In one fell swoop, the High Court’s judgment about the eligibility of Katy Gallagher as a Senator disposed of five members of Parliament.

Not only was Gallagher disqualified, but the consequence was that Susan Lamb, Justine Keay, Josh Wilson and Rebekha Sharkie had no legal ground left to stand on. They had to resign, and they did
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In each case, although they had initiated the procedure to renounce their foreign citizenship before the nomination date at the last election, that procedure had not been completed in the United Kingdom and they were still formally British citizens on nomination day. That was enough to see them disqualified.

A change in the law or a clarification?

The ALP had previously boasted of its rigorous vetting of its candidates, and expressed certainty they were all validly elected.

What went wrong? Has the High Court changed its interpretation of the Constitution or has it been consistent, as the Liberal Party claims ?

The answer is that the previous position, as set out by the High Court, was ambiguous and could legitimately have been interpreted in two different ways. What the High Court did was to clarify the law by removing the ambiguity.

Read more: ***Explainer: what the High Court decision on Katy Gallagher is about and why it matters***

When the issue was first dealt with in the 1992 case of *Sykes v Cleary* , Chief Justice Mason and Justices Toohey and McHugh rejected a strict reading of section 44(i) of the Constitution on the ground that it would:

result in the disqualification of Australian citizens on whom there was imposed involuntarily by operation of foreign law a continuing foreign nationality, notwithstanding that they had taken reasonable steps to renounce that foreign nationality.

They considered that it would

be wrong to interpret the constitutional provision in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance.

Their Honours pointed out that even at federation, Australia was a nation of migrants, and that:

it could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality.

The ambiguity was whether the “reasonable steps test”: (a) only applies where the person would otherwise be disbarred from parliament because he or she was unable to renounce the foreign citizenship by any reasonable means; or (b) applies to all categories of dual citizenship, including those that can readily be renounced by following a reasonable procedure. This would mean that a candidate need only take all the reasonable steps within his or her power to renounce the foreign nationality prior to the nomination date, even if the formal renunciation did not happen until after that date.

Either view about what the court meant could have been fairly taken, but on balance most scholars favoured interpretation (b) because their Honours went on to apply the test of

"reasonable steps" to two candidates who had dual citizenship with countries that permitted renunciation.

It was therefore unsurprising that the ALP, in its legal advice to candidates, took interpretation (b), with the consequence that some of its candidates undertook the renunciation process before the nomination date, but not sufficiently early for the renunciation to be completed prior to nomination.

While this approach was legitimate, it was not the most cautious one, as it involved a risk of invalidity if the High Court later decided that (a) was the correct approach.

Doubts arose about this interpretation when the High Court handed down its judgment last year in relation to Barnaby Joyce and the other "citizenship seven" in the *Re Canavan* case.

There, when discussing the "reasonable steps test", the High Court did so solely in the context of the "constitutional imperative" to avoid the "irremediable exclusion" of citizens from being capable of election to parliament.

This left lawyers wondering whether the reasonable steps test applied more broadly, and the court had simply not mentioned it in that context, or whether the Court was confining its application to circumstances where the foreign citizenship could not be renounced at all.

What the High Court decided in the Katy Gallagher case

We now have an answer – the court took interpretation (a) above. It held that the "reasonable steps test" only applies where it is impossible or not reasonably possible to renounce the foreign citizenship.

In such a case, the person must still take all reasonable steps within his or her power to renounce that citizenship (but not the "unreasonable" ones). Once this is done, the person can stand for Parliament even though the foreign citizenship continues.

But if the impediment is simply slow processing, or that renunciation is a matter of discretion, this is not enough to trigger the exception. The process of renunciation has to be completed in accordance with the law and procedures of the foreign country before the person nominates as a candidate in a Commonwealth election.

Has this now resolved all the problems?

We now have more certainty than we did a year ago. We know that a person can be disqualified for holding dual citizenship, even when it was inherited through parents and the person holding it did not know of its existence. Ignorance is no excuse. We also now know that a person has to complete the process of renunciation of that foreign citizenship before he or she nominates to stand for parliament, even if it takes a long time to complete it.

The only exemption will be if it is impossible to renounce the foreign citizenship or the steps for doing so are unreasonable, such as a requirement that would involve a risk to the person, such as residency in a dangerous country.

It is in this area that there may yet be litigation. Some countries make it very difficult to renounce foreign citizenship, and the court may have to decide in the future about the point at which that difficulty becomes unreasonable. So this may not necessarily be the last of these cases.

What are the ramifications?

In practice, it will mean that political parties need to complete their pre-selection processes well before an election to allow sufficient time for any renunciation. If there is a snap election, or where casual vacancies or byelections occur and a candidate is needed quickly, those with dual citizenship may have to be passed over if there is not enough time to renounce the foreign citizenship.

Read more: ***Grattan on Friday: Voters just want citizenship crisis fixed – but it isn't that easy***

It is also likely that arrangements will be made with some countries, such as the United Kingdom, to fast-track processing of renunciation to deal with this problem.

But in other countries, this will not be feasible, so some potential candidates will have to renounce a long time in advance in order to be ready to nominate if the opportunity arises. The message to every aspiring politician is to check your family tree, identify any foreign citizenship you may have and renounce now.

Can this be fixed?

Realistically, the only way of removing this problem is by way of a constitutional amendment approved by a referendum. There have been many past proposals to repeal this disqualification, or to replace it with a requirement that all candidates be Australian citizens, or instead to give parliament the power to deal with the issue by legislation.

It would not be necessary to abandon the principle that members of parliament have sole allegiance to Australia. Instead, this could be achieved by legislation that puts control over renunciation of foreign citizenship into Australian hands.

The biggest problem with the current provision is that both the law as to who is a foreign citizen and the procedure to renounce it are outside Australian control.

Would such a referendum be successful? I have my doubts. It is likely to be perceived as something to help politicians, not the people.

But this High Court judgment will make it more difficult for people from some countries to become members of parliament, and that unfairness may provide a stronger argument to support a referendum to change the system.

Anne Twomey has received funding from the Australian Research Council and occasionally does consultancy work for governments and inter-governmental bodies.

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