HOUSE OF REPRESENTATIVES

House of Representatives

05 DEC 2017

Citizenship Register

To the Registrar of Members' Interests,

Statement in relation to citizenship – 45th Parliament

I declare that at the time I nominated for election in this 45th Parliament I was an Australian citizen.

Section 1—Member's details

Surname	Other Names
Falinski	Jason George

Electorate	State
Mackellar	NSW

Section 2—Member's birth and citizenship details

Place of birth	Citizenship held at birth
Manly, Australia	Australian

Date of birth	Date of Australian naturalisation *(if not an Australian citizen by birth)*
24 / 08 / 1970 Day Month Year	/ / Day Month Year

Notes

(1) The information which you are required to provide is contained in a resolution agreed to by the House of Representatives on 4 December 2017.

(2) If there is insufficient space on this form for the information you are required to provide, you may attach additional pages for that purpose. An electronic version of this form is available at http://members.parl.net/citizenship (internal link).

(3) Forward the original, signed copy of all pages of this statement to the Registrar of Members' Interests, RG.39 Parliament House, Canberra ACT 2600.

Section 3(a)—Member's parents' birth details

	Mother	Father
Place of birth:	Paddington, Australia	Tokmak, USSR
Date of birth:	04 / 08 / 1946 Day Month Year	13 / 12 / 1943 Day Month Year

Section 3(b)—Member's grandparents' birth details

	Maternal grandmother	Maternal grandfather
Place of birth:	Waratah, Australia	Kent, United Kingdom
Date of birth:	21 / 04 / 1921 Day Month Year	05 / 07 / 1914 Day Month Year

	Paternal grandmother	Paternal grandfather
Place of birth:	Leningrad, USSR	Krakow, Austro-Hungarian Empire
Date of birth:	17 / 06 / 1922 Day Month Year	21 / 04 / 1910 Day Month Year

Section 3(c)—Member's spouse details (if applicable)

	Spouse
Place of birth:	Tamworth, Australia
Date of birth:	02 / 12 / 1969 Day Month Year

Section 3(d)

Please list the steps you have taken to assure yourself you have not acquired citizenship of another country by descent, marriage or other means.

- Retrieved documentation regarding citizenship of all parents and grandparents from available family sources.
- Searched archival material available in Australia regarding parents' and grandparents' citizenship.
- Made inquiries of the Polish Consulate and the UK High Commission in Australia.
- I have further sought legal advice from Arnold Bloch Leibler to confirm my citizenship status solely as an Australian citizen. In making this declaration, I do not intend, and do not, waive legal professional privilege in that legal advice.

Section 4(a)—Foreign citizenship

Have you ever been a citizen of any country other than Australia?

☒ NO — ***Proceed to Section 6***

☐ YES — ***List the countries that you have been a citizen of, and evidence of the date and manner in which your citizenship of any other country was renounced or otherwise came to an end in accordance with the laws of the relevant country.***

Country	Manner of renunciation or other manner in which the foreign citizenship came to an end	Date	Evidence attached

NB: *Evidence of the date and manner in which your citizenship was renounced or otherwise came to an end* ***should*** *be attached to this form. Please date and initial each page of any attachment.*

Section 4(b)—Foreign citizenship at time of nomination

On the date you nominated for election in this 45th Parliament were you a citizen of any country other than Australia?

☐ NO

☐ YES — ***Provide details and evidence of any steps you have taken to renounce the citizenship of the other country prior to the date of nomination.***

Country	Action	Date	Evidence attached

NB: *Evidence of the steps taken to renounce the citizenship of the other country prior to the date of nomination* ***should*** *be attached to this form. Please date and initial each page of any attachment.*

Section 4(c) —Foreign citizenship now

Are you now a citizen of any country other than Australia?

☐ NO

☐ YES — ***Provide details and evidence of any steps taken to renounce the citizenship of the other country.***

Country	Action	Date	Evidence attached

NB: *Evidence of the steps taken to renounce the citizenship of the other country* ***should*** *be attached to this form. Please date and initial each page of any attachment.*

Section 5—Member with foreign citizenship at nomination or now

Complete this section if you answered YES in section 4(b) or 4(c)

Basis on which you contend you are not disqualified under s 44(i) of the Constitution	Evidence attached

NB: *Please date and initial each page of any attachment.*

Section 6—General declaration

I declare that I have completed this statement to the best of my knowledge and have attached all evidence relevant to my declarations.

Signed	Date:
	4 / 12 / 2017 Day Month Year

HOUSE OF REPRESENTATIVES

House of Representatives

06 DEC 2017

Citizenship Register

To the Registrar of Members' Interests,

Statement in relation to citizenship – alterations or additions

Surname	Other Names
Falinski	Jason

Electorate	State
Mackellar	NSW

I wish to alter my statement in relation to citizenship as follows:

Section	Alteration

***NB**: Any relevant evidence **should** be attached to this form. Please date and initial each page of any attachment.*

I wish to provide additional information for my statement in relation to citizenship as follows:

Section	Additional Information
3d	Legal advice from Arnold Block Leibler

***NB**: Any relevant evidence **should** be attached to this form. Please date and initial each page of any attachment.*

Notes

(1) The information which you are required to provide is contained in a resolution agreed to by the House of Representatives on 4 December 2017.

(2) If there is insufficient space on this form for the information you are required to provide, you may attach additional pages for that purpose. An electronic version of this form is available at http://members.parl.net/citizenship (internal link).

(3) Forward the original, signed copy of all pages of this statement to the Registrar of Members' Interests, RG.39 Parliament House, Canberra ACT 2600.

I declare that I have completed this statement to the best of my knowledge and have attached all evidence relevant to my declarations.

Signed	Date:
	6 / 12 / 2017 Day Month Year

Arnold Bloch Leibler
Lawyers and Advisers

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6 December 2017

By E-mail
Confidential and privileged

Mr Jason Falinski MP
Member for Mackellar
Shop 1
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Narrabeen NSW 2101

Our Ref ML/SMF
File No. 021906101

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SYDNEY

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Leonie R Thompson
Zaven Mardirossian
Jonathan M Wenig
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Paul Rubenstein
Peter M Seidel
Alex King
John Mitchell
Ben Mahoney
Sam Dollard
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Caroline Goulden
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Genevieve Sexton
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Nathan Briner
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Justin Vaatstra
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Susanna Ford
Tyrone McCarthy
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Sue Kee
Kimberley MacKay
Andrea Towson
Daniel Mote
Damien Cuddihy
David Robbins
Krystal Pellow
Jeremy Lanzer
Gia Cari
Tanya Bastick
Emily Simmons
Liam Thomson
Jason van Grieken
Elyse Hilton
Meagan Grose
Charles Gardiner
Bridgid Cowling
Brianna Youngson
Rebecca Zwier
Gavin Hammerschlag
Kaitlin Lowdon
Lara O'Rorke
Stephanie Campbell
Claire Slubbe
Dominic Delany
Stephen Lloyd
Jonathan Ortner
Briely Trollope
Laura Cochrane
Dorian Henneron
Rachel Soh
Scott Phillips
Greg Judd

Dear Mr Falinski

Citizenship Advice

You have asked us to consider whether, for the purposes of section 44 of the *Commonwealth Constitution*, birth in Australia to parents of other than Australian heritage in your circumstances renders you a citizen of a foreign country or entitled to the rights and privileges of such citizenship and therefore incapable of sitting as a member of the House of Representatives.

Based on your instructions, and our review of academic commentary, of UK citizenship law and of English translations of Polish, Kyrgyz, USSR and Russian citizenship law, our advice is that for the purposes of section 44, you are not a citizen of the United Kingdom, Poland, Russia or Kyrgyzstan and are therefore capable of sitting as a member of the House of Representatives.

As previously discussed, we cannot conclusively advise on foreign law and recommend that you seek independent advice from foreign law experts to confirm our views set out in this advice.

Instructions

You have given us the following instructions:

(a) your father, Stanislaw (Stanley) Falinski, was born on 10 December 1943 in Tokmak in the former Union of Soviet Socialist Republics (USSR), a city that is now located in modern day Kyrgyzstan. Around 1948 he and his family moved to Krakow, Poland, and then emigrated to Australia in 1958. He arrived in Australia on 10 April 1958 and became a naturalized Australian citizen on 27 July 1967;

(b) your paternal grandfather, Leon, was born in Krakow, (then the Austro-Hungarian Empire, and now Poland), on 21 April 1910. Leon was of Jewish faith and fled Poland to Tokmak, USSR, at the time of the Nazi invasion of Poland in 1939, where he served in the Red Army as an engineer. He arrived in Australia on 18 August 1958. It

[1] Certificate Evidence of Australian Citizen, Stanley Falinski (provided by Jason Falinski to ABL); NAA series number K269, control symbol 10 APR 1958 TOSCANA, barcode 30132402.

appears he became a naturalized Australian citizen on 27 July 1967, at the same time as Stanley and Maria;

(c) your paternal grandmother, Maria, was born in Leningrad, USSR, on 17 June 1922. She arrived in Australia with your father, age 15on 10 April 1958. It is unknown when she became naturalized a Australian citizen;

(d) Leon and Maria met in Tokmak but never married;

(e) your mother, Jill, was born in Australia on 4 August 1946 and is a dual Australian-British citizen. Your mother acquired a British passport in 2006 which states she is a British citizen;

(f) your maternal grandfather, Roy Brittain-White (**Roy**) was born on 5 July 1914 in Kent, United Kingdom, and emigrated finally to Australia in or around 1945 having lived there for some time before.

Consideration of your circumstances in the context of Section 44

Because your father Stanley was born out of wedlock (and therefore would have been considered illegitimate under Polish law), he did not inherit your paternal grandfatrher Leon's citizenship on that basis and it is therefore unlikely that you have acquired Polish citizenship by virtue of your paternal grandfather's nationality.[1]

It is also likely that Leon would, as a matter of Polish law, be considered to have lost his citizenship by virtue of his enrolment into the Soviet military service, the Red Army, during World War II sometime between 1939 and 1942.[2] Stanley was born in 1942 and, on the basis that Leon had lost his citizenship by virtue of his service in the Red Army, Stanley either would never have inherited Polish citizenship, or would have lost it because Polish law at the time extended the loss of citizenship to a wife and his children under 18 of a man who has lost Polish citizenship.[3]

Finally, based on your instructions from your father's clear recollection, it appears unlikely that Leon, Maria or Stanley sought Polish citizenship following their return to Poland in the late 1940s, and as such would not be considered Polish citizens as a matter of Polish law.[4]

As such, if our understanding of Polish law is correct, you would not be considered under Polish law to be a citizen of Poland, nor are you entitled to the rights and privileges of a Polish citizen, and therefore section 44 of the Constitution does not apply to you, so as to render you incapable of sitting in the House of Representatives.

It is also our view that it is unlikely that Stanley was a citizen of Kyrgyzstan on two bases. First, being born on Kyrgyz territory is not sufficient to acquire Kyrgyz citizenship. Second, during the period of the USSR, Soviet law was the primary source of citizenship status. As such, if our understanding of Kyrgyz and Soviet law

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[2] See Affirmation or Oath of Allegiance by Leon Falinski sworn on 27 July 1967.

[3] Certificate Evidence of Australian Citizen, Stanley Falinski (provided by Jason Falinski to ABL); NAA series number K269, control symbol 10 APR 1958 TOSCANA, barcode 30132402.

[1] The Polish Citizenship Act of 20 January 1920 Article 5.
[2] The Polish Citizenship Act of 20 January 1920 Article 11(2).
[3] The Polish Citizenship Act of 20 January 1920 Article 13.
[4] The Polish Citizenship Act of 20 January 1920 Article 3.

is correct, we advise that you are not a citizen of Kyrgyzstan, nor are you entitled to the rights and privileges of a Kyrgyz citizen, and therefore section 44 of the Constitution does not apply to you, so as to render you incapable of sitting in the House of Representatives.

It is more likely that Stanley was a citizen of the USSR and later Russia as both he and Maria were born within its territory. At the time of his birth, USSR citizenship was largely, although not explicitly, informed by the principle of *ius soli*.[5] This means that persons born within the territory were automatically citizens of the USSR.[6]

On this basis, and on the basis of the consideration of USSR and Russian law, Maria and Stanley were likely to be USSR citizens by virtue of being born within its territory. It is unclear to us whether Maria and Stanley ever acquired Polish citizenship and we have proceeded on the basis that they did not.

Stanley became a naturalized Australian citizen as an adult, around 24 years of age, in 1966. In 1966, the legislatively prescribed Australian citizenship oath included a renunciation of "all other allegiance". If our understanding of USSR is correct, Stanley's renunciation was sufficient for him to lose USSR citizenship, if he had acquired any. We also note that dual citizenship was only permitted under USSR law in certain prescribed circumstances which do not arise on the facts relevant to your citizenship.

In the alternative that Stanley's renunciation was not sufficient to expunge Stanley's status as a citizen of the USSR or the 1991 Citizenship Law restored this status to him, it is nonetheless unlikely that you are a Russian citizen. Citizenship laws enacted since your birth in 1970 have generally provided that a child born outside of the territory to "mixed parents", neither of whom are ordinarily resident in the territory, is either ineligible for citizenship or required that both parents agree in writing that the child is to take USSR or Russian citizenship and then take steps to formalise the child's status with the relevant authorities. You have instructed us that your parents have not taken any such steps.

Therefore, if our understanding of USSR and Russian law is correct, we advise that because you are not a citizen of Kyrgyzstan or Russia, nor are you entitled to the rights and privileges of a Kyrgyz or Russian citizen, section 44 of the Constitution does not apply to you so as to render you incapable of sitting in the House of Representatives.

Finally in relation to British citizenship, you were born in Australia in 1970 to a mother who is a British citizen by birth by virtue of the British law which applied at the time of her birth.

Under the 1981 British Nationality Act you would have been entitled to acquire British citizenship by registration if you had registered with the UK, and under the *British Nationality Act 1948* (which applied at the time of your birth) you would have automatically become a citizen of the United Kingdom and Colonies by descent if women had been able to pass this citizenship on to their children in the same way as men. Because your instructions are that no steps were taken to register you as a British citizen when you were a minor nor as an adult pursuant to section 4C of

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[5] *Constitution of the Russian Socialist Federated Republic 1918* Article 2; *Constitution of the Russian Socialist Federated Republic 1918* Article 2; *Constitution of the Russian Socialist Federated Republic 1936* Chapter 2.

[6] *Constitution of the Russian Socialist Federated Republic 1936* Chapter 2.

the 1981 British Nationality Act, nor have you taken any such steps, you will not have acquired British citizenship by registration.

Therefore, if our understanding of British law is correct, we advise that because you are not a citizen of the United Kingdom, nor are you entitled to the rights and privileges of a British citizen, section 44(i) of the Constitution does not apply to you so as to render you incapable of sitting in the House of Representatives.
Please do not hesitate to contact us if you would like to discuss this advice.

Yours sincerely

Mark Leibler AC
Senior Partner

Susanna Ford
Partner

HOUSE OF REPRESENTATIVES

House of Representatives

09 MAY 2018

Citizenship Register

To the Registrar of Members' Interests,

Statement in relation to citizenship – alterations or additions

Surname	Other Names
FALINSKI	JASON GEORGE

Electorate	State
MACKELLAR	NEW SOUTH WALES

I wish to alter my statement in relation to citizenship as follows:

Section	Alteration
***NB**: Any relevant evidence **should** be attached to this form. Please date and initial each page of any attachment.*	

I wish to provide additional information for my statement in relation to citizenship as follows:

Section	Additional Information
3(d)	Received confirmation from the Polish Government that confirms I am not entitled to the rights and privileges of Polish citizenship. Receipt of updated Legal advice from Arnold Bloch Leibler.
***NB**: Any relevant evidence **should** be attached to this form. Please date and initial each page of any attachment.*	

Notes

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(2) If there is insufficient space on this form for the information you are required to provide, you may attach additional pages for that purpose. An electronic version of this form is available at http://members.parl.net/citizenship (internal link).

(3) Forward the original, signed copy of all pages of this statement to the Registrar of Members' Interests, RG.39 Parliament House, Canberra ACT 2600.

I declare that I have completed this statement to the best of my knowledge and have attached all evidence relevant to my declarations.

Signed	Date:
	9 / 5 / 2018 Day Month Year

Embassy
of the Republic of Poland
in Canberra

Canberra, 27 April 2018

Mr Jason Falinski MP
House of Representatives
Parliament House
Canberra ACT 2600

Dear Mr Falinski,

In response to your inquiry regarding your citizenship status in relation to Poland please be advised that, as a general rule, there are three documents which enable Polish diplomatic and consular missions to state someone`s Polish citizenship status: a valid Polish passport, a valid Polish ID (dowód osobisty), and a decision of the relevant province governor on the possession of Polish citizenship.

I can confirm that according to our records you have never had a Polish passport, or a Polish identity card, and you have never applied through our Embassy to relevant Polish authorities to confirm the possession of Polish citizenship or to be bestowed with Polish citizenship.

Unless you submit at least one of the above mentioned documents you are not entitled to the rights or privileges of Polish citizenship, including a Polish passport.

Yours faithfully,

Michał Kołodziejski
Ambassador of Poland to Australia

7 Turrana Street
Yarralumla, ACT 2600, Australia
tel.: (61 02) 6272 1000
fax: (61 02) 6272 3184
e-mail: canberra.amb.sekretariat@msz.gov.pl

9.5.18

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9 May 2018

By E-mail
Confidential and privileged

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Our Ref ML/SMF
File No. 021906101

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Paul Rubenstein
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Ben Mahoney
Jonathan Milner
John Mengolian
Caroline Goulden
Matthew Lees
Genevieve Sexton
Jeremy Leibler
Nathan Briner
Jonathan Caplan
Justin Vaatstra
Clint Harding
Susanna Ford
Tyrone McCarthy
Teresa Ward
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Sam Dollard
Laila De Melo
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Daniel Mole
David Robbins
Krystal Pellow
Jeremy Lanzer
Gia Cari
Tanya Bastick
Emily Simmons
Liam Thomson
Jason van Grieken
Elyse Hilton
Charles Gardiner
Bridgid Cowling
Brianna Youngson
Rebecca Zwier
Gavin Hammerschlag
Kaitlin Lowdon
Lara O'Rorke
Stephanie Campbell
Claire Stubbe
Stephen Lloyd
Jonathan Ortner
Briely Trollope
Laura Cochrane
Dorian Henneron
Rachel Soh
Scott Phillips
Greg Judd

Dear Mr Falinski

Citizenship Advice

You have previously asked us to consider whether, for the purposes of section 44 of the *Commonwealth Constitution*, birth in Australia to parents of other than Australian heritage in your circumstances renders you a citizen of a foreign country or entitled to the rights and privileges of such citizenship and therefore incapable of sitting as a member of the House of Representatives.

We have previously advised, including in written advice given on 6 December 2017, that for the purposes of section 44, you are not a citizen of the United Kingdom, Poland, Russia or Kyrgyzstan and are therefore capable of sitting as a member of the House of Representatives (**December advice**).

Our December advice stands in light of the recent receipt of independent advices from a Polish law expert, Piotr Stączek, the Polish Ambassador to Australia, Mr Michal Kolodziejski, and Mr David Bennett AC QC.

Instructions

You instructed us as follows:

(a) You were born in Australia on 24 August 1970, and are an Australian citizen.

(b) Your father, Stanislaw Falinski (**Stanley**), was born on 13 December 1943 in Tokmak in the former Union of Soviet Socialist Republics (**USSR**), a city that is now located in modern day Kyrgyzstan. Around 1948 he and his family moved to Krakow, Poland, and then emigrated to Australia in 1958. He arrived in Australia on 10 April 1958 and became a naturalized Australian citizen on 27 July 1967.

(c) Your paternal grandfather, Leon Falinski (**Leon**), was born in Krakow, (then the Austro-Hungarian Empire, and now Poland), on 21 April 1910. Leon was of Jewish faith and fled Poland to Tokmak, USSR, at the time of the Nazi invasion of Poland in 1939, where he served in the Red Army as an engineer. He arrived in Australia on 18 August 1958. It appears he became a naturalized Australian citizen on 27 July 1967, at the same time as Stanley and Maria.

9.5.18

(d) Your paternal grandmother, Maria Falinski (nee Ummicyn) (**Maria**), was born in Leningrad, USSR, on 17 June 1922. She arrived in Australia with your father, when he was aged 15, on 10 April 1958. It is unknown when she became a naturalized Australian citizen.

(e) Leon and Maria met in Tokmak but never married.

(f) Leon and Maria returned to Poland in the late 1940s, but Stanley's instructions are they never declared that they wished to become Polish citizens or renounced any Russian citizenship, nor did they make any such declaration on behalf of Stanley.

(g) Your mother, Jill Falinski (nee Brittain-White) (**Jill**), was born in Australia on 4 August 1946 and is a dual Australian-British citizen. Your mother acquired a British passport in 2006 which states she is a British citizen.

(h) Your maternal grandfather, Roy Brittain-White (**Roy**), was born on 5 July 1914 in Kent, United Kingdom, and emigrated finally to Australia in or around 1945 having lived there for some time before.

(i) Your parents were married in Australia on 19 January 1970.

(j) You have not registered yourself as a Polish citizen or taken any other steps to acquire a Polish or any other passport.

(k) You have been not registered by yourself or any member of your family as a Polish citizen at birth or at any other time.

(l) No application for citizenship or request for certification or registration as a Polish citizen has been made by you or on your behalf.

Factual enquiries

You have previously provided us with a number of original documents relating to your maternal and paternal lineage.

Consideration of applicable foreign law

Polish citizenship law

The following is based on our review of academic commentary and English translations of Polish citizenship law. As previously discussed, we cannot advise on Polish law and note that you have recently received independent advice from a Polish law expert that confirms our views set out below.

The Polish Citizenship Act of 20 January 1920 (**1920 Citizenship Act**), was the first act promulgated under the newly formed Polish State. The 1920 Citizenship Act was followed by the Polish Citizenship Act of 8 January 1951 (**1951 Citizenship Act**), and then the Polish Citizenship Act of 15 February 1962 (**1962 Citizenship Act**).

9.5.18

Relevant in the circumstances are Article 5 of the 1920 Citizenship Act, which expressly provided that legitimate children acquired their father's citizenship by birth and illegitimate children acquired their mother's, and Article 4 of the 1962 Citizenship Act, which provided that the acquisition of Polish citizenship by birth occurred either when both parents are Polish citizens, or when only one of them is a Polish citizen and the other is unknown or his/her citizenship is undetermined or he/she has no citizenship.

It continues to be our view that because Stanley was born out of wedlock (and therefore would have been considered illegitimate under Polish law), Stanley did not inherit Leon's citizenship on that basis and it is therefore unlikely that you have acquired Polish citizenship by virtue of your paternal grandfather's nationality.

This view is confirmed by the Polish expert, who concluded:

> *According to art. 5 of the Act of 20th January 1920 on citizenship of the Polish state, which was binding on the day of when Stanislaw (Stanley) Falinski was born, namely, 14th December 1943 - legitimate children obtained their father's citizenship by birth, while illegitimate children obtained their mother's citizenship. Hence, if Leon Falinski and Maria Falinski never got married, whereas Maria Falinski was not a Polish citizen, then at the moment of birth, namely, on 13th December 1943, according to art. 5 of the Act on citizenship of 1920 Stanislaw (Stanley) Falinski did not obtain Polish citizenship.*
>
> [...]
>
> *Jason Falinski was born in born in Manly, New South Wales, Australia, on 24 August 1970 as a legitimate child. The act binding then was the act of 15 February 1962 on Polish citizenship. According to art. 4 of this act, a child obtains Polish citizenship if at least one of the parents holds Polish citizenship. In the case of the parents of Jason Falinski, neither of the parents held Polish citizenship. This means that he did not obtain Polish citizenship.*

Application of section 44(i) of the Commonwealth Constitution

Section 44(i) of the *Commonwealth Constitution* (**section 44(i)**) 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;*
> >
> > *[...]*
> >
> > *shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.*

9.5.18

Section 44(i) has been considered by the High Court in several cases which confirm that persons are ineligible to sit as a senator or as a member of the House of Representatives in circumstances where they have acquired dual citizenship, including in circumstances such as those which apply to you, and failed to renounce that foreign citizenship.[1]

The section was considered by the High Court in *Re Canavan & Ors* (2017) 349 ALR 534 (***Re Canavan***) where it was unanimously held that the proper construction of section 44(i) is that it:

> *[…] operates to render "incapable of being chosen or of sitting" persons who have the status of subject or citizen of a foreign power. Whether a person has the status of foreign subject or citizen is determined by the law of the foreign power in question. Proof of a candidate's knowledge of his or her foreign citizenship status (or of facts that might put a candidate on inquiry as to the possibility that he or she is a foreign citizen) is not necessary to bring about the disqualifying operation of s 44(i).*
>
> *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 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.*[2]

The Court also explained that the structure of the text of section 44(i) is such that there are two bases for disqualification under the section. The first looks to the conduct of the person concerned. That is, whether there has been a voluntary act of allegiance, obedience or adherence to a foreign power.[3] The second is concerned with a state of affairs involving the existence of a status or of rights under the law of the foreign power, irrespective of whether a candidate is in fact minded to act upon any duty of allegiance they may have.[4]

We have not found any case law which specifically considers what it means to be "under an acknowledgement of allegiance, obedience or adherence to a foreign power". The Court in *Re Canavan* and *Re Gallagher* did not consider the issue.

On 9 May 2018, the High Court of Australia handed down its judgment in *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***).[5] In *Re Gallagher*, the Court considered the operation of the constitutional imperative in the context of section 44(i). The 'constitutional imperative' is expressed to be "that an Australian citizen not be irremediably prevented by foreign law from participation in representative government."[6]

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[1] See, for example, *Nile v Wood* (1988) 167 CLR 133; *Sykes v Cleary* (1992) 176 CLR 77.
[2] *Re Canavan & Ors* (2017) ALJR 1209 (*Re Canavan*) at 1223 [71]-[72].
[3] *Re Canavan* at 541 [21], 542 [23] and [25].
[4] *Re Canavan* at 1215 [21], 1216 [23] and [25]-[26].
[5] [2018] HCA 17.
[6] *Re Canavan* at 1214 [13], 1223 [72], cited with approval in *Re Gallagher* at [11].

9.5.18

In ruling that Ms Gallagher was ineligible to stand for election to Parliament by reason of her being a foreign citizen at the time of her nomination, it was unanimously held that:

> *[F]or 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.*[7]

Consideration of your circumstances in the context of section 44

It remains our view that because Stanley was born out of wedlock (and therefore would have been considered illegitimate under Polish law), Stanley did not inherit Leon's citizenship on that basis and, therefore, you have not acquired Polish citizenship by virtue of your paternal grandfather's nationality.

The opinion of the expert in Polish law who you retained confirms that as a matter of Polish law, you are not a Polish citizen. In particular, the Polish law expert concluded:

> *Jason Falinski does not hold and has never held Polish citizenship.*

This finding is supported by the Polish Ambassador to Australia, who confirmed on 27 April 2018:

> *[T]hat according to our records you have never had a Polish passport, or a Polish identity card, and you have never applied through our Embassy to relevant Polish authorities to confirm the possession of Polish citizenship or to be bestowed with Polish citizenship.*
>
> *Unless you submit at least one of the above mentioned documents you are not entitled to the rights or privileges of Polish citizenship, including a Polish passport.*

David Bennett AC QC, whose independent advice you have sought and received, likewise concludes that that you '*are not a dual citizen of the United Kingdom, Poland, Russia or Kyrgyzstan.*'

On these bases, we advise you that section 44 of the *Commonwealth Constitution* does not apply to you so as to render you incapable of sitting as a member of the House of Representatives.

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[7] Ibid at [26] per Kiefel CJ, Bell, Keane, Nettle, and Gordon JJ (Gageler J (at [41]) and Edelman J (at [69]) agreeing).

9.5.18

Please do not hesitate to contact us if you would like to discuss this advice.

Yours sincerely

Mark Leibler AC
Senior Partner

Susanna Ford
Partner

9.5.18