IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY **NO C 32 OF 2017**

RE SENATOR KATY GALLAGHER
Senate reference under s 376 of the
Commonwealth Electoral Act 1918 (Cth)

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ANNOTATED REPLY SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

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Date of this document: 9 March 2018

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PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ARGUMENT

Ignoring the constitutional text and the reasons in *Re Canavan*

2. Senator Gallagher's submissions are striking for ignoring, almost entirely, the words of s 44(i). Those words impose, in peremptory terms, a disqualification rule that turns principally on status under foreign law. In asserting that disqualification is determined by reference to 'the constitutional imperative' (Gallagher [21]ff), Senator Gallagher mistakes the exception for the rule. Further, she treats the 'constitutional imperative' not as a limitation on s 44(i), but as an individual right to participate in representative government which must be given its fullest operation, thereby disregarding the fact that the sole purpose of s 44 is to prevent persons from being 'chosen' in the circumstances it specifies. Senator Gallagher's reliance on ss 16 and 34 of the Constitution (and the legislative provisions that have superseded them) is particularly inapt, given that those provisions are subject to s 44, and therefore can provide no basis to confine s 44.[1]

3. Senator Gallagher's submissions go on to develop, with a level of over-complexity apt to obscure rather than elucidate, what the 'constitutional imperative' is said to require. In doing so, she pays no regard to the reasoning in *Re Canavan*, where the 'constitutional imperative' was explained as being to ensure that Australian citizens are not 'irremediably prevented'[2] by foreign law from participation in representative government. Absent irremediable incapacity of that kind, there is no foundation for a constitutional implication confining the text of s 44(i), and therefore no basis to ignore a candidate's disqualifying status under foreign law.

4. All of this is apparent from the reasons in *Re Canavan*. Yet, in a second striking feature, Senator Gallagher's submissions focus exclusively on one part of paragraph 72 of those reasons (Gallagher [14], [18], [19], [20], [21], [32], [46]), to the complete exclusion of the balance of the reasons. Her submissions ignore, throughout, the focus in *Re Canavan* on the ordinary and natural meaning of the text of s 44(i), the relevance of duties reciprocal on status as a foreign citizen (being duties that exist until citizenship is

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1 *Re Day (No 2)* (2017) 91 ALJR 518, 532 [74] (Kiefel CJ, Bell and Edelman JJ).
2 *Re Canavan* (2017) 91 ALJR 1209, 1218-1219, 1223 [43], [44], [46], [72].

renounced in a way that is effective under foreign law), and the repeated linking of the constitutional imperative to 'irremediable prevention'.

Ignoring aspects of foreign law

5. *Re Canavan* held, in reliance on both *Sykes v Cleary* and *Sue v Hill*, that the operation of s 44(i) turns principally on the status of a person under foreign law.[3] Senator Gallagher's submissions implicitly challenge that approach, because she asserts that to the extent that status under foreign law depends on 'actions of foreign officials' (including, but not limited to, 'discretions, degrees of diligence or bureaucratic practices') those actions must be 'disregarded' or 'not recognised' (Gallagher [29], [37], [44], [49]). On that approach, the operation of s 44(i) would no longer depend on a person's status under foreign law, because that status will commonly depend on action by foreign officials (as it does in this case). That argument is contrary to the reasoning in the above cases.

6. In any event, the reasons advanced by Senator Gallagher in support of the proposition that the actions of foreign officials must be disregarded are unpersuasive. In particular, her equation of discretionary decision-making with arbitrary and discriminatory decision-making is unjustified. The theoretical possibility that similar cases may be treated differently is not constitutionally problematic (Gallagher [28], [45]). Such a possibility exists in Australian law whenever decision-makers have a discretion as to the weight to give to competing considerations, or as to the considerations that they will take into account, or where the issue is whether particular evidence 'satisfies' the decision-maker that legislative criteria have been met.

7. A foreign law that requires action by a foreign official before renunciation is effective will engage the constitutional imperative only if it irremediably prevents renunciation. The fact that effective renunciation requires action by a foreign official does not have that effect. It is only if a person who has sought renunciation encounters an irremediable obstacle (such as an inordinate delay in registering renunciation) that the operation of foreign law may engage the constitutional imperative. Otherwise, there is no basis to depart from the ordinary meaning of s 44(i), which requires candidates to divest themselves of foreign citizenship in a way that is effective under foreign law (whether or not that requires action by foreign officials) before they can be chosen.

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[3] *Re Canavan* (2017) 91 ALJR 1209, 1218 [37]-[38].

8. Senator Gallagher's submission rests on a false dichotomy between foreign law and actions or decisions of officials taken pursuant to that law, and would require an artificial dissection, indeed a denaturing, of foreign law. For example, s 12(2) of the *British Nationality Act 1981* (UK) **[CB tab 7, p 186]** provides that renunciation takes effect when the declaration of renunciation is registered. To ignore the requirement for registration (which necessarily involves an act of a foreign official) would produce a very different law. That is graphically illustrated if the requirements for renunciation required first action by the candidate (eg submitting forms), then steps by the foreign official (eg review of the forms) and then further action by the candidate in response (eg attendance at an interview): on Senator Gallagher's argument, all steps after submission of the forms would be 'ignored'. Further, to dissect foreign law in that way may characterise the foreign law unreasonable when, in fact, it is not. For example, if a foreign law imposed a high fee for renunciation of citizenship, but permitted that fee to be waived on application to an official, on Senator Gallagher's approach the prospect of permitted waiver would be 'disregarded'. The result might then be that the foreign law would impose an unreasonable requirement, which would be ignored when applying s 44(i), even though when taken as a whole the foreign law was reasonable.

'Sufficiency'

9. Senator Gallagher's 'primary argument' (Gallagher [39]) invokes a strained notion of 'sufficiency'. The argument is that provided a candidate has done the minimum possible that could possibly result in successful renunciation under foreign law, s 44(i) does not prevent that candidate from being chosen even if a foreign official could lawfully reject the application unless further material was provided (Gallagher [8], [11], [42]).

10. That result would be far removed from the text of s 44(i), or from any irremediable incapacity to participate in Australian representative democracy. To illustrate, suppose a candidate submitted material to a foreign government which was capable of being accepted as 'sufficient' but that, before nomination, the foreign government responded seeking further information and advising that, without it, the renunciation would not be accepted. On Senator Gallagher's argument, it would be open to the candidate to refuse to provide the further information even if it were readily available, and as a consequence to remain a foreign citizen, yet not to be disqualified by s 44(i). That would be absurd. It illustrates the unviability of the notion that the operation of s 44(i) turns on the taking of

steps that could possibly (but may not in practice) result in effective renunciation, rather than steps that actually achieve effective renunciation under foreign law.

11. If the steps taken by Senator Gallagher are relevant, they were inadequate because it was lawful and reasonable for British officials to take the course they did and to require more information to be provided before registering her declaration. The 'sufficiency' of the steps taken by Senator Gallagher is particularly hard to accept given that she did not provide her father's birth certificate (the primary evidence of his citizenship), or her parents' marriage certificate, even though both were in her possession and the guidance material indicated that they should be provided (AG [53]). Senator Gallagher's quotations from the report of Mr Fransman (Gallagher [16]) on this point are selective and misleading: the quote of [98] **[CB tab 6, p 164]** omits Mr Fransman's opinion that the material provided by Senator Gallagher 'was far from overwhelming and complete'; it omits the reference to the explanation at [95] **[CB tab 6, p 163]** of the need for sufficient proof of British citizenship; and it omits his conclusion at [99] **[CB tab 6, p 164]** that if Senator Gallagher had 'refuse[d] to provide any further evidence, [the Secretary of State] would have been entitled as a matter of law to refuse to register the declaration'.

Oppression and uncertainty

12. Senator Gallagher posits the risk of foreign bureaucratic delay turning s 44(i) into 'an instrument of punishment or oppression' and submits that the Attorney-General's approach would create 'uncertainty, chaos and discriminatory outcomes' (Gallagher [47], [51], [53]). The supposed problems are extreme examples or distorting possibilities that are irrelevant to the interpretive task.[4] Not only is the spectre of oppressive delay or arbitrary exercises of power unsupported by evidence, it is countered by what this Court has seen in the succession of s 44 cases over the last six months, involving many successful renunciations within periods of a few days to a few months.[5] In any case, the Attorney-General's submissions addressed to the terms or operation of foreign law cater for these scenarios (AG [6.1], [17], [20], [24]).

13. In contrast to these imagined problems, the difficulties created by Senator Gallagher's

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[4] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 43 [32] (Gleeson CJ, Gummow and Hayne JJ).

[5] See, eg, *Re Canavan* (2017) 91 ALJR 1209, 1226 [96], 1228 [115], 1230 [123].

approach are real. It allows a candidate to nominate even when clearly still a foreign citizen, taking steps to renounce that may (or may not) be 'sufficient' (itself an inherently contestable concept) only just before nomination (cf Gallagher [43]). Despite the text of s 44(i), it allows such a candidate to be a foreign citizen on polling day and afterwards, even while sitting in Parliament.[6] It will encourage legal proceedings involving disputes about which parts of foreign law should be 'disregarded', and whether a candidate took all reasonable steps (perhaps involving disputes about access to particular documents, and disputes between experts as to the requirements of foreign law). None of that will occur if renunciation must ordinarily be completed before a candidate is eligible to be chosen.

10 **Senator Gallagher's alternative argument cannot be reconciled with *Re Canavan***

14. Senator Gallagher's attempt to limit the relevant window of time to events after nomination (Gallagher [27]) appears relevant only on her alternative argument. It is an obvious attempt to avoid the facts highlighted at AG [44]–[45]. It is far removed from the constitutional imperative that justifies the exception to the terms of s 44(i), and is artificial given that the timing of elections is reasonably predictable. It is a plea to the Court to 'shut [its] eyes and grope in the dark',[7] which should not be entertained.

15. Senator Gallagher's alternative submission that s 44(i) does not apply where a person reasonably holds a 'subjective belief' that they have taken all reasonable steps to renounce foreign citizenship (Gallagher [60]) cannot be reconciled with *Re Canavan*.[8]

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Dated: 9 March 2018

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6 Cf *Re Canavan* (2017) 91 ALJR 1209, 1221 [59].

7 *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426, 431 (Lord Mcnaghten), quoted in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 659 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

8 (2017) 91 ALJR 1209, 1219 [44]-[48], 1221–3 [61]–[69].