ALEXANDER V MINISTER FOR HOME AFFAIRS: CITIZENSHIP STRIPPING A DREADFUL PUNISHMENT

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I INTRODUCTION

The High Court's decision in *Alexander v Minister for Home Affairs* ('*Alexander*') expands the federal separation of judicial power doctrine.[1] In considering legislation which strips an Australian of their citizenship, the High Court applied the *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*')[2] principle outside of a detention context for the first time. While *Alexander* discusses the scope of the aliens power, this article will only consider the decision regarding Chapter III of the *Constitution*.[3] First, this article will critically compare the judgments. It will argue that the principal distinction between the majority six judges and the minority, Steward J, was the former's focus on the substance rather than the form of the relevant statutory provision. Second, it will analyse the significance of the case to the advancement of Australian constitutional jurisprudence regarding Chapter III. Lastly, this article will argue that the novel application of *Lim* is better viewed as the identification of a separate Chapter III limitation.

II CASE SUMMARY AND ANALYSIS

A Facts

The plaintiff ('Mr Alexander') became both an Australian and Turkish citizen upon his birth in Australia.[4] Following Mr Alexander's departure from Australia

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1 (2022) 96 ALJR 560 ('*Alexander*').

2 (1992) 176 CLR 1 ('*Lim*').

3 For discussion of the aliens power, see Sangeetha Pillai, 'Judicial Agreements and Disagreements in Alexander v Minister for Home Affairs', *AUSPUBLAW* (Blog Post, 21 September 2022) <https://www.auspublaw.org/blog/2022/09/judicial-agreements-and-disagreements-in-alexander-v-minister-for-home-affairs>.

4 *Alexander* (n 1) 568 [1] (Kiefel CJ, Keane and Gleeson JJ).

on 16 April 2013 and entrance to Turkey, he travelled to Syria.[5] The Australian Security Intelligence Organisation ('ASIO') reported that it was 'likely' that Mr Alexander had joined the Islamic State of Iraq and the Levant by August 2013.[6] It also found that he had 'likely engaged' in foreign incursions and recruitment.[7] Mr Alexander was apprehended by Kurdish militia in November 2017 and convicted by a Syrian court on 31 January 2019.[8] He was pardoned by the Syrian government.[9] However, he remained in detention because he could not be released into the Syrian community nor repatriated to Turkey or Australia.[10]

The Australian government made numerous decisions about Mr Alexander following his arrival in Syria. These decisions were made based on ASIO's reports on his activity in Syria. They included the cancellation of his passport, a Temporary Exclusion Order, and a Qualified Security Assessment.[11] The final decision, and at the basis of this case, was the Minister for Home Affairs' (the 'Minister') 2 July 2021 decision pursuant to section 36B(1) of the *Australian Citizenship Act 2007* (Cth) that Mr Alexander ceased to be an Australian citizen.[12] In making the adverse decision, the Minister stated that 'Mr Alexander had engaged in foreign incursions while outside Australia, which demonstrated a repudiation of his allegiance to Australia; that it would be contrary to the public interest for Mr Alexander to remain an Australian citizen; and that Mr Alexander would not become stateless by reason of the determination'.[13] Through his litigation guardian, Mr Alexander challenged the validity of section 36B on the basis that it is unsupported by the aliens head of power and in breach of the federal separation of powers doctrine.[14]

B Decision

The impugned section 36B purported to enable the Minister to strip an Australian of their citizenship.

Section 36B provided:

> *Cessation of citizenship on determination by Minister*
>
> (1) The Minister may determine in writing that a person aged 14 or older ceases to be an Australian citizen if the Minister is satisfied that:
>
> (a) the person:
>
> (i) engaged in conduct specified in subsection (5) while outside Australia; or

5 Ibid 568 [4].
6 Ibid 568 [5].
7 Ibid.
8 Ibid 568 [6]–[7].
9 Ibid 568 [8].
10 Ibid.
11 Ibid 569 [12]–[13].
12 Ibid 569 [15].
13 Ibid.
14 As stated in the introduction, this article only considers the federal separation of powers issue.

> (ii) engaged in conduct specified in any of paragraphs (5)(a) to (h) while in Australia, has since left Australia and has not been tried for an offence in relation to the conduct; and
>
> (b) the conduct demonstrates that the person has repudiated their allegiance to Australia; and
>
> (c) it would be contrary to the public interest for the person to remain an Australian citizen (see section 36E). …
>
> (5) For the purposes of paragraph (1)(a), the conduct is any of the following: ...
>
> (h) engaging in foreign incursions and recruitment.[15]

The High Court held 6:1 that section 36B is invalid because it breached the federal separation of powers doctrine. Chief Justice Kiefel and Keane and Gleeson JJ delivered a plurality judgment, while Gageler J, Gordon J, and Edelman J delivered separate judgments. Steward J was the sole dissenter.

The plaintiff submitted that section 36B breached the *Lim* principle. The *Lim* principle, as stated by Brennan, Deane, and Dawson JJ is that 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[16]

There are few qualifications to the rule that detention as a form of punishment is an exclusively judicial function. The exceptions are either historical, such as military tribunals, or due to their non-punitive purpose, such as quarantine for infectious disease.[17] The *Lim* principle is supported by the *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*') doctrine, which provides for a strict separation of federal judicial power as mandated by the *Constitution*.[18] This means that the *Lim* principle does not operate at the state level, because there is not the same isolation of the judiciary and judicial power from the other branches of government.[19]

The defendants rejected the notion that *Lim* includes non-detention powers.[20] Further, the defendants submitted that section 36B merely inflicts 'involuntary hardship or detriment'[21] on a person, which, as Gleeson CJ explained in *Re Woolley; Ex parte Applicants M276/200373* ('*Re Woolley*'), is 'not an exclusively judicial function'.[22]

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15 *Australian Citizenship Act 2007* (Cth) s 36B.

16 *Lim* (n 2) 27 (Brennan, Deane and Dawson JJ).

17 Ibid 28.

18 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

19 But see *Garlett v Western Australia* (2022) 96 ALJR 888, 928 [184], where Gordon J stated that *Lim* is 'not irrelevant to the assessment of whether State legislation is compatible with Ch III of the Constitution'. Gageler J shared a similar view at 914 [119]. See also Tamara Tulich and Sarah Murray, 'Confronting Race, Chapter III and Preventive (In)justice: Garlett v Western Australia', *AUSPUBLAW* (Blog Post, 4 November 2022) <https://www.auspublaw.org/blog/2022/11/confronting-race-chapter-iii-and-preventive-injustice-garlett-v-western-australia>.

20 *Alexander* (n 1) 577 [67] (Kiefel CJ, Keane and Gleeson JJ).

21 Ibid 578 [68].

22 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 12 [17] (Gleeson CJ) ('*Re Woolley*').

1 Plurality – Substance over Form

The plurality held that section 36B is a power that Chapter III courts have the exclusive authority to exercise.[23] Their analysis focused on the substance of the law. They stated that 'whether a law provides for the adjudication and punishment of criminal conduct is a matter of substance, not form'.[24] In other words, the courts will look past a law's mere form or language and consider its actual purpose and effect. Such a view is consistent with Brennan, Deane and Dawson JJ's earlier emphasis in *Lim* that 'the *Constitution*'s concern is with substance and not mere form'.[25] This approach led the plurality to focus on the practical consequences of the Minister exercising the power under section 36B. They explained that Australian citizenship affords liberty within the country and also to return to it.[26] As such, they emphasised that to have this stripped cannot be reduced to 'involuntary hardship or detriment'[27] or analogised to having a statutory licence revoked.[28] Instead, the plurality considered section 36B to go much further by being a deprivation of nationality and thus right of liberty.[29] They found that to strip a person of their citizenship is an extreme and drastic measure; it not only takes away the rights associated with citizenship but also a person's 'right to be at liberty in Australia'.[30]

The plurality made it clear that Parliament cannot cloak the exercise of a punitive power.[31] Justices Brennan, Deane and Dawson had warned of such attempts in *Lim* when they held that it

> would … be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt.[32]

By appropriately valuing the substance of the law over its form, the plurality was critical of the legislature, writing that 'the substantive effect of the deprivation of rights of liberty conferred by Australian citizenship is not disguised by the use of the emollient language of "citizenship cessation"'.[33] The plurality compared section 36B with section 40(2) of the *British Nationality Act 1981* (UK), noting that the United Kingdom ('UK') Parliament displayed 'commendable frankness'[34] with its language of 'deprivation of citizenship'.[35] The implication here is that the word 'deprivation' rather than 'cessation' makes plain the gravity of the power

23 *Alexander* (n 1) 583 [96] (Gageler J).
24 Ibid 580 [79] (Kiefel CJ, Keane and Gleeson JJ).
25 *Lim* (n 2) 27 (Brennan, Deane and Dawson JJ).
26 *Alexander* (n 1) 578–9 [74] (Kiefel CJ, Keane and Gleeson JJ).
27 Ibid 578 [68]–[70].
28 Ibid 578 [77]. This was the argument put forth by the defendants.
29 Ibid 580 [79].
30 Ibid 583 [95] (Gageler J).
31 Ibid 580 [70] (Kiefel CJ, Keane and Gleeson JJ).
32 *Lim* (n 2) 27 (Brennan, Deane and Dawson JJ).
33 *Alexander* (n 1) 580 [79] (Kiefel CJ, Keane and Gleeson JJ).
34 Ibid.
35 Ibid.

being exercised. The High Court does recognise that the UK Parliament is exercising its power in a different constitutional universe.[36] Regardless, by making this comparison, the High Court is arguably chastising Parliament for using language which seeks to sever the seriousness of a measure from the terms in which it is phrased.

This criticism of the legislature is a breath of fresh air in *Lim* case law, a context where the High Court has sometimes failed to adopt the substance-focused approach which was used here.[37] For example, in *Plaintiff M68 v Minister for Immigration and Border Protection* ('*Plaintiff M68*'), the High Court considered the constitutional validity of offshore detention in Nauru. It held that it was not in breach of *Lim* because the plaintiff was in the custody of Nauru, not the Commonwealth.[38] The majority distinguished between authorising/enforcing and implementing detention.[39] However, this distinction is immaterial when the substance of the law is the focus, especially when immigration detention in Australian territory is often carried out by contractors on the Commonwealth Government's behalf rather than by the Commonwealth itself.[40]

Another case where the High Court has been criticised for favouring form over substance is *Al-Kateb v Godwin* ('*Al-Kateb*'),[41] a case where indefinite detention was upheld. Dan Meagher states that:

> It is, however, a stunning triumph of constitutional form over substance if a person can be indefinitely deprived of their liberty consistently with Ch III so long as the Commonwealth formally maintains this purpose even though, as a matter of fact, there is no reasonable prospect of it being secured in the foreseeable future.[42]

In the above cases the plaintiffs all failed to succeed on their *Lim* submissions.[43] The plaintiff in *Alexander* may have faced similar difficulties if the High Court had adopted the form over substance approach it was criticised for adopting in *Plaintiff M68* and *Al-Kateb*.[44] However, the Court invalidated section 36B in

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36 Ibid.

37 See, eg, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 70 [41] (French CJ, Kiefel and Nettle JJ) ('*Plaintiff M68*'); *Al-Kateb v Godwin* (2004) 219 CLR 562, 651 [268] (Hayne J), 658–9 [290] (Callinan J) ('*Al-Kateb*'); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 592 [36] (French CJ, Kiefel and Bell JJ) ('*NAAJA*'); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 97 [36] (Kiefel CJ, Bell, Keane and Steward JJ) ('*Benbrika*'). See also Brynna Workmann, 'Protecting Individual Liberty: Recent Applications of the *Lim* Principle' (2016) 35(2) *University of Tasmania Law Review* 136.

38 *Plaintiff M68* (n 37) 70 [41] (French CJ, Kiefel and Nettle JJ); Workmann (n 37).

39 *Plaintiff M68* (n 37) 70 [41] (French CJ, Kiefel and Nettle JJ).

40 See generally 'Immigration Detention in Australia', *Australian Border Force* (Web Page, 24 January 2019) <https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention#:~:text=Immigration%20detention%20is%20part%20of,Australia%20to%20obtain%20a%20visa.>.

41 *Al-Kateb* (n 37). The Court's decision in Al-Kateb is currently being challenged in case S28/2023: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 72.

42 Dan Meagher, 'The "Tragic" High Court Decisions in Al-Kateb and Al Khafaji: The Triumph of the "Plain Fact" Interpretative Approach and Constitutional Form over Substance' (2005) 7(4) *Constitutional Law and Policy Review* 69, 75.

43 See also, more recently, *Benbrika* (n 37).

44 Criticisms have also been made of *NAAJA*: see, eg, Workmann (n 37).

Alexander, notwithstanding that it purported to confer a power in terms which separated stripping a person of citizenship from punishment. This is a welcome outcome in the context of *Lim* case law.[45] As McHugh J stated in *Re Woolley*, 'Chapter III looks to the substance of the matter and cannot be evaded by formal cloaks'.[46]

2 Gageler J – How to Best Apply the Punitive/Non-Punitive Dichotomy

Like the plurality, Gageler J adopted a substance over form analysis. Unlike the plurality, however, this is an approach he has consistently taken.[47] Gageler J provided useful observations on the impact the level of generality or abstraction has on the application of the punitive/non-punitive dichotomy. Drawing a distinction between a punitive purpose and protective purpose is an 'elusive' task.[48] Nonetheless, it is analytically useful when determining whether a power should be characterised as judicial or non-judicial. Gageler J emphasised that the value of this analysis relies on 'the notion of what amounts to a protective purpose [being] kept within bounds'[49] – to draw boundaries limiting the elasticity of what can be characterised as either protective or punitive is what 'make[s] the distinction meaningful'.[50] To blur these boundaries by invoking an excessively broad concept of protection would defeat the purpose of the distinction. This explains why Gageler J was critical of the broad terms the defendants used to describe the purpose of the law. He held that they used too high a level of generality. Calling to mind the poet TS Eliot's idea that 'words strain / crack and sometimes break',[51] he held that the defendant's description 'stretches the concept of protection to breaking point. It deprives the distinction between "protective" and "punitive" of all utility'.[52] This is significant because whether a law breaches *Lim* turns upon its purpose,[53] and a protective purpose can more easily be found at a high level of generality.[54] For example, detaining a convicted drug trafficker can be said to protect the community from harm.[55] However, for the purpose of *Lim*, that would be 'stretch[ing] the concept of protection' too far for Gageler J.[56] His comments

45 See another recent example, *Benbrika* (n 37).
46 *Re Woolley* (n 22) 35 [82] (McHugh J).
47 Justice Gageler has consistently followed this approach to applying *Lim*, where he has often been in dissent: see, eg, *Plaintiff M68* (n 37) 111 [184] (Gageler J); *Benbrika* (n 37) 119 [95]–[97] (Gageler J); *NAAJA* (n 37) 569 [88]–[92] (Gageler J).
48 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, 145 [32] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
49 *Alexander* (n 1) 585 [107] (Gageler J).
50 Ibid.
51 TS Eliot, *The Complete Poems and Plays* (Faber & Faber, 2004) 175.
52 *Alexander* (n 1) 585 [110] (Kiefel CJ, Keane and Gleeson JJ).
53 *Re Woolley* (n 22) 25–6 [60] (McHugh J).
54 See generally Jeffrey Steven Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention' (2012) 36 *Melbourne University Law Review* 41.
55 Rebecca Ananian-Welsh, 'Minister for Home Affairs v Benbrika: Terrorism, Preventative Detention and the Separation of Powers' (Speech, Australian Association of Constitutional Law, 27 April 2021).
56 *Alexander* (n 1) 585 [110] (Kiefel CJ, Keane and Gleeson JJ).

echo Gummow J's warning in *Fardon v Attorney-General (Qld)* ('*Fardon*') against adopting a high level of generality.[57]

This raises the question of the appropriate level of generality. For Gageler J, it depends upon the constitutional value and doctrine in play. He referred to a useful passage from Cromwell J of the Supreme Court of Canada, who explained why judges should avoid each extreme:

> The appropriate level of generality, therefore, resides between the statement of an 'animating social value' – which is too general – and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context – which risks being too specific'.[58]

Thus, Gageler J's analysis focused on what *not* to do when applying *Lim*, as opposed to pinpointing how to select the appropriate level of generality. The real utility of Gageler J's observations is that it provides a red flag for judges when considering submissions that utilise analogies at too high a level of generality to argue that the purpose of a law is protective. Here, the majority rejected the defendant's submissions likening the cessation of citizenship to revoking a statutory license.[59] Therefore, the plurality's analysis was consistent with Gageler J's observations, as they rejected a level of generality that was too high.

3 Gordon and Edelman JJ on Punishment

Gordon J centred her analysis on whether section 36B, 'by reason of [its] nature or because of historical considerations',[60] should be characterised as penal or punitive. Historical considerations in this sense involved tracing how the power to denationalise an individual has been used in the past. This enquiry is from *Lim* and informs statutory interpretation.[61] Gordon J interpreted section 36B as retribution on the basis that it is a measure 'taken in the name of society to exact just retribution on those who have offended against the laws of society'[62] by engaging in past conduct that is **'**identified and articulated wrongdoing'.[63]

First, looking at the nature of section 36B, Gordon J highlighted that it goes beyond involuntary hardship, as citizenship cessation is a 'loss of fundamental rights of citizenship with immediate effect, and permanently'.[64] Justice Gordon then turned to historical considerations. She traced citizenship cessation from ancient Rome to feudal England and 20th century United States ('US') case law.[65] Justice Gordon's historical analysis across centuries and continents of citizenship

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57 (2004) 223 CLR 575, 613 [83] ('*Fardon*'). See also Gordon (n 54) 95.

58 *Alexander* (n 1) 584 [105], citing *R v Moriarity* [2015] 3 SCR 485, 498–9 [28].

59 *Alexander* (n 1) 579 [77] (Kiefel CJ, Keane and Gleeson JJ).

60 Ibid 595 [159] (Gordon J).

61 *Lim* (n 2) 27 (Brennan, Deane and Dawson JJ).

62 Justice Gordon cites the following cases: *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 359 [94] (Nettle J) ('*Falzon*'), citing *Veen v The Queen [No 2]* (1988) 164 CLR 465, 473–4 (Mason CJ, Brennan, Dawson and Toohey JJ), 490–1 (Deane J). See also *Pollentine v Bleijie* (2014) 253 CLR 629, 650 [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Benbrika* (n 37) 154–5 [196] (Edelman J).

63 *Alexander* (n 1) 596 [163] (Gordon J), quoting *Al-Kateb* (n 37) 650 [265] (Hayne J).

64 *Alexander* (n 1) 597 [166] (Gordon J).

65 Ibid 597–8 [167]–[172].

cessation was not gratuitous. Rather, it serves to make the point that – for the purpose of the enquiry called for by *Lim* – to strip a person of their citizenship has historically been used as punishment in organised societies.

Historical considerations also guided Edelman J. However, his Honour's analysis considered two categories of laws. Both have 'harsh consequences',[66] but only one of these types of laws is properly categorised as punitive.[67] His Honour wrote:

> There can sometimes be a very fine line between (i) punitive laws, which have as one of their purposes sanctioning proscribed conduct by making it subject to harsh consequences, and (ii) laws which use certain conduct merely as a factum which informs a decision to impose harsh consequences for separate purposes concerning the public interest. The category that a law falls into will depend upon the identified purposes of the law.[68]

Edelman J held that section 36B fell into (i), but noted that not all citizenship cessation powers would do so.[69] For example, as was the case in *Falzon v Minister for Immigration and Border Protection*,[70] the power of deportation might alternatively be enacted 'as a political precaution ... and possibly on considerations not susceptible of definite proof but demanding prevention or otherwise dependent on national policy'.[71] Justice Edelman left open the possibility for Parliament to draft citizenship cessation legislation that is not punitive, but it seems that the circumstances are rather narrow as his only example was for 'political precautions'.[72] Indeed, it was Edelman J who most emphasised the grave harm involved in stripping a person of their citizenship – not only to the denationalised person but to the society itself that hands down such a punishment. His Honour even suggested that it was antithetical to modern democracy, noting that the punishment has been described as 'a fate universally decried by civilised people'[73] and 'as a form of civil death'[74] that has been 'a dreadful punishment, abandoned by the common consent of all civilised people'.[75] In light of this view, it is unlikely that Edelman J would welcome future legislation purporting to give the executive power to strip a person's citizenship.

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66 Ibid 612 [241] (Edelman J).

67 Ibid 611 [239].

68 Ibid 612 [241].

69 Ibid 613 [249].

70 *Falzon* (n 62).

71 *Alexander* (n 1) 613 [249] (Edelman J).

72 Helen Irving points out that citizenship cessation is available under s 36D of the *Australian Citizenship Act 2007* (Cth), but this power notably requires the individual to have been convicted of certain offences: see Helen Irving, 'Alexander v Minister for Home Affairs: Existential Citizenship and Metaphorical Allegiance', *AUSPUBLAW* (Blog Post, 15 July 2022) <https://www.auspublaw.org/blog/2022/07/alexander-v-minister-for-home-affairs-existential-citizenship-and-metaphorical-allegiance>. Cf Pillai (n 3), who says s 36D may be constitutionally challenged. Section 36D has since been challenged in case M90/2022: *Benbrika v Minister for Home Affairs* [2023] HCATrans 83. Section 34(2)(b)(ii) has since been challenged in case B47/2022: *Jones v Commonwealth of Australia* [2023] HCATrans 85.

73 *Alexander* (n 1) 613 [248].

74 Ibid.

75 Ibid. See also Jeffrey Steven Gordon who describes detention similarly in Gordon (n 54) 102.

4 Steward J in Sole Dissent

Steward J held that while denationalisation could be penal,[76] section 36B is an administrative rather than judicial power.[77] His Honour emphasised that the federal executive 'may exercise a power to impose a penalty or a detriment based upon an opinion that a crime has been committed'.[78]

Unlike the other judges, Steward J did not consider section 36B to be retributive.[79] His Honour looked to the purpose of the *Australian Citizenship Act 2007* (Cth), which is laid out in section 36A. His Honour stated that section 36A makes 'no reference, either directly or indirectly, or indeed inferentially, to punishment or retribution'.[80] Justice Steward constructed section 36B as an acknowledgement of a fact that has already happened – a person severing their bond with the Australian community and repudiating their allegiance to the country.[81] His Honour wrote that 'it does not promote form over substance and practical effect'.[82] Further, his Honour suggested that the majority's conclusion regarding section 36B as retributive manifestly clashes with the expression of purpose set out in section 36A and in the Revised Explanatory Memorandum to the Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 (Cth) ('Cessation Explanatory Memorandum').[83] In his Honour's view, it failed to grapple with an essential aspect of section 36B: repudiation of allegiance to Australia.[84]

The objects sections of legislation are helpful tools in statutory interpretation that should not be disregarded. But the High Court made it abundantly clear in *Australian Communist Party v Commonwealth* ('*Australian Communist Party Case*') that 'the stream cannot rise above the source'.[85] By focusing on section 36A and the Cessation Explanatory Memorandum, Steward J gave too much weight to what Parliament expressly considered to be the purpose of the legislation. The other six judges placed somewhat less weight on the description of the statutory purpose in section 36A. However, the important distinction to draw is that they found that it supported – rather than opposed – the finding that section 36B was punitive. As discussed above, the plurality also went one step further in expressly criticising the legislature's drafting as disingenuous.[86] In *Lim,* for example, the Court specifically used the example of Parliament investing in the executive an arbitrary power to detain citizens in custody as beyond its legislative power –

76 As was the case in *Trop v Dulles*, 356 US 86 (1958).
77 *Alexander* (n 1) 630–2 [332]–[339].
78 Ibid.
79 Ibid 632 [337].
80 Ibid.
81 Ibid.
82 Ibid 632 [338] (Steward J).
83 Ibid.
84 Ibid.
85 (1951) 83 CLR 1, 258 (Fullagar J).
86 *Alexander* (n 1) 580 [79] (Kiefel CJ, Keane and Gleeson JJ).

'notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt'.[87] Justice Steward disagreed with the other six judges that the concern of section 36B is with 'retribution for conduct' which is 'reprehensible'.[88] For his Honour, it was the 'expression of purpose set out in section 36A' which 'reflects the reality of the statute'.[89] It is upon this basis, which is more deferential to Parliament's stated purpose, that his Honour emphasised that 'it is wrong to conclude that the concern of section 36B is retributive.[90]

In support of his Honour's argument that section 36B has a non-retributive purpose, Steward J considered the example of a terrorist who leaves Australia to commit a terrorist act or acts that demonstrate the required repudiation of allegiance.[91] His Honour wrote that a loss of citizenship for them would 'be no more than an inconvenience or an insult'[92] in order to argue that the legislative scheme comprised by section 36B is in substance targeted at those who 'fundamentally loathe this country and all that it stands for'.[93] This interpretation of section 36B is flawed. The purpose of section 36B remains retributive notwithstanding an Australian citizen's perceived loathe or hate for Australia. This is because in our view the stripping of citizenship remains a fundamental loss of liberty. It is immaterial how much an Australian citizen may dislike or hate the country, to strip them of their citizenship remains a grave infringement on their entitlement to 'be at liberty in this country and to return to it as a safe haven in need'.[94]

Moreover, it is relevant to keep in mind Kirby J's comments in *Fardon*, that 'protection of the legal and constitutional rights of minorities in a representative democracy such as the Australian Commonwealth is sometimes unpopular'.[95] Indeed, Kirby J was echoing Latham CJ who commented that 'the majority of the people can look after itself': constitutional protections only really become important in the case of 'minorities, and, in particular, of unpopular minorities'.[96] This was the case here in *Alexander*, where the plaintiff fitted squarely into this category. And like *Fardon*, this was another case 'that the adherence of this Court to established constitutional principle is truly tested'.[97] While *Alexander* concerns a constitutional limitation as opposed to a right, Kirby J's idea remains relevant, and this is made clear by Latham CJ's reference to 'constitutional protections'.[98]

87 *Lim* (n 2) 27 (Brennan, Deane and Dawson JJ).
88 *Alexander* (n 1) 632 [338].
89 Ibid.
90 For commentary of the High Court's deferential acceptance of Parliament's stated purpose, see Amelia Simpson, 'Executive Detention as a Site for Creative Constitutional Interpretation in Australia' (2019) 45(2) *Commonwealth Law Bulletin* 296, 308 <https://doi.org/10.1080/03050718.2020.1725584>.
91 *Alexander* (n 1) 632 [338].
92 Ibid.
93 Ibid.
94 Ibid 579 [74] (Kiefel CJ, Keane and Gleeson JJ).
95 *Fardon* (n 57) 628–9 [143] (Kirby J dissenting).
96 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 124 ('*Adelaide Company*').
97 *Fardon* (n 57) 628–9 [143] (Kirby J dissenting).
98 *Adelaide Company* (n 96) 124.

Further, the idea that a person who has committed alleged conduct such as 'foreign incursions and recruitment'[99] outside of Australia would only want to return to Australia to commit acts of terrorism is reductive. To characterise the stripping of a person's citizenship as 'no more than an inconvenience or an insult'[100] on the basis that such a person is 'unlikely to care much for Australian citizenship'[101] assumes that the only possible reason such a person would want that citizenship would be 'to further some terrorist cause.'[102] This assumption is misplaced. For example, that individual may have family who remain in Australia. If citizenship is required to one day visit them, they may care to keep that citizenship. Or, in another hypothetical, the individual may be persecuted overseas, and rely on the country they left for protection on the basis that they are still a citizen. This example is not used in defence of that individual's right to return to Australia, or to sympathise with them. Rather it demonstrates the retributive nature of section 36B and Steward J's use of a very narrow example to support his argument that the effect of section 36B 'might be no more than an inconvenience or an insult'.[103] In these circumstances, because it is penal, the power in section 36B to strip an individual of their citizenship should only be exercised by the judiciary. The groups of people referred to by Kirby J and Latham CJ are the most vulnerable to executive overreach.

III DEVELOPMENT OF JURISPRUDENCE

A Introduction

The final part of this article will analyse the significance of *Alexander* on the development of Australian constitutional jurisprudence regarding the federal separation of judicial power.

B *Lim* Goes beyond Detention for the First Time

A notable aspect of *Alexander* is the High Court's novel application of *Lim* outside of the detention context. This is significant because the *Lim* principle has only been applied and considered for the power to detain. *Lim* has developed since 1992 through a body of case law in the migration and non-migration context. The principle has been tested against various detention regimes, including offshore processing,[104] indefinite detention,[105] continuing detention orders,[106] and the

99 *Alexander* (n 1) 626 [309] (Steward J).
100 Ibid 632 [338] (Steward J).
101 Ibid.
102 Ibid.
103 Ibid.
104 *Plaintiff M68* (n 37).
105 *Al-Kateb* (n 37).
106 *Benbrika* (n 37).

paperless arrest regime.[107] The plaintiffs failed in each of these cases and *Lim* was held not to apply. In *Alexander*, the *Lim* principle is tested and survives in a brand new context – a surprise, given the principle's narrow application over the years.

The expansion of *Lim* raises two related questions. Firstly, whether *Lim* is the appropriate vehicle for the restriction on executive power found in *Alexander*; and secondly, whether further limitations are possible.

C *Lim* or Something Else?

The application of *Lim* to the non-detention context can be described as an exercise of extrapolation. In argument during *Alexander* the plaintiff submitted that: '*Chu Kheng Lim* does not state a principle merely about detention; it states a principle about punishment, of which detention is but one example'.[108] This statement was at the heart of the plaintiff's Chapter III submissions and was ultimately accepted by a majority of the High Court. The plaintiff and the High Court in *Alexander* morphed the rule into something more general. It is helpful to restate the language of the rule itself – 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[109]

The majority interpreted the first line of the rule as *any penal or punitive power, under our system of government*. An alternative view that is incompatible with this interpretation is the defendant's, who stated, 'critically, however, *Lim* says nothing about laws that do not involve detention in custody'.[110] The submission made by the defendants was mostly true on its face. *Lim* is plainly about detention, and the original decision in *Lim* even includes a constitutional immunity against non-criminal detention.[111] Further, central to *Lim* is the presumption that detention is punitive unless an exception applies.[112] Therefore, *Lim* has little to say about protection against non-criminal punishment more generally, at least not providing a clear rule to that effect.[113] The purpose of the law and the nature of punishment does not become a focus of the *Lim* line of cases until later in the development of the case law.[114] Both these concepts are nonetheless part of the inquiry of determining the purpose of the detention. That inquiry involves asking why the subject is being detained – as punishment, or for some other legitimate and non-punitive reason? However, there is a way to reconcile the

107 *NAAJA* (n 37).

108 Delil Alexander (by his litigation guardian Berivan Alexander), 'Plaintiff's Submissions', Submission in *Alexander v Minister for Home Affairs*, S103/2021, 12 November 2021, 25 [75].

109 *Lim* (n 2) 27 (Brennan, Deane and Dawson JJ).

110 Minister for Home Affairs and Commonwealth of Australia (Cth), 'Submissions of the First and Second Defendant', Submission in *Alexander v Minister for Home Affairs*, S103/2021, 12 November 2021, 25.

111 *Lim* (n 2) 28 (Brennan, Deane and Dawson JJ).

112 Ibid 27.

113 Non-criminal punishment means punishment other than the adjudgment and punishment of criminal guilt under a law of the Commonwealth.

114 *Re Woolley* (n 22) introduced this focus on the purpose of the law, see in particular McHugh J's comments at 35 [82].

positions of the plaintiff and defendant on this issue in a manner which – without relying entirely on *Lim* – still has the effect of invalidating section 36B.

The rule in *Alexander* may be better characterised as follows: denationalisation for proscribed conduct is punishment and properly characterised as exclusively an exercise of judicial power. Therefore, it can only be exercised by Chapter III courts pursuant to the *Boilermakers* doctrine.[115] This statement does not rely principally on the decision of *Lim*. Rather, it is another protection offered by the *Boilermakers* doctrine. It joins the ranks of other Chapter III limitations, such as the direction rule,[116] the guarantee against Acts of Attainder,[117] and *Lim*.[118] The notion that the executive cannot punish someone for conduct is not a previously undiscovered aspect of *Lim*. Rather, it goes to the heart of the separation of federal judicial power doctrine. One reason that the *Constitution* is structured in three separate Chapters is that certain powers are to be only exercised by the judiciary, namely, judicial power. Section 36B fits squarely as judicial power. Thus, using the *Lim* principle as a square peg for a round hole may be inappropriate when the *Boilermakers* doctrine is, in this context, sufficiently round.

In *Alexander*, the parties' submissions and oral argument regarding Chapter III focused on *Lim* and the key question of whether or not the principle applied to non-detention powers.[119] Perhaps it was open to the plaintiff to argue his case in the way described above: that section 36B infringes a novel constitutional limitation on federal legislative and executive power. One can only speculate whether this would have led to a different outcome. However, it is important to keep in mind that the way parties frame constitutional issues in written submissions and oral argument influence judicial decision-making. The Court may have been more likely to establish a novel constitutional limitation if the case was argued as such.

However, it could be argued that the High Court did expressly purport to apply *Lim* here. This is because despite the parties' submissions, it remained open to the Court to consider *Alexander* as a new principle and yet none of the judges did so. Justice Gordon stated extra-judicially, citing a number of Australian and United States decisions, that: 'the elucidation of legal principles proceeds best, and is "most securely founded", when it takes place within the concrete parameters of a dispute in which "a question emerges precisely framed and necessary for decision from a clash of adversary argument"'.[120] In other words, legal doctrine best

115 However, Edelman J does leave it open, stating 'that even the extreme consequence of stripping a person of their citizenship, with associated deportation or exile, does not necessarily dictate the conclusion that a law is punitive': *Alexander* (n 1) 613 [249]. In that same paragraph, his Honour only gives the example of a political precaution.

116 *Nicholas v The Queen* (1998) 193 CLR 173.

117 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

118 *Lim* (n 2).

119 See above nn 108 and 110. See also Transcript of Proceedings, *Alexander v Minister for Home Affairs* [2022] HCATrans 8.

120 Justice Michelle Gordon, 'Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law' (Speech, Lucinda Lecture, 2 August 2022) 14, citing *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 248 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Poe v Ullman*, 367 US 467, 503 (Frankfurter J) (1961); *United States v Fruehauf*,

develops incrementally and in response to specific disputes, and that is exactly how the *Lim* principle is developing here.

While it is arguable that *Alexander* is an incremental development of *Lim*, the better view is that *Alexander* is a new Chapter III limitation. The strand that connects *Lim* and *Alexander* is the idea that the power to punish is exclusively judicial. However, *Lim* has been restricted to punishment in the context of detention; *Alexander* concerns punishment in the context of citizenship stripping. The consequences of these powers are also different. Detention is the gravest infringement on liberty.[121] Citizenship stripping, while 'dreadful',[122] concerns the right *to liberty*. While these differences demonstrate the metaphorical distance between the two principles, they are in themselves not enough to constitute a new and separate Chapter III limitation. The key reason why the *Alexander* principle is distinct, is because it really is closer to *Boilermakers* than it is to *Lim* – it does not rely on the existence of *Lim* to survive and be legitimate. Put in other words, if the *Lim* principle was to hypothetically be overturned, it would not necessarily follow that *Alexander* would also have to be overturned, so long as *Boilermakers* remained.

Lastly, it should be noted that, as discussed above, *Lim* only operates as a limitation on federal, and not state power, because it is derived from *Boilermakers*.[123] Therefore, if *Alexander* is considered to create a separate limitation it would still only operate at the federal level, because it is again derived from the strict separation of federal judicial power.

IV CONCLUSION

In *Alexander*, the High Court appears to have created a new and separate Chapter III limitation: that the stripping of an individual's citizenship for proscribed conduct is punishment and thus – with very few possible exceptions – an exclusively judicial power. In reaching this conclusion, the High Court reiterated the *Constitution's* concern with substance over form. Its emphasis on the substantive effect of stripping an individual of their citizenship should be welcomed. Of course, the value of this does not rely solely on the creation of a new limitation. If, under a more modest appraisal, the High Court's decision is viewed as extending the *Lim* principle, the case remains a positive development in the Chapter III case law. It would mean that *Lim*'s boundaries have been pushed outwards as opposed to the very real possibility of them being drawn in. Lastly, *Alexander* underlines the continued significance of the *Australian Communist Party Case* and its importance in Australian constitutional law; it very much remains the case that the stream cannot rise above its source.

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365 US 146, 157 (Frankfurter J) (1961) (emphasis added), quoted in *Zhang v Commissioner of Police* (2021) 273 CLR 216, 231 [25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

121 *Al-Kateb* (n 37) 634–5 [212] (Hayne J).

122 *Alexander* (n 1) 613 [248] (Edelman J).

123 *Lim* (n 2) 26–7 (Brennan, Deane and Dawson JJ).