR 534 at 539, 540, 551.

s 44(i) in their ordinary and natural meaning disqualify a person who has the status of a foreign citizen from being chosen or sitting as a senator or member of the House of Representatives. Section 44(i) will have this effect regardless of the extent of the person's knowledge of that status or his or her intention to act upon the duty of allegiance associated with that status[8].

9 Whether a person is a foreign citizen to whom s 44(i) applies is necessarily determined by reference to the law of the relevant country because it is only that law which can be the source of the status of citizenship or the rights and duties involved in that status[9]. And it is the law of that country which may enable a person to renounce his or her citizenship so that he or she may be freed from the disqualifying effect of s 44(i).

10 In the joint judgment in *Sykes v Cleary*[10] the possibility was identified that the continuance of foreign citizenship might be "imposed involuntarily by operation of foreign law" on an Australian citizen notwithstanding that the person had "taken reasonable steps to renounce that foreign nationality"[11]. If such a situation were to occur not only would an Australian citizen be disqualified from being elected but the foreign law would also practically determine whether s 44(i) was to apply to that person. This could not have been intended when s 44(i) was enacted, their Honours said, and it would be wrong to construe s 44(i) to disbar an Australian citizen who had taken reasonable steps to renounce that foreign nationality. Dawson J agreed[12] that s 44(i) should not be given a construction that "would unreasonably result in some Australian citizens being irremediably incapable of being elected" to either House of Parliament.

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8 *Re Canavan* (2017) 91 ALJR 1209 at 1216 [25]-[26], 1223 [71]; 349 ALR 534 at 541, 551.

9 *Sykes v Cleary* (1992) 176 CLR 77 at 105-106, 112-114; see also *Sue v Hill* (1999) 199 CLR 462 at 486-487 [47], 528-529 [175]; *Re Canavan* (2017) 91 ALJR 1209 at 1218 [37]-[38]; 349 ALR 534 at 544.

10 (1992) 176 CLR 77 at 107-108.

11 *Sykes v Cleary* (1992) 176 CLR 77 at 107.

12 *Sykes v Cleary* (1992) 176 CLR 77 at 131.

11 In *Re Canavan*[13] this Court accepted that s 44(i) is subject to an implicit qualification which arises from the constitutional imperative underlying it. The constitutional imperative was stated to be "that an Australian citizen not be irremediably prevented by foreign law from participation in representative government"[14]. At least this could be so when the person has taken all steps reasonably required by foreign law to renounce his or her foreign citizenship[15].

12 No person the subject of the references in *Re Canavan* was subject to a foreign law which had the effect that the person would have been "irremediably incapable of being elected". It is Senator Gallagher's contention that British law should be taken to have operated in this way when she sought to renounce her British citizenship and that the constitutional imperative referred to in *Re Canavan* is engaged.

British law relating to renunciation

13 Senator Gallagher acquired the status of a Citizen of the United Kingdom and Colonies ("CUKC") by descent at her birth by reason of s 5 of the *British Nationality Act* 1948 (UK). Her father was born in England and was a British subject. She acquired the right of abode in the United Kingdom on the commencement of the *Immigration Act* 1971 (UK). In 1983 persons who were CUKCs having a right of abode were reclassified as British citizens under s 11(1) of the *British Nationality Act* 1981 (UK).

14 Section 12(1) of the *British Nationality Act* 1981 provides that if a citizen makes a declaration of renunciation of British citizenship in the prescribed manner then, subject to further provisions not presently relevant, the Secretary of State shall cause the declaration to be registered. By sub-s (2), a person ceases to be a British citizen on registration of the declaration.

15 The British Nationality (General) Regulations 2003 (UK) require a declaration of renunciation of British citizenship to be made to the Secretary of

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13 (2017) 91 ALJR 1209 at 1214 [13], 1218-1219 [43]-[44], 1223 [72]; 349 ALR 534 at 539, 545, 551.

14 *Re Canavan* (2017) 91 ALJR 1209 at 1214 [13], 1223 [72]; 349 ALR 534 at 539, 551.

15 *Re Canavan* (2017) 91 ALJR 1209 at 1214 [13], 1223 [72]; 349 ALR 534 at 539, 551.

State at the Home Office and to satisfy the requirements of Sched 5[16]. Schedule 5 to the Regulations contains requirements with respect to declarations of renunciation. They relevantly include that the declaration contain "information showing that the declarant … is a British citizen". The Immigration and Nationality (Fees) Regulations 2016 (UK) provide for a fee to be paid at the time when a declarant applies to have a declaration of renunciation registered. A form of declaration is not prescribed but in practice the Home Office provides a form. It is the Form RN, which is accompanied by the Guide RN.

The renunciation process

16 At the time when Senator Gallagher applied to have her declaration of renunciation registered, the time between lodgement of a declaration of renunciation and registration varied. It could take in excess of six months; it could be expedited if good reason was shown to the Home Office. These matters were not known to Senator Gallagher, who made no enquiry as to them.

17 Senator Gallagher completed a Form RN declaration of renunciation on 20 April 2016 and provided it, together with certified copies of her birth certificate and Australian passport, and her credit card details, to the Vetting Team of the Australian Labor Party, of which party she was a member. The Australian Labor Party, Australian Capital Territory Branch, had preselected her as a candidate for the Senate. The Vetting Team forwarded the form, the copy documents and the credit card details to the Home Office, which received them on 26 April 2016. Her credit card was debited with the amount of the relevant fee on 6 May 2016.

18 On 20 July 2016 Senator Gallagher received a letter dated 1 July 2016 from the Home Office requiring further documents. The documents were said to be required "in order to demonstrate to the Secretary of State that you are a British citizen". The letter identified as necessary to be provided, in the case of a British citizen by descent who is not the holder of a British passport, the relevant birth certificates and the marriage certificates of the person's parents and grandparents. Senator Gallagher replied the same day enclosing a certified copy of her father's birth certificate, her parents' original marriage certificate and her original birth certificate. These documents were in her possession. Sometime before 30 August 2016, Senator Gallagher received advice from the Home Office that the declaration of renunciation had been registered.

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16 British Nationality (General) Regulations 2003 (UK), regs 8 and 9.

Senator Gallagher's argument

19 It is Senator Gallagher's contention that by 20 April 2016, when she submitted her declaration of renunciation, or at the latest 6 May 2016, when her credit card was debited with the required fee, she had taken every step required by s 12(1) of the *British Nationality Act* 1981 that was within her power to secure a release of her British citizenship. The reason why she did not cease to be a British citizen before the date of her nomination lay in matters outside her control, namely the time and manner in which the Secretary of State chose to perform the duty under s 12(1). It is submitted that the ability of the Secretary of State to choose the time and manner in which the duty was to be performed was an irremediable impediment to her participation in the 2016 election. The constitutional imperative referred to in *Re Canavan* was therefore engaged, entitling her to participate in the election. This is so irrespective of the differences of opinion expressed by the experts on British immigration law whom the parties had called as witnesses.

20 The area of disagreement between the witnesses called by Senator Gallagher and by the Commonwealth Attorney-General to give evidence as to British citizenship law concerns whether the Secretary of State came under a duty to register Senator Gallagher's declaration of renunciation when the declaration and the information accompanying it was received. The view of the witness called by Senator Gallagher is that she did come under such a duty. It is not a view with which the witness called by the Attorney-General agrees. It is his opinion that the Secretary of State was required to be satisfied about the fact of Senator Gallagher's British citizenship and was entitled as a matter of law to refuse to register the declaration until so satisfied.

The Commonwealth Attorney-General's argument

21 The principal submission of the Commonwealth Attorney-General is that it is not enough for a candidate merely to have taken steps to renounce his or her foreign citizenship. Unless the relevant foreign law imposes an irremediable impediment to an effective renunciation, it is necessary that a candidate actually have divested himself or herself of his or her status as a foreign citizen before the commencement of the process of being chosen to which s 44(i) applies. The exception to s 44(i) does not apply to British law because that law does not either in its terms or in its operation render it impossible or not reasonably possible to renounce British citizenship. At the time of her nomination Senator Gallagher remained a foreign citizen and was incapable of being chosen.

22 The Attorney-General's alternative submission is that if it were sufficient for Senator Gallagher to have taken all steps reasonably required by British law to renounce her British citizenship prior to nomination, she did not do so. It is not necessary to resolve the issues arising from that submission. The Attorney-General's primary submission is clearly correct. It reflects the law stated in *Sykes v Cleary* and *Re Canavan*.

The constitutional imperative

23 A concern of the constitutional imperative discussed in *Re Canavan* is the ability of Australian citizens to participate in the representative government for which the Constitution provides. But the context for the constitutional imperative narrows its focus. The particular constitutional context for the imperative is s 44(i) and the disqualification it effects by reference to a person's status as a foreign citizen. Its concern, properly understood, is that an Australian citizen might forever be unable to participate in elections because a foreign law prevents that person from freeing himself or herself of the foreign citizenship which, if s 44(i) were to apply in its terms, would disqualify that person from nomination.

24 The constitutional imperative thus requires that s 44(i) be seen as subject to an implicit qualification which gives effect to the constitutional imperative in circumstances where it may be said that the purpose of s 44(i) is met. Consistently with the limits which are accepted to apply with respect to the making of a constitutional implication, the qualification to s 44(i) can extend only so far as is necessary to give effect to the textual and structural features which support it[17]. There is no warrant for reading it, or the constitutional imperative upon which it is based, more widely. The qualification operates in its own terms.

25 In *Re Canavan* the qualification to s 44(i) was expressed as an exception[18]:

> "A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign

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17 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; [1997] HCA 25; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 618 [20], 623 [39], 627 [54], 635 [83], 656 [171]; [2008] HCA 28.

18 *Re Canavan* (2017) 91 ALJR 1209 at 1223 [72]; 349 ALR 534 at 551.

> law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged."

26 It may be observed from this paragraph, and from earlier passages in the reasons in *Re Canavan*[19], that for s 44(i) to be read as subject to the exception two circumstances must be present. The first arises from the terms of the constitutional imperative. It is that a foreign law operates irremediably to prevent an Australian citizen from participation. The second is that that person has taken all steps reasonably required by the foreign law which are within his or her power to free himself or herself of the foreign nationality.

27 A foreign law will not "irremediably prevent" an Australian citizen from renouncing his or her citizenship simply by requiring that particular steps be taken to achieve it. For a foreign law to meet the description in *Re Canavan* and *Sykes v Cleary* it must present something of an insurmountable obstacle, such as a requirement with which compliance is not possible. Consistently with the approach taken in *Re Canavan*, the operation of the foreign law and its effect are viewed objectively.

28 In *Re Canavan*[20] an example was given of a foreign law which operated in a way that would engage the constitutional imperative. The example was a foreign law which permitted renunciation of foreign citizenship but required foreign citizens to carry out the necessary acts of renunciation in the territory of the foreign power. Compliance with this requirement was not possible because it put the person at risk. So understood, the foreign law would irremediably disqualify the person.

29 The operation of such a law was contrasted[21] with one which required a foreign citizen to apply for the favourable exercise of a discretion to permit renunciation of that foreign citizenship. That is a step required by foreign law which is reasonably open to the person and must be taken. It was for this reason

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19 (2017) 91 ALJR 1209 at 1214 [13]; 349 ALR 534 at 539.

20 (2017) 91 ALJR 1209 at 1223 [69]; 349 ALR 534 at 551.

21 *Re Canavan* (2017) 91 ALJR 1209 at 1222-1223 [68]; 349 ALR 534 at 550-551.

that it could not be concluded that in *Sykes v Cleary* Mr Kardamitsis had taken reasonable steps to divest himself of his foreign citizenship. The fact that he had expressly renounced his foreign allegiance in the course of a naturalisation ceremony was not sufficient[22].

30 Contrary to a submission made by Senator Gallagher, the "test" for the engagement of the constitutional imperative is not contained in the second sentence of the passage from *Re Canavan* set out above. It is not sufficient that a person in her position has taken all steps reasonably required by the foreign law which are within her or his power for the exception to s 44(i) to apply. The exception stated in *Re Canavan*[23] requires for its operation that a foreign law operate in the way described. The "foreign law" referred to in the second sentence is the same body of law which operates to irremediably prevent the person's participation, as described in the preceding sentence.

31 Both of the circumstances referred to in the passage from *Re Canavan* must be present for the exception to apply. It will not be sufficient that a foreign law operates in the way described. It is necessary in every case that all steps reasonably required which are able to be taken towards renunciation are taken. We do not understand Senator Gallagher to submit to the contrary.

32 It may be added, for completeness, that all steps must be taken even though the foreign law will in any event operate to prevent renunciation being effected. The reason for such a requirement lies in the concerns of s 44(i) about a person's duty or allegiance to the foreign power. In *Sykes v Cleary*[24], in a passage quoted in *Re Canavan*[25], Brennan J explained that so long as the duty remained under foreign law it may be seen as an impediment to unqualified allegiance to Australia. It is therefore only after all reasonable steps have been taken under foreign law to renounce the status, and with it the duty, of foreign citizenship that it is possible to say that the purpose of s 44(i) would not be fulfilled by recognition of the foreign law. To this may be added, consistently with the objective approach applied in *Re Canavan*, that it is not until it is manifest that a

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22 *Re Canavan* (2017) 91 ALJR 1209 at 1222-1223 [68]; 349 ALR 534 at 550-551.

23 (2017) 91 ALJR 1209 at 1223 [72]; 349 ALR 534 at 551.

24 (1992) 176 CLR 77 at 113-114.

25 (2017) 91 ALJR 1209 at 1219 [45]; 349 ALR 534 at 545-546.

person has done all he or she can towards renunciation that the exception should apply.

33 Senator Gallagher's approach to s 44(i) is based upon a constitutional imperative which is different from or wider in its operation than that described in *Re Canavan*. The constitutional imperative of which Senator Gallagher speaks is said to be informed by a purpose to preserve participation in representative government and, consistent with that different or wider constitutional imperative, it is necessary that matters which are beyond the control of a candidate are to be taken into account with respect to the operation of the constitutional imperative. By way of example, if a snap election is called, the constitutional imperative should operate to permit a person to nominate, notwithstanding the terms of s 44(i).

34 It is not necessary to address the various aspects of the constitutional imperative for which Senator Gallagher contends which find no expression in that stated in *Re Canavan*. The constitutional imperative there recognised does not demand that s 44(i) be read so that its effects are more generally ameliorated so as to ensure the ability of foreign citizens to nominate. Its command is much more limited. It is, in terms, "that an Australian citizen not be irremediably prevented by foreign law from participation in representative government"[26].

Identification of foreign law

35 Senator Gallagher's argument as to the constitutional imperative contains one submission which is relevant to the identification of the foreign law to be considered in connection with the exception. It is submitted that the constitutional imperative cannot be made to depend upon the actions of foreign officials or exercises of discretion under foreign law which may be productive of arbitrary results.

36 The submission may be dealt with shortly. The constitutional imperative, and the exception which it informs and of which it forms part, is concerned with how foreign law operates with respect to a renunciation of the status of foreign citizen. A law regarding citizenship and its renunciation may operate by reference to requirements of individuals. It may give powers, including discretions, to and impose duties on officials, including with respect to decision-

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26 *Re Canavan* (2017) 91 ALJR 1209 at 1214 [13], 1223 [72]; 349 ALR 534 at 539, 551.

making. To ignore these powers and their exercise would be to distort the reality of the foreign law and its effect. Moreover it is evident from the discussion in *Sykes v Cleary*[27] and *Re Canavan*[28] that a discretionary power is to be regarded as part of foreign law for the purposes of s 44(i).

An irremediable impediment?

37 Senator Gallagher does not identify any aspect of the relevant British law which operates to prevent her irremediably from nominating for an election. No requirement of the relevant provisions could be described as onerous. The procedure is simple. There was never any doubt that a decision to register would be made. The issue for Senator Gallagher was only ever to be the timing of the registration.

38 Senator Gallagher's contention is that because she had done all that was required of her by British law and which was within her power to do, everything that occurred thereafter under British law which prevented her nomination is to be regarded as an irremediable impediment. Such a submission finds no support from what was said in *Re Canavan*. It is not sufficient for the exception to s 44(i) to apply for a person to have made reasonable efforts to renounce. In *Re Canavan* it was explicitly said[29] that the majority in *Sykes v Cleary* did not suggest that a candidate who made a reasonable effort to comply with s 44(i) was thereby exempt from compliance with it.

39 The questions in this reference turn upon one issue: whether British law operated to irremediably prevent an Australian citizen applying for renunciation of his or her British citizenship from ever achieving it. An affirmative answer cannot be given merely because a decision might not be provided in time for a person's nomination. The exception is not engaged by a foreign law which presents an obstacle to a particular individual being able to nominate for a particular election.

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27 (1992) 176 CLR 77 at 108, 114, 132.

28 (2017) 91 ALJR 1209 at 1222-1223 [68]; 349 ALR 534 at 550-551.

29 *Re Canavan* (2017) 91 ALJR 1209 at 1221 [61]-[62]; 349 ALR 534 at 549.

The answers

40 The questions referred for the determination of the Court of Disputed Returns should be answered as follows:

(a) Yes.

(b) The vacancy should be filled by a special count of the ballot papers. Any direction necessary to give effect to the conduct of the special count should be made by a single Justice.

(c) Unnecessary to answer.

(d) Unnecessary to answer.

41 GAGELER J. The questions referred by the Senate are set out in the joint reasons for judgment. For the following reasons, in addition to those set out in the joint reasons for judgment, I agree with the answers there proposed.

42 The disqualification expressed in s 44(i) of the Constitution is relevantly that "[a]ny person" who is "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". The disqualification serves the constitutional purpose of preventing a senator or member of the House of Representatives from being conflicted in the performance of his or her parliamentary or executive duties to the Commonwealth of Australia as a result of such allegiance and other duties as may be attendant under foreign law on being a citizen of another country. A person meets the description of a citizen of a foreign power so as to fall within the expressed ambit of the disqualification simply by reason of having the status of citizen of another country under the law of that country.

43 The "constitutional imperative" recognised in *Re Canavan*[30] is an implied exception to the operation of that disqualification. The implied exception serves the function of ensuring that the disqualification does not operate so rigidly as to undermine the constitutionally prescribed system of representative and responsible government which the disqualification is designed to protect. The centrally informing notion is that an Australian citizen who meets the qualifications for election as a senator or member set by ss 16 and 34 of the Constitution or by a law enacted by the Commonwealth Parliament under s 51(xxxvi) for the purpose of s 34 of the Constitution is not to be permanently disabled from participating in the parliamentary and executive government of Australia by a disqualification in s 44, with the possible exception only of an Australian citizen who "is attainted of treason" within the meaning of s 44(ii). That centrally informing notion is complemented in its application to s 44(i) by the notion that an arbitrary or intransigent operation of the law of another country cannot be permitted to frustrate the ability of such an Australian citizen to participate in the parliamentary and executive government of Australia.

44 The implied exception to the operation of the disqualification expressed in s 44(i) is accordingly engaged where a person who has the status of citizen of another country under the law of that country, and who therefore falls within the expressed ambit of the disqualification, is an Australian citizen who irremediably retains the status of citizen of another country under the law of that country despite having taken all steps reasonably within his or her power to renounce that citizenship under the law of that country. Critical to recognise is that it is the irremediable nature of the retention of foreign citizenship in circumstances of the

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30 (2017) 91 ALJR 1209 at 1214 [13], 1218-1219 [43]-[46], 1223 [72]; 349 ALR 534 at 539, 545-546, 551; [2017] HCA 45.

Australian citizen having taken all steps reasonably available to him or her under the applicable foreign law to effect renunciation which justifies the implication of the exception to the operation of the disqualification and which sets the boundaries of the operation of the exception.

45 The implied exception is not engaged merely because a person who has the status of citizen of another country under the law of that other country is an Australian citizen who has taken all steps reasonably within his or her power to renounce that citizenship under the law of that country. An Australian citizen who has done everything reasonably within his or her power to renounce his or her citizenship of another country under the law of that country remains within the ambit of the disqualification expressed in s 44(i) for so long as a process of renunciation provided for by the law of that country simply remains incomplete. Retention of foreign citizenship can hardly be said to be irremediable while it remains in the process of being remedied. The implied exception cannot be engaged unless and until such time as such process of renunciation as is provided for by the law of the other country can be characterised for practical purposes as a process that will not permit the person to renounce the foreign citizenship by taking reasonable steps, requiring if not that an impasse has actually occurred then at least that an impasse can be confidently predicted.

46 Assuming Senator Gallagher to have done everything reasonably within her power to renounce her British citizenship under the law of the United Kingdom by 6 May 2016, the fact is that she remained a British citizen under the law of the United Kingdom until registration of her renunciation in accordance with that law on 16 August 2016. Retention of her British citizenship is shown to have been remediable by the fact of that subsequent registration. It follows that the implied exception to the disqualification expressed in s 44(i) of the Constitution was not at any time engaged. Senator Gallagher remained a citizen of a foreign power at the time of her nomination for election to the Senate on 31 May 2016 and was for that reason incapable of being chosen as a senator at the double dissolution election which occurred on 2 July 2016.

47 Nothing turns on such uncertainty as may have existed as to the timing of the election in which Senator Gallagher sought to participate before the Prime Minister announced on 8 May 2016 that the Governor-General had accepted his request to dissolve both Houses of the Parliament and to call a double dissolution election to be held on 2 July 2016, or before the Governor-General on 16 May 2016 issued a writ for the election of senators for the Australian Capital Territory fixing the closing date for nominations as 9 June 2016.

48 Sections 7, 12, 13, 28, 32, 33 and 57 of the Constitution (and, in respect of Territory senators, ss 42, 43 and 44 of the *Commonwealth Electoral Act* 1918 (Cth)) allow for a degree of latitude as to the timing of elections, which means that in practice the time at which a particular election to the Senate or the House of Representatives is announced or at which a writ is issued will ordinarily

be attended by a measure of prior uncertainty. Uncertainty about the precise timing of the announcement of, or the issue of a writ for, a particular election accordingly forms part of the practical context within which each of the provisions of s 44 of the Constitution has the potential to operate to disqualify a particular potential candidate from participation in the process of being chosen in a particular election. Whatever the time of the announcement of the election or the issue of the writ, the process of being chosen to which each of the disqualifications in s 44 applies will always commence at the time of nomination and will continue until a candidate who is qualified to be chosen and who is not disqualified from being chosen as a senator or member of the House of Representatives is returned as elected[31].

49 No differently from any of the other disqualifications in s 44, uncertainty as to the precise timing of the announcement of an election and as to the precise timing of the issue of the writ has no bearing on the operation of the disqualification expressed in s 44(i) or its implied exception. The disqualification will always operate, and can be anticipated in advance of the announcement of a particular election or the issue of a particular writ always to operate, on and from nomination.

50 Avoidance of the disqualification so as to preserve the ability to participate in a particular election therefore demands a degree of vigilance on the part of a potential candidate not simply as to the taking of available remedial action but also as to the timing of that available remedial action. Just as it was held in *Sykes v Cleary*[32] to have been the responsibility of Mr Cleary to have ensured that his resignation as an officer of the Victorian teaching service took effect before his nomination for the election which occurred on 11 April 1992 if he was to escape the disqualifying effect of s 44(iv) so as to be capable of being chosen as a member of the House of Representatives in that election, it was the responsibility of Senator Gallagher to ensure that renunciation of her British citizenship took effect under the law of the United Kingdom before her nomination for the election which occurred on 2 July 2016 if she was to escape the disqualifying effect of s 44(i) so as to be capable of being chosen as a senator in that election.

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31 *Re Nash (No 2)* (2017) 92 ALJR 23 at 28-31 [20]-[39]; 350 ALR 204 at 209-213; [2017] HCA 52.

32 (1992) 176 CLR 77 at 99-100; [1992] HCA 60.

51 EDELMAN J. Section 44(i) of the Constitution renders a person incapable of being chosen or of sitting as a senator or a member of the House of Representatives if, among other grounds, the person "is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power". That sub-section contains no express provision for how to determine whether a person should be recognised as a subject or a citizen of a foreign power or as entitled to those rights or privileges. Nor does it contain any express constitutional constraint upon whether a recognised foreign law should apply for the purposes of s 44(i). There are, however, two constraints. The first constraint is that in some circumstances the foreign law will not be recognised. One manner of non-recognition can be from a rule of the common law, often reflecting international law. The second constraint is the constitutional implication that was described in *Re Canavan* as a "constitutional imperative"[33]. This reference is concerned only with the latter constraint but it is necessary in these reasons also to discuss the former because the two are not wholly independent.

52 At Federation[34], as now[35], the general common law and international law rule was that the nature of a right or status acquired under the law of another country was to be determined by the law by which that right or status was acquired. However, it was, and is, well recognised at common law and in international law that exceptions exist to this general recognition rule. One of those exceptions is that a foreign law will not be recognised if the foreign law is inconsistent with local policy or the maintenance of local political institutions[36]. It has been said that "[i]t is difficult to conceive, upon what ground a claim can be rested, to give to any municipal laws an extraterritorial effect, when those laws are prejudicial to the rights of other nations, or to those of their subjects"[37]. Where this exception applies, "the judge will have to apply the domestic law

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33 (2017) 91 ALJR 1209 at 1219 [43], 1223 [72]; 349 ALR 534 at 545, 551; [2017] HCA 45.

34 Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at xliii-xliv; Story, *Commentaries on the Conflict of Laws*, 8th ed (1883), §29.

35 *Re Canavan* (2017) 91 ALJR 1209 at 1218 [37]; 349 ALR 534 at 544.

36 Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 33-34. See also Savigny and Guthrie, *A Treatise on the Conflict of Laws*, 2nd ed (rev) (1880) at 76-77.

37 Story, *Commentaries on the Conflict of Laws*, 5th ed (rev) (1857), §32, referred to in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 511-512 [50]; [2002] HCA 10 and *The "Halley"* (1868) LR 2 PC 193 at 203.

more exclusively than [the general] principle allows, and must, on the other hand, leave the foreign law unapplied"[38].

53 The general rule, and exceptions, have been applied to foreign laws concerning citizenship[39]. In *Sykes v Cleary*[40], Brennan J effectively treated the question of recognition, ie the general rule and the exceptions, as an anterior question, to be asked before considering the application of s 44(i). His Honour said that whether a person was a subject or citizen of a foreign power was a question for the law of that foreign power, subject to exceptions recognised by international law as well as exceptions sourced in public policy derived from both common law and the Constitution[41]. Similarly, in *Sykes v Cleary*[42] and in *Sue v Hill*[43], Gaudron J relied upon common law authorities[44] in the context of discussion of circumstances when an Australian court might not apply a foreign law.

54 Several examples of non-recognition of a foreign law as a result of this anterior question were given by Brennan J in *Sykes v Cleary*[45]. One of those was described as "an extreme example, if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all". In cases of such exorbitant foreign laws both public policy and international law require that the foreign law not be recognised. The test for exorbitancy, as expressed by Brennan J[46], borrowing from Lord Cross of Chelsea in

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38 Savigny and Guthrie, *A Treatise on the Conflict of Laws*, 2nd ed (rev) (1880) at 76.

39 As to recognition in international law of the possibility of exceptions in relation to citizenship laws see *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4 at 20-21.

40 (1992) 176 CLR 77; [1992] HCA 60.

41 (1992) 176 CLR 77 at 112.

42 (1992) 176 CLR 77 at 135-136.

43 (1999) 199 CLR 462 at 528-529 [175]; [1999] HCA 30.

44 *R v The Home Secretary; Ex parte L* [1945] KB 7 at 10; *Lowenthal v Attorney-General* [1948] 1 All ER 295 at 299; *Oppenheimer v Cattermole* [1976] AC 249 at 277-278, 282-283.

45 (1992) 176 CLR 77 at 112-113. See *R v Lynch* [1903] 1 KB 444; *R v The Home Secretary; Ex parte L* [1945] KB 7; *Lowenthal v Attorney-General* [1948] 1 All ER 295.

46 (1992) 176 CLR 77 at 113.

Oppenheimer v Cattermole[47], was "when the foreign law, purporting to affect nationality of persons who have had no connexion or only a very slender connexion with the foreign power, exceeds the jurisdiction recognized by international law".

55 It is unnecessary on this reference to consider whether, in addition to the exceptions discussed by Brennan J, there are, or should be, any further exceptions in international law or public policy sourced in common law or legislation. Although Senator Gallagher referred in oral submissions to the example of exorbitancy, and although at times she submitted that parts of the relevant foreign law – the *British Nationality Act* 1981 (UK) – should not be "recognised", her focus was not upon this usually anterior question. Instead, her submissions correctly assumed that none of the existing, limited exceptions applied to prevent recognition of the foreign law. She relied instead upon the implied constitutional qualification upon s 44(i) to prevent the foreign law, assuming it to be recognised, having any application.

56 The implied constitutional qualification was first discussed in *Sykes v Cleary*. In that case, the joint judgment of Mason CJ, Toohey and McHugh JJ[48] and the separate judgment of Dawson J[49] identified an implication, based on construction of s 44(i) in its context, that unqualified effect would not be given to the common law and international law rules that would otherwise require citizenship to be determined by the foreign state. Deane J, in dissent, also recognised a constitutional implication "which must be read into" s 44(i)[50], although his Honour's broader implication did not command the support of a majority of the Court.

57 In *Re Canavan*, this constitutional implication was described as a "constitutional imperative". Like the "constitutional imperative" said to underlie the freedom to communicate on political matters[51] or the freedom to vote[52], the

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47 [1976] AC 249 at 277.

48 (1992) 176 CLR 77 at 107.

49 (1992) 176 CLR 77 at 131.

50 (1992) 176 CLR 77 at 127-128.

51 *Wotton v Queensland* (2012) 246 CLR 1 at 30 [76]; [2012] HCA 2.

52 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 [24]; [2007] HCA 43; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 59 [161], 117 [368], 121 [384]; [2010] HCA 46; *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at 1038 [34], 1069 [239]; 334 ALR 369 at 380, 422; [2016] HCA 36.

rationale of the implication is to maintain the political institution of representative government. However, just as there are significant, valid limitations that can be placed upon the ability to participate in representative government despite these implied freedoms, so too the implication which maintains the political institution of representative government in the context of s 44(i) cannot displace or ignore all significant limitations or burdens imposed by a recognised foreign law.

58 Significant limitations that are placed upon a person's ability to participate in representative government by nomination for and election to the Commonwealth Parliament are recognised in the Constitution. The limitations include ss 16, 34, 43, 44 and 45, and any valid law enacted by the Commonwealth Parliament under s 51(xxxvi)[53]. These qualifications show that there is no absolute right for every citizen to participate in representative government by nomination for and election to the Commonwealth Parliament. The existence of these express limitations thus militates powerfully against an implication in absolute terms that denies application to any foreign law that has the effect of constraining the same participation. Instead, the constitutional implication is narrowly tailored to ensure that a foreign law does not stultify a person's qualified ability to participate. It requires only that "an Australian citizen not be irremediably prevented by foreign law from participation in representative government"[54]. In that way the concrete implication is confined to that which is truly necessary to achieve the more abstract constitutional purpose[55].

59 The reference in the rationale for the implication to an "irremediable" prevention of participation includes circumstances where the foreign law would make participation permanently impossible. Hence, on the perhaps contestable assumption that the foreign citizenship law would be recognised by Australian law, one potential application of this constitutional imperative would be to a foreign citizenship law that provides no legal mechanism for renunciation of foreign citizenship[56]. Of course, although the constitutional imperative would mean that citizenship under such a foreign law would not disqualify a person under s 44(i), a person who would otherwise have been a citizen under that

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53 See, eg, *Commonwealth Electoral Act* 1918 (Cth), ss 163, 164.

54 *Re Canavan* (2017) 91 ALJR 1209 at 1223 [72], see also at 1219 [44]; 349 ALR 534 at 551, see also at 545.

55 Goldsworthy, "Functions, Purposes and Values in Constitutional Interpretation", in Dixon (ed), *Australian Constitutional Values*, (2018) 43 at 56, quoting Hand, *The Bill of Rights*, (1958) at 29.

56 *Sykes v Cleary* (1992) 176 CLR 77 at 132.

foreign law, and who wished to avoid disqualification under s 44(i), may still need to take steps to repudiate "any acknowledgment of allegiance, obedience, or adherence to a foreign power".

60 However, as Senator Gallagher correctly submitted, "irremediable" is not limited only to circumstances of permanent impossibility. The constitutional imperative also applies to a foreign citizenship law the "operation"[57] – that is, the legal or practical effect – of which imposes unreasonable obstacles upon the ability of a person to renounce his or her foreign citizenship. Unreasonableness is a relative term. In *Re Canavan*[58], this Court gave a telling example of a law having this unreasonable practical effect. That example was a law requiring renunciation to be carried out in the territory of the foreign power, where the citizen's presence in that territory could involve risks to their person or property. The telling nature of this example lies in the unreasonableness required to engage the constitutional imperative.

61 Senator Gallagher submitted that any foreign citizenship law that required action or inaction by foreign officials as part of a process of renunciation imposed such an unreasonable obstacle in that respect, and therefore ought not to be given effect. It was submitted that otherwise the foreign law could introduce arbitrariness, including discriminatory outcomes and the difficulty of having recourse to the administrative and legal processes of a foreign country. Senator Gallagher also submitted that the actions of foreign officials could otherwise affect the ability of a person to participate in election campaigning during the short period of time between nominations and the return of the writs.

62 The relevant foreign law that was said to be the source of these unreasonable obstacles is s 12(2) of the *British Nationality Act*. Section 12 contains the statutory requirements governing renunciation of British citizenship. It provides:

> "(1) If any British citizen of full age and capacity makes in the prescribed manner a declaration of renunciation of British citizenship, then, subject to subsections (3) and (4), the Secretary of State shall cause the declaration to be registered.
>
> (2) On the registration of a declaration made in pursuance of this section the person who made it shall cease to be a British citizen.
>
> (3) A declaration made by a person in pursuance of this section shall not be registered unless the Secretary of State is satisfied that the

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57 *Re Canavan* (2017) 91 ALJR 1209 at 1223 [72]; 349 ALR 534 at 551.

58 (2017) 91 ALJR 1209 at 1223 [69]; 349 ALR 534 at 551.

> person who made it will after the registration have or acquire some citizenship or nationality other than British citizenship; and if that person does not have any such citizenship or nationality on the date of registration and does not acquire some such citizenship or nationality within six months from that date, he shall be, and be deemed to have remained, a British citizen notwithstanding the registration.
>
> (4) The Secretary of State may withhold registration of any declaration made in pursuance of this section if it is made during any war in which Her Majesty may be engaged in right of Her Majesty's government in the United Kingdom.
>
> (5) For the purposes of this section any person who has been married, or has formed a civil partnership, shall be deemed to be of full age."

63 Senator Gallagher submitted that s 12 should operate, but that the constitutional imperative meant that no operation should be given to s 12(2) because that sub-section involves the action of a foreign official.

64 That submission should not be accepted. Although the constitutional implication is not confined to foreign laws that make participation in representative government impossible, the further one departs from a situation of impossibility, and the broader the operation given to "unreasonable obstacles" to renunciation, the more vague and uncertain becomes the implication and the more unpredictable becomes its operation. In turn, this undermines the implication itself. Senator Gallagher's submission, if accepted, would even treat as an unreasonable obstacle to renunciation a law that had the potential to allow efficient renunciation for some and extremely efficient renunciation for others.

65 Although a foreign law should not be automatically excluded by the implication whenever any action of a foreign official is involved, some circumstances involving actions of foreign officials might still immediately engage the constitutional imperative. An example where this arguably might occur, to adapt from one given in oral submissions by the Attorney-General of the Commonwealth, is where the actions required for renunciation under the foreign law are: (i) submission of a form; (ii) payment of a fee; and (iii) certification by a foreign official that military service for the country has been served, in circumstances in which the country is, and has been, engaged in active combat with another state.

66 If the constitutional imperative were engaged in the example above, there would be a further issue. The further issue concerns the steps that a person must take to renounce if a foreign law imposes unreasonable requirements. On one view, akin to the approach that Senator Gallagher submitted should apply to

s 12(2), the constitutional implication would require the person to take the reasonable steps (futile under foreign law) of submitting the form and paying the fee, in order to satisfy (i) and (ii), before renunciation were deemed to take effect. On another view, the requirement to take all reasonable steps to renounce applies only where all the required steps are reasonable. In other words, if the constitutional imperative were engaged in the above example the person would not be required to take the futile steps of submitting a form and paying a fee as part of a process that was not "effective under the relevant foreign law"[59] and could never lead to renunciation. However, as I indicated above, the person would still be required by s 44(i) to demonstrate that he or she is not "under any acknowledgment of allegiance, obedience, or adherence" to the foreign power. It is not necessary to resolve that issue in this case.

67 Other circumstances involving the actions of foreign officials might engage the constitutional imperative in their practical effect. Again, although it is not necessary to express any concluded opinion, one example given in oral submissions was of a foreign law requiring renunciation to be processed by an official where, in its practical operation, such processing had not taken place after three years. Another might arguably be where a foreign official unreasonably refuses to exercise a discretion to allow renunciation when all steps had otherwise been taken[60].

68 Ultimately, perhaps the most fundamental difficulty for Senator Gallagher's submission that actions of foreign officials should be automatically excluded by the implication is that the submission shears the constitutional implication from its rationale of ensuring that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. The submission treats as an "unreasonable obstacle" falling within the implication any foreign law that does not irremediably prevent participation, but which might have an arbitrary or discriminatory effect. This would require a different implication, one which is lacking in any textual or structural constitutional foundation.

69 For these reasons, as well as generally those in the joint judgment, I would also answer the questions reserved as in the joint judgment.

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59 *Sykes v Cleary* (1992) 176 CLR 77 at 113.

60 See *Sykes v Cleary* (1992) 176 CLR 77 at 131-132.