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Précis Paper

The Citizenship Crisis

A discussion between David Bennett AC QC and Professor Tony Blackshield on section 44 of the Constitution, the trouble it has caused, and what needs to be done about it

Discussion Includes

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Précis Paper

The Citizenship Crisis

1. In this edition of BenchTV, David Bennett AC QC (Barrister, 5 Wentworth Chambers, Sydney) and Professor Tony Blackshield (Emeritus Professor of Law, Macquarie University, Sydney) discuss the most recent trouble caused by section 44 of our Constitution – *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash* [2017] HCA 45.

Overview

2. There are two big myths about s 44 which are spread by the press, and to an even greater extent, by people who write letters to the editors of newspapers.
    - The first myth is that it is an easy matter to check what one's citizenship is, and the politicians who do not do it are either foolish or indolent
    - The second myth is that a problem is somehow created for a person who has an ancestry which gives them (upon filling out a form and lodging it), under the laws of a foreign country, the right to citizenship in that country

    Both myths need to be dispelled.

3. The High Court has said, unfortunately, that the proper exercise in cases such as these is to put s 44 - which prohibits a person who wishes to sit as a senator or a member of the House of Representatives. from having a foreign nationality (even if it is a dual nationality with the person's Australian nationality) together with the private international law rule - which directs one to look at the country of putative nationality in order to determine whose law to apply to whether or not the person is a national of it. (In *Sykes v Cleary* [1992], the High Court did list a number of exceptions to this.)

4. This means that foreign law must be looked at, and some foreign law is very different to ours, and it cannot be assumed that foreign citizenship laws are the same as ours. Thus, many complexities arise in this area.

5. *The first complexity*: citizenship by descent. Countries have very different rules surrounding citizenship by descent, and those rules change from time to time. Even national borders change from time to time. Some countries, such as Italy, have citizenship by indefinite descent, so that however far back an Italian ancestor is, the Italian citizenship just passes down the line (subject to some exceptions).

6. *The second complexity*: loss of citizenship. Some countries, including Italy again, say that if a person takes out Australian citizenship, for example, they forfeit their Italian citizenship.

7. An example which illustrates the problem: suppose two Italian men come to Australia at the same time. Both marry non-Italians in Australia, both become Australian citizens, thus forfeiting their Italian nationality. Each then has a child. There is, however, is one difference between the two Italians - one of them becomes an Australian citizen the day *before* the birth of his only child, and the other becomes an Australian citizen the day *after* the birth of his only child.

8. Ten generations later, all the descendants of one are dual nationals of Italy and Australia; all the descendants of the other are not – simply because the ceremonies took place a day before or a day after the birth of the child. This child of course might be the great-great-grandparent of the putative member.

9. So how on earth is this to be investigated? It is almost impossible to work such things out.

10. *The third complexity*: whether, under the particular law, ancestry automatically *makes* a person a citizen, or simply gives the person the *right to become* a citizen. Funnily enough, many embassies and consulates do not actually know the answer to these difficult questions because they are not generally staffed by lawyers.

11. David knows of at least three cases where a person has asked the relevant embassy or consulate questions of these kind, and received the wrong answer. So the popular idea that it is simply a matter of calling the relevant embassy or consulate and asking them for an answer is misconceived. From the point of view of policy, it is outrageous that in a country of immigrants, we are engaging in these genealogical witch-hunts to see if someone has a bit of the wrong ancestry.

12. If we go back six or seven generations, there are very few people in this country, apart from Indigenous Australians, who are not immigrants. Incidentally, a great irony of the citizenship registry is that it is the people of Indigenous descent who are most likely to be unable to give a sufficient account of their ancestry.

13. The provision simply has to go - it is completely out of place in modern day Australia.

<u>Senator Canavan</u>

14. Canavan was born in Queensland in 1980. Both his parents were born in Queensland. His father's family has no Italians in it at all. His mother's parents were both born in Italy, and both came to Australia and became Australian citizens.

15. Canavan's grandfather became a citizen *before* the birth of his mother; his grandmother became a citizen *after* the birth of his mother. Under the Italian citizenship law of 1912 ('the

1912 law'), citizenship extended to an indefinite number of generations, but only through the male line.

16. So because his grandfather had become Australian and had therefore lost his Italian citizenship *before* his mother was born, she was not born an Italian citizen. She was born an Australian citizen and only an Australian citizen.

17. Similarly, when Senator Canavan was born in 1980, he was an Australian citizen and only an Australian citizen. So one would think he would have no problem. However, in 1983, three years after Canavan's birth, the Italian Constitutional Court heard a challenge to their citizenship law, on the basis that it was discriminatory against women, and therefore contrary to a clause in their Constitution. The Court upheld the challenge.

18. Under Italian constitutional doctrines, unlike under ours, it was held that the law was simply to be read so as to be valid i.e. that the law was to be read as if it had said that citizenship passes through the male and female lines; and normally constitutional decisions are retrospective to the date of the Constitution in 1948, meaning citizenship now passes through the female line retrospectively.

19. The effect of this - if it is applied literally - is that when Canavan's mother was born, his grandmother was still an Italian citizen. So, retrospectively, his mother was born Italian, and similarly, he was born retrospectively the son of an Italian mother.

20. So by virtue of the double retrospectivity of the constitutional decision, Canavan would be an Italian citizen.

21. Then the Australian government obtained, through its embassy in Rome, an opinion (joint report) from a firm of solicitors, which on the face of it said that Canavan was indeed an Italian citizen.

22. The first part of the opinion was written by two partners of the firm, and went through the matters already discussed to conclude that Canavan was an Italian citizen.

23. The second part took the form of an addendum, written by a professor of law whom the firm consulted, which firstly referred to a principle of Italian constitutional law – which is that legislation, particularly when it is the result of construction by the Constitutional Court, must be reasonable – and secondly stated that it would be unreasonable, on the facts of this particular case, to impose Italian citizenship with a double retrospectivity on Canavan – and that such unreasonableness could be avoided by construing the legislation instead as meaning that a person with an Italian ancestor *has the right* to become an Italian citizen if he so chooses, *but is not automatically one*.

24. Then, at the very beginning of the joint report was discovered the statement 'we (the partners) agree with his (the professor's) views'. Suddenly, the opinion was no longer 1:2, but 3:0. Their view was that the law would not be applied literally, and therefore that Canavan was not an Italian citizen. (A word to the wise (solicitor): *never advise on a document you haven't seen.*)

25. Under our rules of private international law, if Italian law is applied, the whole of it must be applied. So on the evidence before it, the High Court could not be satisfied that Senator Canavan was a citizen of Italy.

26. Canavan's case also establishes the falsity of the second myth. It makes it clear that simply because a person has the *right to become a citizen* of another country, does not mean he or she is disqualified under s 44. S 44 does not specifically mention having the right to become a citizen of another country.

27. So the High Court in this case makes it clear that a person who is entitled to foreign citizenship, but does not take it up, is not caught by s 44. This clarification has been fortunate for another reason – that is that the suggestion that all Jews are disqualified under s 44 from Parliament on the basis that they are entitled to citizenship of Israel on application can now be confirmed as baseless.

<u>Renunciations & exceptions under s 44</u>

28. It can be said that there is a third myth – that is that as long as a person takes reasonable steps to inquire about and renounce his or her citizenship, that person is not likely to be disqualified under s 44.

29. But reasonableness only arises in a context where we are looking at foreign law, and deciding whether or not it is unreasonable. If it *is* decided that a particular foreign law is unreasonable, and provided the person did everything that they reasonably could, then that person might not be caught by s 44.

30. So the crucial question is not whether a person's action is reasonable, but more so *whether a foreign law is unreasonable.*

31. The Courts have said in *Sykes v Cleary* that there is an exception to s 44 citizenship if a person used his or her best endeavours to renounce his or her citizenship, but were unable to do so, either because the country did not permit renunciation, or because it imposed unreasonable conditions on the renunciation.

32. The first argument that was put in the Canavan case on behalf of Barnaby Joyce and various other people was that if a person does not know that they have a foreign citizenship, s 44 should not apply. Bret Walker SC for Barnaby Joyce put this very eloquently when he said

'you cannot heed what you do not hear' – i.e. how can a person have a conflict of interest if they do not know about the foreign citizenship?

33. The second argument was that given that s 44 does not disqualify a person who takes all reasonable steps to renounce, it must follow that the content of the obligation to take reasonable steps of a person who does not know that he or she has citizenship is zero.

34. This argument was rejected by the High Court, which said that there were too many shades of knowledge involved. Rather than have to decide all the possible nuances of knowledge, the High Court decided to take the simple approach by ruling that knowledge does not matter, despite remarks made in dissent by Deane J in *Sykes v Cleary* about the important 'mental element' in citizenship.

35. It has been suggested that we do not automatically accept everyone's definition of what their citizenship is - we reject exorbitant claims. The Court seemed very receptive to the idea that citizenship through an indefinite number of generations was an exorbitant claim. Although it was strongly argued, the High Court did not refer to the issue in its judgment.

Senator Xenophon

36. Xenophon was born in Australia. He had one Greek and one Cypriot parent. He had checked with both the Greek and Cypriot embassies, who both told them that he was not a citizen.

37. What did not occur to either of the embassies was that Xenophon might have some form of British citizenship arising from the fact that Cyprus was in British possession at the time of his father's birth.

38. The High Court found that the citizenship a person got if they lived in Cyprus at the time was not British citizenship at all. Rather, it was something called 'British overseas citizenship', which was a sort of sop the British government invented to make people in black Commonwealth countries happy. But it did not mean anything - it was a fairly meaningless concept.

39. So the High Court ruled that 'British overseas citizenship' is not citizenship - it is something less, even though it uses the word.

Other aspects of s 44

Bankruptcy

40. This aspect of s 44 is that a person who is bankrupt, or takes the benefit of the law relating to bankruptcy (by scheme of arrangement or composition), is disqualified under the section.

This is a result of the 1901 prejudice that a bankrupt is in some way an evil person, and an otherwise untrustworthy person for parliament.

41. Today, of course, there is no rational reason why a person who has become bankrupt should not be capable of being a senator or member of the House. The concept is passé, and the sooner we get rid of it, the better. Incidentally, even more inappropriately, the same disqualification appears in relation to the solicitor-general in the *Law Officers Act.*

Conviction

42. This aspect is that a person convicted of an offence carrying a sentence of over a year is also disqualified under the section. We saw a very unkind result of this in the case of *Culleton*.

Office of profit under the Crown

43. This aspect - disqualification of a person who holds any office of profit under the Crown - is anachronistic and cause for confusion.

44. If there are certain government positions which are incompatible with sitting in Parliament, then there should be a clear, enumerated list of them.

Timing

45. Another question that arises in dealing with s 44 relates to timing. The Court has said that the disqualifications apply during the entire electoral process, starting with the issue of the writs, and ending with the declaration of the poll.

46. In Hollie Hughes's case, the Court put this together with a proposition that when a person is disqualified, the original election is looked at and the votes recounted to see who comes next as the replacement.

<u>Calls for constitutional amendment</u>

47. We are all aware of the difficulties of changing the Constitution We all know how many attempts have failed. We also know that some idiot is going to say to the public that such a change as is suggested would only be for the benefit of politicians, and there would be no reason for it. It is. In fact, something that is crying out for change.

48. The section is anti-democratic, racist, and discriminatory against people like bankrupts, and people who have had accidental, very minor convictions (especially where they are set aside later).

49. The simple course would be to repeal s 44. There have been many proposals for a constitutional amendment to change s 44. Bills have been introduced again and again for a referendum, nothing has ever eventuated from any of these attempts.

50. *Re Wood* was the first case in which we started to t dual nationality. Wood was a British citizen. The Court disposed of the case by deciding that he was disqualified under the *Commonwealth Electoral Act 1918* (Cth), but went on to say that there was a big question about s 44 of the Constitution which needed urgent attention.

51. Constitutional referenda come with great difficulty. One thing that is absolutely clear is that the referendum will not succeed if the political parties disagree over it. There has to be bipartisan consensus for a referendum to succeed.

52. Given the chaos of all these cases in 2017, it may well be the case that if the people were approached with a bipartisan proposal which said that s 44 was nonsense and should be gotten rid of, there would be a good chance that such a change might occur.

53. Not only would such a proposal garner bipartisan support, it would also garner multi-partisan support, because the small parties have been as affected as the big parties. So there should be unanimity in Parliament. But it is more a question of selling the proposal.

54. It would be much better just to get rid of the section altogether, rather than to introduce any amendments. The section is totally anachronistic.

BIOGRAPHY

David Bennett AC QC

Barrister, 5 Wentworth Chambers, Sydney

David Bennett AC QC practises in the areas of appellate law generally, constitutional law, administrative law, revenue law, trade practices and competition law, among others. David has held various positions during his career, including Solicitor-General for the Commonwealth of Australia, President of the Australian Bar Association and also President of the NSW Bar Association. He has been a part-time member of the Australian Government's Takeovers Panel and is recognised in various publications as a leader in the law.

Professor Tony Blackshield

Emeritus Professor of Law, Macquarie University, Sydney

Tony Blackshield taught in the 1960s in the Department of Jurisprudence and International Law at the University of Sydney. In the 1970s he was a founding member of the Faculty of Law at the University of New South Wales. Thereafter he was Professor of Legal Studies at La Trobe University (1979-1988), and Professor of Law at Macquarie University (1988-1999). He was also a frequent public commentator, notably on "the Dismissal" of 11 November 1975 and "the Murphy affair" of 1984-1986. He is a Fellow of the Academy of Social Sciences in Australia, an Honorary Professor of the Indian Law Institute, New Delhi, and an Officer of the Order of Australia.

BIBLIOGRAPHY

Focus Case

Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash [2017] HCA 45

Benchmark Link

Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash [2017] HCA 45

Judgment Link

Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash [2017] HCA 45

Cases

Sykes v Cleary [1992] HCA 60; 176 CLR 77

Re Culleton [No 2] [2017] HCA 4

Re Nash [No 2] [2017] HCA 52

Re Wood [1988] HCA 22

Legislation

Law Officers Act 1964 (Cth)

Commonwealth Electoral Act 1918 (Cth)