HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS AND ANOR — RESPONDENTS

EX PARTE MENG KOK TE — APPLICANT/PROSECUTOR

Re Minister for Immigration and Multicultural Affairs;
Ex parte Te
[2002] HCA 48
7 November 2002
M25/2001

ORDER

Application dismissed with costs.

Representation:

C M Maxwell QC with A F L Krohn for the applicant/prosecutor (instructed by Access Law Lawyers)

D M J Bennett QC, Solicitor-General of the Commonwealth with C Gunst QC, W S Mosley and P R D Gray for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS — RESPONDENT

EX PARTE DUNG CHI DANG — APPLICANT/PROSECUTOR

Re Minister for Immigration and Multicultural Affairs; Ex parte Dang
7 November 2002
M118/2001

ORDER

1. *The question reserved for the decision of the Court be answered as follows:*

   Question: "Did section 501(2) of the Migration Act *1958 (Cth) validly authorise the respondent to cancel the applicant's visa on 27 June 2000?"*

   Answer: "Yes".

   The matter is remitted to a single Justice for further consideration and disposition.

2. *Costs of the case stated reserved to the Justice disposing of the cause.*

Representation:

C M Maxwell QC with A F L Krohn for the applicant/prosecutor (instructed by Access Law Lawyers)

D M J Bennett QC, Solicitor-General of the Commonwealth with C Gunst QC, W S Mosley and P R D Gray for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte Te

Re Minister for Immigration and Multicultural Affairs; Ex parte Dang

Constitutional Law – Naturalisation and aliens – Immigration – Whether ss 200 and 501(2) of the *Migration Act* 1958 (Cth) are supported by s 51 (xix) or (xxvii) of the Constitution – Meaning of "alien" – *Australian Citizenship Amendment Act* 1984 (Cth) – Relevance to status of alienage of absorption into the community.

Immigration – Alien – Status and meaning of – Relevance to status of alienage of absorption into the community and allegiance to the Queen of Australia.

Words and phrases: "alien".

Constitution, s 51 (xix), (xxvii).
Australian Citizenship Act 1948 (Cth), s 5.
Australian Citizenship Amendment Act 1984 (Cth).
Migration Act 1958 (Cth), ss 196(1), 200, 201, 501.

GLEESON CJ.

Re Minister for Immigration and Multicultural Affairs & Anor; Ex parte Meng Kok Te

1 This application, seeking orders for certiorari and prohibition, was referred to a Full Court. It was heard together with the matter of *Re Minister for Immigration and Multicultural Affairs; Ex parte Dung Chi Dang*, and raises substantially the same issues.

2 The applicant was born in Cambodia in 1967. He entered Australia as a refugee in 1983, and was granted a permanent resident visa. He has never become an Australian citizen. He has been convicted of a number of criminal offences including trafficking in drugs. For an offence committed in 1991, he was sentenced to a term of imprisonment of 12 months.

3 Pursuant to s 200 of the *Migration Act* 1958 (Cth) an order of deportation was made against the applicant. That provision applies to non-citizens convicted of various offences. The applicant claims that he is beyond the reach of s 200 and that it does not validly apply to him because he is no longer an alien. His reasons for that contention are the same as those advanced for the prosecutor in the case of *Dung Chi Dang*. My reasons for rejecting the contention are the same as in that case.

4 The application should be dismissed with costs.

Re Minister for Immigration and Multicultural Affairs; Ex parte Dung Chi Dang

5 The prosecutor was born in the Republic of Vietnam (South Vietnam) in 1968. In 1980, in company with his mother and three of his sisters, he fled Vietnam and went to Malaysia. In July 1981, they entered Australia on a Class 302 Permanent Visa and went to live in Victoria, where the prosecutor attended school. After leaving school in 1985, the prosecutor took up various forms of employment. In 1989, he paid a brief visit to Vietnam, and returned to Australia. He did the same thing again in 1990. Save for those visits, he has remained in Australia since he first arrived. He is married. His wife has become an Australian citizen. They have a child who is an Australian citizen. Other close relatives of the prosecutor have also become Australian citizens. He has never done so.

6 The prosecutor has a criminal history, involving the use of, and dealing in, prohibited drugs. Since he first entered Australia, he has spent 663 days in prison serving sentences for various offences, 794 days in prison on remand in connection with charges that did not result in convictions, 76 days in prison on remand in connection with a charge that resulted in a conviction and a suspended sentence, 205 days in immigration detention, and a further period of remand in respect of unresolved charges that commenced in September 2001.

7 On 27 June 2000, the respondent made a decision, pursuant to s 501(2) of the *Migration Act* 1958 (Cth), authorising the cancellation of the prosecutor's visa. The section provides:

> "501 (2) The Minister may cancel a visa that has been granted to a person if:
>
> (a) the Minister reasonably suspects that the person does not pass the character test; and
>
> (b) the person does not satisfy the Minister that the person passes the character test."

8 We are not presently concerned with the reasons for the Minister's decision, but with a claim that s 501(2), in its application to the prosecutor, is invalid, and, in particular, is not supported by par (xix) or par (xxvii) of s 51 of the Constitution. The prosecutor has commenced proceedings seeking orders of certiorari and prohibition. Hayne J has stated a case reserving for the consideration of the Full Court the following question:

> "Did section 501(2) of the *Migration Act* 1958 (Cth) validly authorise the respondent to cancel the applicant's visa on 27 June 2000?"

9 That question is presently before the Court. There may be other issues relevant to the claim for constitutional writs, but, if there are, we are not now concerned with them.

10 For the reasons that follow, I would answer the question in the affirmative, upon the basis that s 501(2), in its application to the prosecutor, is supported by s 51(xix). It is therefore unnecessary to consider s 51 (xxvii).

11 Such an answer would plainly have been required by the decisions of this Court in *Pochi v Macphee*[1] and *Nolan v Minister for Immigration and Ethnic Affairs*[2]. However, the reasoning of four members of the Court[3] in the recent

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1 (1982) 151 CLR 101.

2 (1988) 165 CLR 178.

case of *Re Patterson; Ex parte Taylor*[4] is said to have undermined the authority of *Pochi* and *Nolan*, and forms the basis of the prosecutor's arguments. That was reasoning with which I was unable to agree in *Patterson*; and nothing I have heard in argument in the present case has caused me to change my view.

12 Essential to the success of the prosecutor's claim that s 501(2) of the *Migration Act* does not validly apply to him is the argument that he is beyond the reach of the power, conferred on the Parliament by s 51(xix) of the Constitution, to make laws with respect to naturalization and aliens. He says that, at the time of the cancellation of his visa, he was not an alien.

13 When, in 1981, the prosecutor arrived in Australia, the *Australian Citizenship Act* 1948 (Cth) in s 5, defined an alien as a person who did not have the status of a British subject, and was not an Irish citizen or a protected person. A British subject was a person who was an Australian citizen or a citizen of a member country of the Commonwealth of Nations[5]. At the time of his arrival here, the prosecutor was an alien within the meaning of that legislation. He was never a British subject. He has never become an Australian citizen. In 1983, the *Migration Act* was amended to include a definition of non-citizen. The prosecutor is a non-citizen. So long as he held a visa, he was a "lawful non-citizen". Without such a visa, he is liable to removal. That is the significance of the decision to cancel his visa.

14 The *Australian Citizenship Amendment Act* 1984 (Cth), with effect from 1 May 1987, removed references to the status of a British subject, and repealed the definition of "alien". Australian citizenship could only be acquired by birth, adoption, descent, or the grant of a certificate of Australian citizenship upon swearing allegiance to the Queen of Australia[6].

15 The prosecutor acknowledges that he is a non-citizen; but denies that he is an alien. In *Pochi*[7], Gibbs CJ said that, for the purposes of s 51(xix), Parliament can treat as an alien "any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian". The prosecutor is such a person. In *Nolan*[8], six Justices of this Court approved that

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3 Gaudron, McHugh, Kirby and Callinan JJ.

4 (2001) 75 ALJR 1439; 182 ALR 657.

5 s 7.

6 ss 10, 10A, 10B, 13 and 15.

7 (1982) 151 CLR 101 at 109-110.

8 (1988) 165 CLR 178 at 183, 185.

statement, and treated as an acceptable definition of the term "alien", as adapted to Australia, a statement by a United States court that, in the United States, an alien is "one born out of the United States, who has not since been naturalized under the constitution and laws"[9].

16 It is contended that although the prosecutor was born out of Australia, and his parents were not Australian, and he has not taken up Australian citizenship and thus become naturalized as an Australian, he is, nevertheless, not an alien. That contention involves two steps. First, it is said, four members of this Court in *Patterson* recognized the existence of a class of persons in Australia who, although not citizens, are not aliens. Secondly, it is said, the prosecutor is a member of that class. The second step, of course, depends upon the definition of the class referred to in the first step; but on that point there are differences in the reasons given by the four Justices who, on this issue, were in a majority in *Patterson*. In that case, the prosecutor, Mr Taylor, although not an Australian citizen, was a British subject who had migrated from the United Kingdom to Australia, who had lived here for many years and, who, if it be relevant, had been absorbed into the Australian community. In the present case, the prosecutor, although never a British subject, says his position is otherwise not materially different from that of Mr Taylor.

17 The prosecutor contends that, at the date of the cancellation of his visa, he had ceased to be an alien by reason that -

(a) he owed allegiance to the Queen of Australia, and to no other power; and/or

(b) he was a member of the community constituting the body politic of Australia; and/or

(c) he had been absorbed into the Australian community.

18 If the reasoning in *Pochi* and *Nolan* is correct, each of those three propositions is beside the point. As a person who was born outside Australia, whose parents were not Australian, and who has never become an Australian citizen, the prosecutor would be someone whom Parliament was entitled to treat as an alien.

19 There is no majority in *Patterson* for the view that any one of the propositions referred to in (a), (b), or (c) above, if established, would sustain the prosecutor's case. Each proposition can be traced to aspects of the reasoning of one or more of the four Justices who comprised the majority, but there was no majority view that either (a), or (b), or (c), if made good, would require a

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9 *Milne v Huber* 17 Fed Cas 403 at 406 (1843).

conclusion that the prosecutor is not an alien. On the other hand, six Justices in *Nolan* jointly expressed a view which, if correct, would mean that neither all, nor any, of the propositions, if established, would entitle the prosecutor to succeed. That is the current, inconclusive, state of authority.

20 Before examining the three propositions upon which the prosecutor relies for the contention that he is not an alien, I should make some observations as to the power conferred by s 51(xix).

21 In *Robtelmes v Brenan*[10], in 1906, this Court, following the opinion of international jurists, and decisions of courts of the highest authority in England and the United States, held that it is an attribute of sovereignty that every State is entitled to decide what aliens shall or shall not become members of its community. Griffith CJ quoted the statement of the Privy Council[11] that "[o]ne of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests."

22 Major and Binnie JJ, of the Supreme Court of Canada, said, in 2001, in *Mitchell v MNR*[12]:

> "Control over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty.
>
> 'It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role.'"

23 They emphasised the concluding sentence.

24 The legislative powers conferred upon the Parliament by pars (xix) and (xxvii) of s 51 of the Constitution are intended to enable the exercise of that power and responsibility. It is a large responsibility, vital to the welfare, security and integrity of the nation. From the beginning, the power to make laws with respect to aliens has been understood as a wide power, equipping the Parliament with the capacity to decide, on behalf of the Australian community, who will be

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10 (1906) 4 CLR 395.

11 (1906) 4 CLR 395 at 400 quoting from *Attorney-General for Canada v Cain and Gilhula* [1906] AC 542 at 546.

12 [2001] 1 SCR 911 at 989 [160], citing *R v Simmons* [1988] 2 SCR 495 at 528.

admitted to formal membership of that community. Alienage is a legal status. Naturalization is the act in the law by which a person who was formerly an alien ceases to be one. The power conferred by s 51(xix) includes a power to determine legal status[13]. When an alien is permitted to enter Australia, as in the case of the prosecutor, ordinarily such permission is, by virtue of the legislative scheme pursuant to which it is granted, conditional. An alien retains the status of alienage until that status is removed by the process of naturalization. It is for Parliament to decide, from time to time, what that process will involve.

25 Mason CJ said in *Cunliffe v The Commonwealth*[14], that the aliens power provides a more expansive source of power than the immigration power. Immigration and emigration are activities. Immigration is "an activity which *ex vi termini* is one day to be completed and looks forward (usually, at any rate) to that day."[15] That does not mean that only a person who intends to settle in Australia is an immigrant for the purposes of the power[16]. Nor does it mean that the power to make laws with respect to immigration is in all respects limited in time to the duration of that activity[17]. But a law which purports to expel, or authorise the expulsion of, a person who has become absorbed into the Australian community, so that the activity of immigration has ceased, will not bear the character of a law with respect to immigration[18]. If, however, the person in question entered as an alien, and that status has not altered, then such a law may be supported by the power to make laws with respect to aliens. As Mason CJ said, in *Cunliffe*[19], "an alien who has been absorbed into the Australian community ceases to be an immigrant, though remaining an alien."

26 The concept of absorption into the Australian community, vague as it may be, has been developed as a method of indicating that the activity of immigration in which a person has engaged has come to an end. But it does not mean that the person has lost the status of an alien. Many immigrants become resident aliens. One of the aspects of the power given by par (xix) is a power in the Parliament to

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13 *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1443 [7]; 182 ALR 657 at 661; *Meyer v Poynton* (1920) 27 CLR 436 at 440-441 per Starke J.

14 (1994) 182 CLR 272 at 295.

15 Lane, "Immigration Power", (1966) 39 *Australian Law Journal* 302 at 306.

16 *Chia Gee v Martin; Chow Quin v Martin* (1905) 3 CLR 649 at 654.

17 See *The Queen v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 384-385 per Jacobs J.

18 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36.

19 (1994) 182 CLR 272 at 295.

determine, by legislation, how an alien may alter that status. It includes, for example, a power to provide by legislation that a person who is an alien does not cease to be an alien otherwise than by going through a formal procedure which includes acknowledgment of the obligations and responsibilities of Australian citizenship. And, as I indicated in *Patterson*[20], whilst I accept that Parliament cannot, by some artificial process of definition, ascribe the status of alienage to whomsoever it pleases, par (xix) empowers the Parliament to decide who will be granted Australian citizenship, who will be treated as aliens, and by what process and upon what conditions persons may lose their status of alienage. The Australian community, through Parliament, decides who will be admitted to what the *Australian Citizenship Act* now describes as the formal membership of the community represented by citizenship, "a common bond, involving reciprocal rights and obligations", and the terms and conditions on which such admission will take place[21].

27 It was the historical relationship between Australia and the British Empire, and the status of British subjects, that gave rise to the issue in *Patterson*. If the prosecutor in this case had been born in Hong Kong, or Canada, or Gibraltar, that relationship may have been relevant here. But putting to one side the position of British subjects, there are many people who entered Australia as aliens, who have lived here for long periods and have become absorbed into the community, whose activity of immigration has long since ceased, but who have never sought formal membership of the community. There may be various reasons why they have not done so. In some cases, such a step might require the renunciation of other rights and privileges, or the severance of ties they wish to maintain. Whether by design, or simply as the result of neglect, they remain aliens.

28 An alien resident in Australia may become subject to what is sometimes called "local allegiance". The topic was discussed by Gummow J in *Kenny v Minister for Immigration, Local Government and Ethnic Affairs*[22], in connection with the position of resident friendly aliens. His Honour quoted what was said by Viscount Cave in *Johnstone v Pedlar*[23]:

> "No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given … and having landed, he may be deported, at least if a statute authorises his expulsion … But so long as he remains in

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20 (2001) 75 ALJR 1439; 182 ALR 657.

21 *Australian Citizenship Amendment Act* 1993 (Cth) s 3.

22 (1993) 42 FCR 330.

23 (1993) 42 FCR 330 at 345, citing [1921] 2 AC 262 at 276.

this country with the permission of the sovereign, express or implied, he is subject by local allegiance with a subject's rights and obligations."

29 As that passage makes clear, local allegiance is not incompatible with the status of alienage. Allegiance and alienage are not mutually exclusive[24].

30 Nor is a right to vote (although it is not relevant in this case) necessarily incompatible with the status of alienage. It is within the power of Parliament to extend the franchise to certain kinds of resident alien[25], just as it is within the power of Parliament to deny the right to vote to some citizens, such as persons under a certain age. It is not presently relevant to consider the scope of such a power. It is sufficient to note its existence.

31 Finally, as I indicated in *Patterson*[26], under pars (xix) and (xxvii) of s 51, subject to one qualification, Parliament has the power to determine the legal basis by reference to which Australia deals with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode. The qualification is that, as Gibbs CJ said in *Pochi*[27], Parliament cannot, simply by giving its own definition of "alien", expand the power under s 51 (xix) to include persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word. However, within the class of those who could answer that description, Parliament can determine to whom it will be applied.

32 The prosecutor argues that there are further qualifications by which the power of the Parliament to treat persons as aliens is limited. These must affect the meaning of the expression "naturalization and aliens" in the Constitution. They are implicit in the three propositions said to support the conclusion that the prosecutor is not, and cannot be treated as, an alien.

33 The first proposition is that, at the date of the decision to cancel his visa, the prosecutor owed allegiance to the Queen of Australia and to no other power. It is contended that he fled from Vietnam, entered Australia as a refugee, and, by asserting his refugee status, thereby renounced any allegiance to his country of birth. In consequence, it is said, it is beyond the power of Parliament to treat him as an alien. It is said that the circumstances in which he arrived in this country, and the allegiance to which he became subject by residence here, take him out of

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24 *Joyce v Director of Public Prosecutions* [1946] AC 347.

25 Constitution ss 8, 24, 30.

26 (2001) 75 ALJR 1439; 182 ALR 657.

27 (1982) 151 CLR 101 at 109.

the constitutional description of alien, and, since he has (allegedly) been absorbed into the community, he is beyond the reach of the immigration power. Therefore, he cannot be deported.

34 It has already been pointed out that local allegiance is not inconsistent with the status of alienage. That appears to be accepted by the prosecutor, who argues that his allegiance goes beyond that, and is of a kind that is incompatible with alienage. It is not suggested that the prosecutor ever made any formal renunciation or abandonment of allegiance to Vietnam. It is said that such renunciation is implied by flight and by the assertion of refugee status. If the argument is correct then Australia, by issuing the prosecutor with a visa, put him in a position in which, by his unilateral act, he could change his status from that of alien to non-alien, without becoming a citizen, and he is beyond the reach of the power of deportation. The implications for Australia's capacity, as a sovereign nation, to deport resident aliens are large.

35 For the reasons already given, I do not accept that, even if the prosecutor could make good his arguments as to the nature of his allegiances, it would be beyond the power of Parliament to treat him as an alien. In any event, his arguments as to his allegiances are unsound.

36 Let it be assumed that, at the time he originally left Vietnam, when he later entered Australia, and for a substantial time thereafter, the prosecutor fell within the definition of "refugee" in Art 1A(2) of the Refugees Convention as amended by the Refugees Protocol[28]. There is a difference between a refugee and a stateless person. Furthermore, as Art 1A(2) expressly recognizes, a refugee may be a person who has more than one nationality[29]. Although a person outside a country of nationality may be unable or unwilling to avail himself or herself of the protection of that country, it does not follow that an assertion of refugee status involves an abandonment of the right to protection[30]. Circumstances in the country of nationality may alter, restoring the practical capacity to seek and obtain protection from the country of nationality. For example, a change of government in a country of nationality may alter conditions

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28 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

29 For a discussion of the topic of alienage in connection with refugees, see Hathaway, *The Law of Refugee Status*, (1991) at 29-63.

30 As to the meaning of the definition, see *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 76 ALJR 667 at 670-671 [17]-[23], 677-678 [61]-[68]; 187 ALR 574 at 579-580, 588-590.

that originally led to flight, and might lead a person to return, or re-assert a claim to protection.

37 There have undoubtedly been material changes in circumstances in Vietnam since the prosecutor left. He has since twice returned. He has never renounced his status in Vietnam; and he has never declared allegiance in Australia. The most he can demonstrate is that he is subject to local allegiance through residence, and this is consistent with alienage.

38 The prosecutor's second proposition, that he is a member of the community constituting the body politic of Australia, appears on examination to involve no more than a re-statement of the issue for decision and a bare assertion that the issue should be decided in favour of the prosecutor. I find it difficult to understand what this contention adds to the first and third propositions on which the prosecutor relies. If neither the first nor the third proposition takes the prosecutor outside the constitutional category of a person whom Parliament is entitled to treat as an alien, then it does not advance the matter to construct an antonym for "alien" and assert that it covers the prosecutor.

39 The power conferred upon Parliament by s 51(xix) includes a power to decide who will be entitled to membership of the Australian body politic. That power, as has been noted, is not unqualified; but there is no reason to doubt that it extends to denying such membership to a person who arrived in this country as an alien, and has never taken up Australian citizenship. One of the purposes of conferring power to make laws with respect to "naturalization and aliens" is to enable Parliament to determine the conditions upon which an alien will be admitted to membership of the Australian body politic.

40 The third proposition is that the prosecutor has become absorbed into the Australian community. The major promise is that the status of alienage can be lost by absorption into the community. The minor premise is that such absorption has occurred in the case of the prosecutor.

41 As to the minor premise, the case of the prosecutor provides an example of the vagueness of the concept of absorption, which is accepted as relevant to the immigration power. In *Patterson*[31], McHugh J, referring to the practical difficulties involved in treating British subjects resident in Australia as having their legal status affected by the process of evolution in Australia's relations with the United Kingdom, said that "no bell rang" to inform them when the changes in their status occurred. That is fair comment. It would have been equally fair comment in that case to say that no bell rang to inform Mr Taylor when he became absorbed into the Australian community. Yet all members of the Court accepted that at that time, whenever it was, he ceased to be subject to the

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31 (2001) 75 ALJR 1439 at 1463 [130]; 182 ALR 657 at 688.

immigration power. As is exemplified by the concept of absorption into the community, the silence of bells does not deny the legal significance of gradual change. However, the present case does not turn upon the particular circumstances of the prosecutor, or upon questions as to how the process of absorption into the community is affected by matters of criminal and custodial history. This is because the major premise is to be rejected.

42 It is true that, in *Patterson*, Kirby J[32], with whom Callinan J agreed on this point[33], explicitly referred to the absorption into the Australian community of a class of persons (British subjects) as a reason for treating them as beyond the aliens power as well as beyond the immigration power. There was no majority in *Patterson* for that view. And, in any event, the prosecutor does not belong to that class. Treating absorption into the community as relevant to the status of alienage is inconsistent with earlier judicial views as to the width of par (xix) compared with par (xxvii), to which I have referred above. In my opinion, it is wrong in principle. For reasons already discussed, while absorption reflects the fact that an activity of immigration has come to an end, it may co-exist, and commonly co-exists, with a legal status of alienage. Resident aliens may be absorbed into the community, but they are still aliens.

43 The question reserved for the decision of the Court should be answered: "yes".

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32 (2001) 75 ALJR 1439 at 1496 [304], 1497 [308]; 182 ALR 657 at 734, 735.

33 (2001) 75 ALJR 1439 at 1512, fn 420; 182 ALR 657 at 755.

GAUDRON J.

Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te

44 The prosecutor, Meng Kok Te, was born in Cambodia on 7 April 1967 and entered Australia as a refugee on 7 July 1983. He was granted permanent resident status on arrival. He has not been granted Australian citizenship[34].

45 Since his arrival in Australia, Mr Te has been convicted of a number of criminal offences, including, in 1992, of trafficking in a drug of dependence. For that offence, he was sentenced in the Magistrate's Court of Victoria to 12 months' imprisonment of which three months was subsequently suspended on appeal to the County Court of Victoria.

46 On 10 July 1998, a delegate of the respondent Minister for Immigration and Multicultural Affairs ("the Minister") ordered the deportation of the prosecutor pursuant to s 200 of the *Migration Act* 1988 (Cth) ("the Act"). The prosecutor unsuccessfully appealed from that decision to the Administrative Appeals Tribunal ("the Tribunal"). He later applied to this Court for certiorari to quash the Tribunal's decision, for prohibition directed to the Minister prohibiting him from taking any step to deport him and for consequential relief. His application was referred to a Full Bench.

47 Section 200 which is in Div 9 of Pt 2 of the Act provides:

> " The Minister may order the deportation of a non-citizen to whom this Division applies."

Section 201 relevantly provides:

> " Where:
>
> (a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;
>
> (b) when the offence was committed the person was a non-citizen who:

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34 The prosecutor, in an interview on 2 June 1998 with an officer of the Department of Immigration and Multicultural Affairs, said he had applied for citizenship in 1993 in which he had admitted his criminality and that his application had been refused and he had been told by the officer to wait two years before making a fresh application. The Department of Immigration and Multicultural Affairs has no record of this application on its file.

(i) had been in Australia as a permanent resident:

(A) for a period of less than 10 years; or

(B) for periods that, when added together, total less than 10 years; ...

(c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year;

section 200 applies to the person."

48 By s 496(1) of the Act, the Minister may delegate any of his or her powers under the Act. It is not in issue that the power conferred by s 200 of the Act was delegated to the person who ordered the prosecutor's deportation. Nor is it in issue that the prosecutor falls within the terms of s 201, he having been in Australia as a permanent resident for less than 10 years when the drug trafficking offence was committed on 5 June 1991. Further, it is not in issue that, for the purpose of s 201, that offence was one for which he was sentenced to 12 months' imprisonment. What is in issue is whether ss 200 and 201 of the Act are valid in their application to him.

49 It is well settled that s 51(xix) of the Constitution, which confers legislative power with respect to "naturalization and aliens", authorises laws for the removal of aliens from this country[35]. However, it is contended for the prosecutor that, notwithstanding that he is not an Australian citizen, he is not and was not an alien at the time of the deportation order. It is put that he had, by then, ceased to be an alien either by reason of his absorption into the Australian community or by reason that he then owed allegiance to the Queen of Australia and none other. In support of that argument, counsel for the prosecutor relied on the recent decision of this Court in *Re Patterson; Ex parte Taylor*[36].

50 Although there was some difference in the reasons of those who constituted the majority in *Re Patterson*, that case clearly held that provisions of the Act permitting the detention and removal of non-citizens were invalid in their

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35 See *Robtelmes v Brenan* (1906) 4 CLR 395; *Pochi v Macphee* (1982) 151 CLR 101; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 32 per Brennan, Deane and Dawson JJ; *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1443 [7] per Gleeson CJ, 1450 [52] per Gaudron J, 1457 [99]-[100] per McHugh J, 1482 [235] per Gummow and Hayne JJ, 1496 [304] per Kirby J, 1510 [369] per Callinan J; 182 ALR 657 at 661, 670-671, 680, 715, 734, 753.

36 (2001) 75 ALJR 1439; 182 ALR 657.

application to a person who had been born in the United Kingdom, had entered Australia before the coming into effect, in 1987, of the *Australian Citizenship Amendment Act* 1984 (Cth) ("the 1984 Act") and had been absorbed into the Australian community but had not taken out Australian citizenship. Because the prosecutor in that case had been absorbed into the Australian community, the provisions of the Act in question could not be supported in their application to him as an exercise of the power to legislate with respect to "immigration and emigration"[37]. Thus, the question was whether the prosecutor was an alien for the purposes of s 51(xix) of the Constitution.

51 By reason that the prosecutor in *Re Patterson* was a British subject by birth, it was held in that case that he had not been an alien when he entered Australia[38]. And it was further held that he had not been transformed into an alien either by reason of the emergence of the separate capacity of the Queen as Queen of Australia or by reason of the amendments to the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act") effected by the 1984 Act.

52 Because the prosecutor in *Re Patterson* had not entered Australia as an alien, that case is the obverse of the present. That being so, *Re Patterson* does not assist the prosecutor's argument which is predicated on the proposition that, notwithstanding the Citizenship Act, an alien may become a non-alien other than by the conferral of Australian citizenship.

53 Before turning to the argument advanced on behalf of the prosecutor, it is necessary to say something of Australian citizenship. Citizenship is a statutory, not a constitutional concept. The relevant constitutional concepts with which this case are concerned are "alien", the singular form of the word used in s 51(xix) of the Constitution, and, by way of constitutional distinction, "non-alien". Thus, the

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37 Constitution, s 51(xxvii). See also *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 64 per Knox CJ, 109-111 per Higgins J, 137 per Starke J; *O'Keefe v Calwell* (1949) 77 CLR 261; *Koon Wing Lau v Calwell* (1949) 80 CLR 533; *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 175 per Barwick CJ; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 372 per Barwick CJ, 373-374 per Gibbs J, 376 per Stephen J, 381-382 per Mason J, 383 per Jacobs J; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295 per Mason CJ. See also *R v Governor of Metropolitan Gaol; Ex parte Molinari* [1962] VR 156; *Ex parte Black; Re Morony (No 3)* [1965] NSWR 753.

38 (2001) 75 ALJR 1439 at 1442 [1] per Gleeson CJ, 1450 [52] per Gaudron J, 1464 [136] per McHugh J, 1480 [223] per Gummow and Hayne JJ, 1499 [318] per Kirby J, 1511-1512 [377] per Callinan J; 182 ALR 657 at 659, 670-671, 690, 712-713, 738, 755.

fact that the prosecutor is not an Australian citizen is irrelevant if he is not an alien.

54 It may at once be accepted that the power conferred by s 51(xix) of the Constitution to legislate with respect to "naturalization and aliens" is a power that is confined by the concept of "alien" – a concept which is not at large. Thus, the power to legislate with respect to naturalisation and aliens is not a power to declare that a person who is a non-alien, as was the prosecutor in *Re Patterson*, is an alien in the absence of some change in the relationship of that person with the Australian body politic[39]. So, too, it may be accepted that the notion of "alien" is and always has been linked with a person's place of birth. Thus, s 51(xix) of the Constitution does not permit the Parliament to legislate so as to provide that a person born in Australia to an Australian citizen is an alien.

55 To say that the Parliament's power to legislate so as to deprive a person who is, by birth, or who has become a member of the body politic of his or her status as a non-alien is limited is not to say that there is any limitation on the power of the Parliament to legislate as to the circumstances in which and the procedures by which an alien born person may be admitted to membership of the Australian body politic and, thus, cease to be an alien. Nor is it to say that a person may cease to be an alien other than in the circumstances and by the procedures designated by Parliament.

56 The process whereby an alien born individual attains the status and entitlements that attach to a non-alien is called "naturalization". The argument for the prosecutor is predicated on the proposition that the common law permits and the Constitution recognises that that process can occur other than in the circumstances and by the procedures designated by Parliament. That proposition is without foundation.

57 In *Pochi v Macphee*, Gibbs CJ observed that "[i]t was well settled at common law that naturalization could only be achieved by Act of Parliament – even action by the Crown under the prerogative could not give an alien the status of a British subject"[40]. Holdsworth states that that was recognised "as early as, and probably before, the beginning of the fifteenth century ... and ... was accepted as a settled rule of law in *Calvin's Case*"[41]. In *Calvin's Case* it was said that "the

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39 See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 190-192 per Gaudron J; *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1448-1450 [41]-[52] per Gaudron J; 182 ALR 657 at 668-671.

40 (1982) 151 CLR 101 at 111 per Gibbs CJ.

41 Holdsworth, *A History of English Law*, (1926), vol 9 at 76. See also Blackstone, *Commentaries on the Laws of England*, 8th ed (1778), at 373-374; Thomas, *Lord*

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King by his letters patent may make a denizen, but cannot naturalize him to all purposes, as an Act of Parliament may do"[42]. And Quick and Garran, writing in 1901, noted that "[f]ormerly the only mode of obtaining naturalization was by a special Act of Parliament passed for each individual seeking to be naturalized; but by the Act 7 and 8 Vict c 66, the British Parliament provided a general procedure by which approved aliens could acquire the status of natural-born subjects of the Queen"[43].

58 Once it is accepted, as in my view it must be, that the common law does not permit and, for many centuries, has not permitted an alien born person to acquire the status and entitlements that attach to a person who acquires membership of the Australian body politic by birth except in accordance with statute, it follows that the Constitution recognises neither of the processes which the prosecutor calls in aid in this case and that neither process can or does limit the power of Parliament to define or limit the circumstances in which an alien born person may acquire membership of the Australian body politic and, thereby, cease to be an alien. And when Parliament so legislates, it legislates exhaustively on the topic.

59 At least since 1948, the Citizenship Act has exhaustively provided with respect to the circumstances in which persons who are alien born – a class which, as was held in *Re Patterson*, does not include persons who entered Australia as British subjects in the same circumstances as did the prosecutor in that case – may become members of the Australian body politic by the acquisition of Australian citizenship. It cannot be disputed that the prosecutor was alien born and has not obtained Australian citizenship in accordance with the Citizenship Act. He is, therefore, an alien. Being an alien, ss 200 and 201 of the Act validly apply to him.

60 The application should be dismissed with costs.

Coke's First Institute of the Laws of England, (1818) vol 1 at 89; Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820) at 14-15; Daly, *Naturalization: The Past History of the Subject and the Present State of the Law in the Different Countries of the World*, (1860) at 5, 15, 27; Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 173; Salmond, "Citizenship and Allegiance", (1901) 67 *Law Quarterly Review* 270 at 273; Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland*, (1960) vol 2 at 28.

42 (1608) 7 Co Rep 1a at 7a [77 ER 377 at 385].

43 *The Annotated Constitution of the Australian Commonwealth* (1901) at 601.

Re Minister for Immigration and Multicultural Affairs; Ex parte Dung Chi Dang

61 This case was heard at the same time as *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* and raises essentially the same issues as were raised in that case.

62 The prosecutor in the present matter, Dung Chi Dang, was born in the Republic of Vietnam (South Vietnam) on 29 January 1968. He and other members of his family arrived in Australia on 14 July 1981 as the holders of Class 302 Permanent Visas. He has not been granted Australian citizenship.

63 Since his arrival in Australia, the prosecutor has been convicted of a number of offences for which he has served periods of imprisonment totalling 663 days. The offences include assault, resist arrest, recklessly causing injury, possession of heroin, possession of an unregistered firearm and use of a drug of dependence. Additionally, he was sentenced on 26 March 1997 to 36 months imprisonment, of which 15 months was suspended, for trafficking in heroin and cannabis and, on 27 May, to 24 months for heroin trafficking and attempting to traffick hashish.

64 On 27 June 2000 the respondent Minister for Immigration and Multicultural Affairs ("the Minister") decided to cancel the prosecutor's visa under s 501(2) of the *Migration Act* 1958 (Cth) ("the Act"). Thereafter, the prosecutor applied under s 75(v) of the Constitution for an order nisi for certiorari to quash the Minister's decision and for prohibition to prevent him from taking any step to detain or remove him or otherwise to implement the decision. In those proceedings, Hayne J granted an order nisi and stated the present case for the consideration of the Full Court. The stated case asks:

> "Did section 501(2) of the *Migration Act* 1958 (Cth) validly authorise the respondent to cancel the [prosecutor's] visa on 27 June 2000?"

65 Section 501(2) of the Act provides:

> "The Minister may cancel a visa that has been granted to a person if:
>
> (a) the Minister reasonably suspects that the person does not pass the character test; and
>
> (b) the person does not satisfy the Minister that the person passes the character test."

By sub-s (6) of s 501 it is relevantly provided that:

> "... a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

...

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character".

Substantial criminal record is defined by sub-s (7) to include the case in which a person has been sentenced to a term of imprisonment of 12 months or more and, also, the situation in which he or she has been sentenced to two or more terms of imprisonment totalling two years or more.

66 It is accepted, at least for the purposes of the stated case, that the prosecutor has a substantial criminal record and does not and did not, on 27 June 2000, pass the character test. Likewise, it is accepted that, if s 501(2) of the Act validly applies to him, the Minister was entitled to cancel his visa. It is contended that s 501(2) did not validly apply to the prosecutor because, by 27 June 2000, he was no longer either an immigrant or an alien.

67 Before turning to the question whether, at 27 June 2000, the prosecutor was an immigrant or alien, it is convenient to note the effect of visa cancellation. Upon cancellation of a person's visa, that person becomes an "unlawful non-citizen"[44] and must be taken into detention[45] and removed from Australia as soon as practicable[46]. Because of those consequences, it is convenient to approach the validity of s 501(2) of the Act on the basis that it is a step in the process of removing a person from Australia.

68 It is well settled that the power conferred by s 51(xix) of the Constitution to legislate with respect to "naturalization and aliens" authorises law for the deportation of aliens[47]. Thus, as in *Ex parte Te*, it is unnecessary to consider

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44 Section 15 of the Act.

45 Section 189 of the Act.

46 Section 198 of the Act.

47 See *Robtelmes v Brenan* (1906) 4 CLR 395; *Pochi v Macphee* (1982) 151 CLR 101; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 32 per Brennan, Deane and Dawson JJ; *Re Patterson; Ex parte Taylor* (2001) 75 ALJR

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whether the prosecutor had ceased to be an immigrant as at 27 June 2000 if he was then an alien. And as in *Ex parte Te*, it is contended on behalf of the prosecutor in this case that, at the time of the Minister's decision, he was no longer an alien by reason that he had then been absorbed into the Australian community. Alternatively, it is put that, by then, he owed allegiance to the Queen of Australia and to no other power.

69 For the reasons given in *Ex parte Te* an alien born person may acquire membership of the Australian body politic and, thereby, cease to be an alien only in the circumstances and in accordance with the procedures specified by the *Australian Citizenship Act* 1948 (Cth). As he was born in Vietnam, the prosecutor is an alien born person; as he has not acquired Australian citizenship in accordance with the *Australian Citizenship Act*, he remains an alien. Accordingly, s 501(2) of the Act is valid in its application to him.

70 The question in the stated case should be answered "Yes".

1439 at 1443 [7] per Gleeson CJ, 1450 [52] per Gaudron J, 1457 [99]-[100] per McHugh J, 1482 [235] per Gummow and Hayne JJ, 1496 [304] per Kirby J, 1510 [369] per Callinan J; 182 ALR 657 at 661, 670-671, 680, 715, 734, 753.

71 McHUGH J. These cases, brought in the original jurisdiction of the Court, arise out of the actions of the Minister for Immigration and Multicultural Affairs in cancelling a visa issued to Dung Chi Dang ("Dang") and in ordering the deportation of Meng Kok Te ("Te") on the ground of their criminal records. Each man contends that, although he was not a citizen of Australia, he was neither an alien nor an immigrant when the Minister took action and that the legislation under which the Minister acted could not constitutionally apply to him. Te has applied to the Court under s 75(v) of the Constitution for a writ of certiorari to quash the decision of the Administrative Appeals Tribunal ("AAT") affirming the deportation order, and for prohibition and other relief against the Minister. Dang has applied for a writ of certiorari to quash the Minister's decision and for a writ of prohibition and other relief against the Minister.

72 Te does not dispute that in terms s 200 of the *Migration Act* 1958 (Cth) ("the Act") authorised his deportation and Dang does not dispute that in terms s 501 of the Act authorised the cancellation of his visa. But they contend that the constitutional validity of those sections depends on s 51(xix) of the Constitution ("the aliens power") and s 51(xxvii) of the Constitution ("the immigration power") and that they were neither aliens nor immigrants within the meaning of those powers. Each applicant contends that he never had been or at all events had ceased to be an alien within the meaning of s 51(xix) when the Minister acted because:

(a) each applicant owed allegiance to the Queen of Australia and to no other power after entering Australia as a refugee; and/or

(b) each applicant was then a member of the community constituting the body politic of Australia; and/or

(c) each applicant had been absorbed into the Australian community.

73 Each applicant also contends that he had become absorbed into the Australian community and was therefore beyond the reach of the immigration power.

74 In my opinion, upon arriving in Australia both Te and Dang were, and have remained, aliens. Section 200 of the Act validly applies to Te and s 501 validly applies to Dang. It is unnecessary to determine whether they were still immigrants when the Minister took action.

Statement of the case

75 Te was born in Cambodia in April 1967. He entered Australia in July 1983 on a Class K4032 Cambodian Refugee Humanitarian visa. The Minister

granted him a permanent entry permit[48]. After his arrival in Australia, he committed a number of serious criminal offences including more than one deportable offence. He has spent about 10 of the 19 years he has been in this country in immigration or prison custody. He has never been granted Australian citizenship. In July 1998, the Minister cancelled his visa and ordered his deportation.

76 After ordering Te's deportation, the Minister directed that he be held in immigration detention on completion of the prison sentence that he was then serving. Te completed his custodial sentence in August 1998; since that time he has been held in immigration detention. In August 1998, he applied to the AAT to review the deportation order. In September 2000, the AAT affirmed the Minister's order[49].

77 In March 2001, Te applied to this Court for an order nisi for the grant of certiorari to quash the decision made in September 2000 by the AAT. He also sought an order nisi for the issue of a writ of prohibition against the Minister prohibiting him from taking any steps to deport the applicant or otherwise give effect to the decision of the AAT. In October 2001, acting under O 55 r 2 of the High Court Rules, Hayne J directed that Te's application for relief be made by notice of motion to a Full Court.

78 Dang, who was born in South Vietnam in 1968, arrived in Australia in 1981 with his mother and three of his sisters. He and the other members of his family held Class 302 Permanent Visas which had been issued to them in Malaysia. He has twice left Australia, travelled to Vietnam and re-entered Australia. On these occasions, Dang was out of Australia for a total of 66 days. Since arriving in this country, he has committed a number of offences including more than one deportable offence. He has spent over 5 years in prison or immigration detention. Dang's mother and two sisters have become Australian citizens but Dang has never held Australian citizenship. In June 2000, the Minister exercised his powers under s 501(2) of the Act and cancelled Dang's visa.

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48 Pursuant to reg 4 of the *Migration Reform (Transitional Provisions) Regulations* 1994, Te's permanent entry permit continued in effect after 1 September 1994 as a transitional (permanent) visa.

49 Te also made an application to the Federal Court to challenge the deportation order and the immigration detention which was dismissed on 16 October 1998 by Branson J. On 23 February 1999, the Full Court of the Federal Court (Sackville, North and Merkel JJ) dismissed an appeal against the judgment of Branson J. Special leave to appeal to this Court was refused (*Te v Minister for Immigration and Multicultural Affairs* (M32/1999), 10 September 1999).

79 Upon his visa being cancelled, Dang filed an application for prerogative and constitutional relief in this Court. He applied for an order nisi for certiorari to quash the Minister's decision and for prohibition to prevent the Minister from taking any step to detain or remove him or otherwise act in accordance with the decision. On 5 April 2001, Hayne J granted an order nisi and referred for the consideration of the Full Court a stated case that asks:

> "Did section 501(2) of the *Migration Act* 1958 (Cth) validly authorise the respondent to cancel the applicant's visa on 27 June 2000?"

The aliens power

80 Under s 51(xix) of the Constitution, "Parliament has power to make laws providing for the deportation of aliens for whatever reasons it thinks fit"[50]. Subject to the Constitution, that power is "constant"[51] and is "limited only by the description of the subject matter"[52]. Thus, as long as a person falls within the description of "alien", the power of the Parliament to make laws affecting that person is unlimited unless the Constitution otherwise prohibits the making of the law[53].

81 The term "alien" connotes "belonging to another person or place"[54]. In *Cunliffe v The Commonwealth*[55], Toohey J said that "an alien can generally be defined as a person born out of Australia of parents who were not Australian citizens and who has not been naturalized under Australian law or a person who

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50 *Pochi v Macphee* (1982) 151 CLR 101 at 106 per Gibbs CJ

51 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 186 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

52 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 64 per McHugh J.

53 *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1457 [100] per McHugh J; 182 ALR 657 at 680.

54 In *Nolan* (1988) 165 CLR 178 at 183, this Court said: "As a matter of etymology, 'alien', from the Latin alienus through old French, means belonging to another person or place. Used as a descriptive word to describe a person's lack of relationship with a country, the word means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state': *Milne v Huber*" [17 Fed Cas 403 at 406 (1843)].

55 (1994) 182 CLR 272 at 375 referring to *Nolan* (1988) 165 CLR 178 at 183-185 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

has ceased to be a citizen by an act or process of denaturalization". This definition makes Te and Dang aliens. But they contend that its terms need qualification. They contend that a person is not an alien if the person:

- has renounced allegiance to his or her country of birth by entering Australia as a refugee and now owes allegiance to the Queen of Australia, or
- is a member of the community that constitutes the body politic of Australia because although citizenship is sufficient to establish membership of the body politic, it is not a necessary condition of membership, or
- has been absorbed into the Australian community.

82 The applicants claim that the first two contentions are supported by *Re Patterson; Ex parte Taylor*[56]. The applicants acknowledge that *Pochi v Macphee*[57] rejected their third contention that an alien ceases to be an alien once he or she is "absorbed into the Australian community"[58]. But they seek leave to reopen *Pochi* and submit that it should be overruled.

83 Neither applicant has made any formal declaration or taken any oath of allegiance to this country or its Queen. However, they contend that they owe allegiance to the Queen because:

(a) by entering Australia as refugees, they have renounced allegiance to their countries of birth, and

(b) since their arrival in Australia they have been subject to the laws of Australia.

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56 (2001) 75 ALJR 1439; 182 ALR 657.

57 (1982) 151 CLR 101.

58 *Pochi v Macphee* (1982) 151 CLR 101 at 111 per Gibbs CJ (with whom Mason and Wilson JJ agreed). The person will, however, be no longer encompassed by a law supported by the immigration power in s 51(xxvii) of the Constitution: *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 64 per Knox CJ, 109-111 per Higgins J, 137 per Starke J; *O'Keefe v Calwell* (1949) 77 CLR 261; *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 175 per Barwick CJ; *Pochi v Macphee* (1982) 151 CLR 101; *Nolan* (1988) 165 CLR 178; *Cunliffe v The Commonwealth* (1994) 182 CLR 272.

Re Patterson; Ex parte Taylor

84 The applicants argue that *Re Patterson*[59] supports their contention that they ceased to be aliens by reason of their allegiance to the Queen and their absorption into the Australian community. In *Re Patterson*, this Court held that a British citizen who had arrived in Australia in 1966 was not an alien for the purpose of the aliens power. In that case, four members of the Court found that s 501 of the Act could not apply to the prosecutor Taylor because he was not an alien. The applicants contend that this creates a third category of non-citizen non-aliens, that they are absorbed members of the Australian community who have allegiance to the Queen of Australia, and that they fall into this third category.

85 *Pochi v Macphee*[60] and *Nolan*[61] held that an alien is any person who is a non-citizen.[62] However, *Re Patterson*[63] shows that that proposition cannot be accepted. In *Re Patterson*, Gaudron, Kirby and Callinan JJ and I agreed that an "alien" is not exclusively defined as a "non-citizen". Some British subjects who entered Australia as non-aliens prior to a certain date are exceptions to the "general proposition" that it is open to Parliament to treat any person who is not an Australian citizen as an alien[64]. To the extent that *Nolan* decided otherwise, the majority Justices in *Re Patterson* overruled it[65].

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59 (2001) 75 ALJR 1439; 182 ALR 657.

60 (1982) 151 CLR 101.

61 (1988) 165 CLR 178.

62 The Court in *Nolan* (1988) 165 CLR 178 at 186 defined "alien" as a non-citizen. Gibbs CJ in *Pochi v Macphee* (1982) 151 CLR 101 at 109-110 held that "alien" included "any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian".

63 (2001) 75 ALJR 1439; 182 ALR 657.

64 *Re Patterson* (2001) 75 ALJR 1439 at 1461 [121] per McHugh J; 182 ALR 657 at 686.

65 *Re Patterson* (2001) 75 ALJR 1439 at 1448 [38], [40] per Gaudron J, 1463 [131], 1463-1464 [133] per McHugh J, 1495 [300], 1497 [307] per Kirby J, 1511-1512 [377], [378] per Callinan J; 182 ALR 657 at 667, 668, 689, 733, 735, 755.

86 However, no *ratio decidendi* with respect to the aliens power can be extracted from the *reasoning* in *Re Patterson*[66]. Gaudron J held that Taylor was not an alien because he was a member of the body politic of the community of Australia. I decided the case on the basis he was not an alien because he was a British subject living in Australia at the commencement of the *Royal Style and Titles Act* 1973 (Cth), resided in Australia and was a subject of the Queen of Australia. Kirby J held that Taylor was not an alien when he arrived in Australia, that he "had been absorbed into the people of the Commonwealth" and that the Parliament could not retrospectively declare him to be an alien[67]. Callinan J agreed with the reasoning of both Kirby J and myself on Taylor's status. Gleeson CJ, Gummow and Hayne JJ dissented. Their Honours applied *Nolan* and held that a British citizen who was an Australian "non-citizen" was an alien within the terms of s 51(xix) of the Constitution. Thus, the reasoning of none of the majority Justices had the support of four of the seven Justices. That being so, the *ratio* of the case cannot be extracted from the reasoning of the four Justices who held that Taylor was not an alien.

87 Moreover, the differing views of the majority Justices in *Re Patterson* as to what facts were facts material to the decision means that it has no precedent value beyond its own facts. If the *ratio decidendi* of a case is not discernible, however, it still has precedential authority in respect of circumstances that "are not reasonably distinguishable from those which gave rise to the decision"[68].

88 The respondent contends that the differences in the reasoning of the majority in *Re Patterson* mean that "it is arguable that [Patterson does not] contai[n] a binding statement of constitutional principle"[69]. He argues that this "may justify departure from that decision" and, conversely, means that the dissenting judgments "deserve respectful consideration"[70]. It is true that there is no single strand of reasoning in *Re Patterson* that contains a binding statement of

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66 The finding that the respondent in *Re Patterson* had erroneously exercised her discretion and that the decision should be quashed on the basis of jurisdictional error attracted a clear majority.

67 *Re Patterson* (2001) 75 ALJR 1439 at 1496 [304] per Kirby J; 182 ALR 657 at 734.

68 *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 at 479; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 37.

69 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.

70 The respondent refers, in a non-constitutional context, to *Jones v Bartlett* (2000) 205 CLR 166 at 224-225 [206], [207] per Gummow and Hayne JJ; 176 ALR 137 at 181.

constitutional principle and that its precedent value is limited to comparable circumstances. But that does not mean that the Court ought to depart "from that decision". In *Great Western Railway Co v Owners of SS Mostyn (The Mostyn)*[71], Viscount Dunedin laid down the approach that a court should take to a decision on a statute where the decision has no *ratio decidendi*. His Lordship said that the court's duty was "to consider the statute for ourselves in the light of the opinions, diverging as they are, and to give an interpretation; but that interpretation must necessarily be one which would not, if it was applied to the facts of [the earlier decision], lead to a different result." That is the approach that we should follow when any question arises concerning circumstances similar to those that arose in *Re Patterson.*

89 Adopting that approach, I find nothing in *Re Patterson* that assists the applicants. There is nothing in the majority judgments in *Re Patterson* that overrules the general proposition that in most cases Parliament may treat any person who is not an Australian citizen as an alien. The majority Justices in *Re Patterson* overruled *Nolan* to the extent that it purported to state an exclusive test of alienage. It overruled that case to the extent that its general proposition applied to certain non-citizen British subjects – those born in the United Kingdom who were living in Australia as part of the Australian body politic or owing allegiance to the Queen of Australia some time before 1987.

90 *Re Patterson* does not apply to the present applicants. Because the prosecutor in *Re Patterson* was a British subject, he was not an alien when he arrived in Australia in 1966[72], and constitutionally he could not become an alien as the result of subsequent legislation. The reasons for this Australian exception to alienage are historical and constitutional. Those reasons mean that allegiance to the Queen of Australia or acquiring membership of the body politic of Australia by means other than citizenship does not apply to non-British non-citizens like the applicants. Since 1948, the *Australian Citizenship Act* 1948 (Cth) has defined the manner in which aliens entering Australia may become non-aliens. *Re Patterson* holds that certain British subjects who were not aliens when they arrived in Australia do not fall within that definition. But that is of no assistance to the applicants. They are not, and never have been British subjects, and they were aliens when they arrived in Australia. There is no substance in the argument that a refugee who enters Australia and becomes subject to its laws is not an alien. Those who enter a common law country as aliens can only acquire

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71 [1928] AC 57 at 74.

72 *Re Patterson* (2001) 75 ALJR 1439 at 1442 [1] per Gleeson CJ, 1450 [52] per Gaudron J, 1480 [223] per Gummow and Hayne JJ, 1499 [318] per Kirby J, 1511-1512 [377] per Callinan J; 182 ALR 657 at 659, 670-671, 712-713, 738, 755.

citizenship and the status of non-aliens by legislation[73]. For this reason, the applicants' arguments that they are not aliens because they owe allegiance to the Queen or because they were refugees or because they are subject to the laws of Australia must be rejected. Similarly, their claim that they are not aliens because they have become members of the Australian body politic must be rejected. To say that an alien is a member of the body politic is a contradiction in terms. Neither of the applicants can invoke the reasoning of any member of the majority in *Re Patterson*. It does not apply to them.

91 Accordingly, the applicants are non-citizens and aliens within the meaning of s 51(xix). The provisions of the Act relating to deportation and cancellation of visas validly apply to them.

Immigration power

92 It is unnecessary to determine whether the applicants have become absorbed into the Australian community and passed beyond the reach of the immigration power conferred on the Parliament by s 51(xxvii) of the Constitution[74].

Conclusion

93 Each of the applicants in these applications is an alien within the meaning of s 51(xix) of the Constitution and therefore is liable to the Minister's orders for cancellation of their visas and deportation. The question in the case stated regarding the applicant Dang should be answered "Yes". The application for orders nisi made by the applicant Te should be dismissed.

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73 Holdsworth, *A History of English Law*, 3rd ed (1944) vol 9 at 76; *Pochi v Macphee* (1982) 151 CLR 101 at 111.

74 *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369.

GUMMOW J.

Re Minister for Immigration and Multicultural Affairs & Anor;
Ex parte Meng Kok Te

94 Pursuant to O 55 r 2 of the High Court Rules, a Justice has ordered that the applicant's application be made by notice of motion to a Full Court. The relief sought includes (i) an extension of time for commencing the application; (ii) an order for certiorari to quash the decision made on 22 September 2000 by the second respondent, the Administrative Appeals Tribunal ("the AAT"), to affirm an order made by the first respondent, the Minister, under s 200 of the *Migration Act* 1958 (Cth) ("the Act"); and (iii) an order for prohibition against the Minister taking any steps to deport the applicant or otherwise to give effect to the decision of the AAT.

95 The ground upon which the relief is sought is that, at the time of the decision of the AAT, s 200 of the Act had no valid application to him. Section 200 states:

> "The Minister may order the deportation of a non-citizen to whom [Div 9 of Pt 2 of the Act] applies."

In support of that proposition it is contended that there was "no relevant nexus" between either the immigration power or the aliens power and the applicant, and that he was "an absorbed person" and "not an alien".

96 Sections 201, 202 and 203 of the Act provide respectively for s 200 to apply to the deportation of non-citizens in Australia for less than 10 years who are convicted of crimes, to the deportation of non-citizens upon security grounds, and to the deportation of non-citizens who are convicted of certain serious offences. It was s 201 which applied to the applicant. Within the meaning of that section, he was a non-citizen convicted in Australia of an offence for which he was sentenced to imprisonment for a period of not less than one year, and when the offence was committed he had been in Australia as a permanent resident for a period of less than 10 years or for periods which, when added together, totalled less than 10 years. The deportable offence, concerned with trafficking in heroin, was committed on 5 June 1991.

97 The applicant was born in Cambodia on 7 April 1967. He arrived in Australia on 7 July 1983. He was granted a permanent resident visa on arrival. The applicant has not been naturalised; he is not an Australian citizen.

98 The extension of time should be granted but the application for orders absolute dismissed with costs. In its application to the applicant, s 200 of the Act was supported as a law with respect to aliens. It is not necessary to determine whether any further head of power supported the application of the provision.

99 I reach the conclusion respecting the aliens power for the reasons given below in *Dung Chi Dang*.

Re Minister for Immigration and Multicultural Affairs;
Ex parte Dung Chi Dang

100 A Justice of this Court granted to the prosecutor an order nisi for certiorari to quash the decision made by the respondent ("the Minister") on 27 June 2000 ("the Decision") and for prohibition against the Minister taking any step to implement or give effect to the Decision. The Decision was made by the Minister in exercise of the power conferred by s 501(2) of the *Migration Act* 1958 (Cth) ("the Act").

101 Section 501(2) of the Act states:

> "The Minister may cancel a visa that has been granted to a person if:
>
> (a) the Minister reasonably suspects that the person does not pass the character test; and
>
> (b) the person does not satisfy the Minister that the person passes the character test."

The expression "character test" is explained by several of the succeeding sub-sections of s 501. In the case of the prosecutor, the Minister relied upon the criterion in par (a) of s 501(6) that the prosecutor had "a substantial criminal record" within the meaning of s 501(7).

102 The ground upon which the order nisi was sought was that the validity of s 501 in its application to the prosecutor could not be supported either by par (xix) or par (xxvii) of s 51 of the Constitution. No other head of power in s 51 has been drawn into contention, a consideration to which further reference will be made. Paragraph (xix) reads "[n]aturalization and aliens" and par (xxvii) reads "[i]mmigration and emigration". In particular, the prosecutor contends that, at the time of the Minister's decision, the prosecutor was not "an alien", was not "a migrant" and was "an absorbed person".

103 The case stated for the Full Court asks whether s 501(2) of the Act validily authorised the Minister to cancel the prosecutor's visa on 27 June 2000. At the relevant time, the prosecutor was an alien in the constitutional sense and, that being so, it is irrelevant to consider whether at that time he was not "a migrant" or was "an absorbed person". Accordingly, the question in the case stated should be answered "yes".

104 I turn to explain why I reach this conclusion.

105 The prosecutor was born on 29 January 1968 in what then was recognised by this country as the Republic of Vietnam, popularly known as "South Vietnam". In 1980, the prosecutor left what by then Australia recognised as the Socialist Republic of Vietnam ("Vietnam"). He entered Australia on a class 302 permanent visa on 14 July 1981. The prosecutor has never held Australian citizenship within the meaning of the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act").

106 In 1989 and 1990, the prosecutor travelled from Australia to Vietnam and returned to Australia using a certificate of identity issued under reg 9 of the Passport Regulations made under the *Passports Act* 1938 (Cth) ("the Passports Act"). Paragraph (a) of s 12(1) thereof empowers the Governor-General to make regulations empowering the issue of certificates of identity for travel purposes. Certificates of identity are issued under reg 9 to persons who are not Australian citizens and who intend to leave Australia or one of its territories and who cannot obtain a passport of their country of nationality from a consular representative of their country of nationality, or who are stateless. The certificate issued to the prosecutor stated that this "in no way affects the national status of the holder".

107 Further reference now should be made to pars (xix) and (xxvii) of s 51 of the Constitution. The words "[i]mmigration" and "emigration" (par xxvii) are apt to identify a process or activity in which individuals engage; at some stage that process or activity will be completed and those individuals will pass beyond the reach of the legislative power. With respect to "[i]mmigration", the status of persons embarking upon that activity is not determinative of the application to them of the legislative power. Thus, it has been held that domicile[75] and status as a British subject[76] do not determine the attraction of the power with respect to immigration.

108 Once engaged, in what circumstances is the power spent? Notions of "membership of the Australian community", "absorption into the Australian community" and becoming "a part of the people of Australia" have been employed in the decisions of the Court to indicate a state of affairs which marks the passage of an individual beyond the range of the immigration power. These and cognate expressions are used in the six judgments in *R v Director-General of Social Welfare (Vict); Ex parte Henry*[77]. These notions assist in determining in

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75 *Ah Yin v Christie* (1907) 4 (Pt 2) CLR 1428.

76 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518.

77 (1975) 133 CLR 369 at 372-373 per Barwick CJ, 373-374 per Gibbs J, 376-377 per Stephen J, 379-380 per Mason J, 384-385 per Jacobs J, 387-388 per Murphy J.

particular cases when the power is spent and thus help indicate the content of the constitutional term "[i]mmigration". However, they do not circumscribe the whole of the power. In particular, they do not confine its engagement or commencement of operation to those entering or seeking to enter Australia in order to settle here. Higgins J pointed out in *Ex parte Walsh and Johnson; In re Yates*[78] that the decision in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly*[79] denies the addition to the notion of the act or action of immigrating the further notion of a necessary intention to settle in Australia. Messrs O'Flanagan and O'Kelly were visiting Australia but had no purpose in entering the country of settling here[80].

109 In contrast, the terms "[n]aturalization" and "aliens" do not identify as a head of legislative power conduct or activities associated with movement of persons to or from Australia. Rather, they identify the possession by persons of a particular status (alienage) in the eye of the law and the prescription by law of formalities by which that status is removed.

110 The power conferred by s 51(xix) of the Constitution answers the description given by the Supreme Court of the United States in 1898 when it said in *United States v Wong Kim Ark*[81]:

> "Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."

Article 1, §8, cl 4 of the United States Constitution provides:

> "The Congress shall have Power …
>
> To establish a uniform Rule of Naturalization".

It has been held over a long period and in many decisions that the Congress has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before

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78 (1925) 37 CLR 36 at 109-110; cf the observations of Mason J in *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 381.

79 (1923) 32 CLR 518.

80 (1923) 32 CLR 518 at 575.

81 169 US 649 at 668 (1898). See also *Perkins v Elg* 307 US 325 at 329 (1939).

naturalization, and the terms and conditions of their naturalization"[82]. Several of the nineteenth century decisions of the Supreme Court to this effect were adopted in the reasoning of Griffith CJ and Barton J in *Robtelmes v Brenan*[83].

111 The Congress draws not only upon Art I, §8, cl 4, but "upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders"[84]. In Australia, the Parliament is no less well endowed. In addition to the powers with respect to trade and commerce with other countries (s 51(i)), and external affairs (s 51(xxix)), mention may be made of s 51(xxviii) ("The influx of criminals") and s 51(xxx) ("The relations of the Commonwealth with the islands of the Pacific"). As to external affairs, it may be remarked that the status of the citizens of one state whilst in the territory of another is "[o]ne of the most important and delicate of all international relationships" and long recognised as such[85].

112 Whether, as the prosecutor contends, his personal history since he entered Australia in 1981 warrants the description of him as one who had been "absorbed" into the "Australian community" by the time the Minister made the Decision on 27 June 2000, would bear upon the application to him of s 501(2) of the Act as a law with respect to his immigration to this country. It is unnecessary to determine whether, as a matter of constitutional fact, the prosecutor had been "absorbed" in this sense. This is because the application to him of s 501(2) is supported by the legislative power with respect to aliens. The prosecutor entered this country as an alien, has departed and re-entered it in 1989 and 1990 as an alien, and retains his status of alienage.

113 The character of the law in question, s 501(2) of the Act, is to be determined by reference to the rights and powers it confers upon the Minister and the duties and liabilities to which it exposes those who are the object of the exercise of those rights and powers; the constitutional text of the head of legislative power relied upon, "[n]aturalization and aliens", like the text of the other heads of power, is to be construed with all the generality which the words used admit; if s 501(2) answers the description of a law with respect to aliens, but not that of a law with respect to "[i]mmigration", that circumstance is of no significance for validity; and if a sufficient connection with a head of power

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82 *Takahashi v Fish and Game Commission* 334 US 410 at 419 (1948). See also *Graham v Richardson* 403 US 365 at 377 (1971); *Plyler v Doe* 457 US 202 at 225 (1982).

83 (1906) 4 (Pt 1) CLR 395 at 401-403, 413-414, 415-416.

84 *Plyler v Doe* 457 US 202 at 225 (1982).

85 *Hines v Davidowitz* 312 US 52 at 64 (1941).

exists, the justice and wisdom of the law, its necessity and desirability are matters of legislative choice. All these propositions are supported by the joint judgment of six members of the Court in *Grain Pool of Western Australia v The Commonwealth*[86].

114 For constitutional purposes, an "alien" is a person born outside Australia, whose parents were not Australians, and who has not been naturalised as an Australian. This was decided in *Nolan v Minister for Immigration and Ethnic Affairs*[87]. The prosecutor answers that description. Subject to any relevant constitutional restraints or prohibitions which limit the exercise of the legislative power, the Parliament may make laws which impose burdens, obligations and disqualifications on aliens which could not be imposed by the Parliament on other persons. Hence the statement by McHugh J in *Chu Kheng Lim v Minister for Immigration*[88] respecting s 51(xix):

> "Subject to the Constitution, that power is limited only by the description of the subject matter."

In *Lim*, statements to like effect were made by Brennan, Deane and Dawson JJ[89] (with whom Mason CJ agreed[90]) and Toohey J[91]. The result is to support a law such as s 501(2).

115 The power with respect to "[n]aturalization" is, in a sense, the obverse of that with respect to "aliens". It supports laws which prescribe the process and procedures by which an alien becomes and may remain an Australian national and which give a particular designation or status, here "Australian citizenship", to those former aliens. Division 2 of Pt III (ss 12-15) of the Citizenship Act provides for the granting of Australian citizenship to persons who are not already Australian citizens (s 12). The prosecutor is not an Australian citizen by birth, adoption or descent as provided for in Div 1 of Pt III of the Citizenship Act (ss 10-11). No grant of Australian citizenship has been made to the prosecutor.

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86 (2000) 202 CLR 479 at 492 [16].

87 (1988) 165 CLR 178 at 185.

88 (1992) 176 CLR 1 at 64.

89 (1992) 176 CLR 1 at 25-26.

90 (1992) 176 CLR 1 at 10.

91 (1992) 176 CLR 1 at 44-45.

116 The conferral of a power upon the Parliament to make laws answering the description of laws with respect to "[n]aturalization" reflects the well settled understanding at common law that naturalisation could be achieved only by statute. Gibbs CJ so restated the position, with reference to the writings of Blackstone, Chitty and Holdsworth, in *Pochi v Macphee*[92]. There was a prerogative power by the issue of letters of denization to relieve aliens of some of the disabilities of their status, but aliens they remained[93]. It is unnecessary to determine whether such authority remains within the scope of the executive power of the Commonwealth provided for in s 61 of the Constitution.

117 In *Pochi v Macphee*[94], Gibbs CJ pointed out that there were strong reasons why the acquisition by an alien of Australian citizenship should be marked by a formal act, as provided for in the Citizenship Act, and that changes in nationality were not to be effected by length of residence or by any intention permanently to remain in a country of which an alien was not a national.

118 However, the prosecutor submits that under the Australian common law, independently of statute, and by the coming to pass of a state of affairs meeting the criterion of "absorption" and the other metaphors used in authorities construing the reach of the immigration power, an alien may lose that status and so pass beyond the reach of the aliens power. The prosecutor then invites the conclusion of constitutional fact that this is what has happened to him.

119 There are several answers to this submission. The first is that were there such a common law principle or doctrine, it would be subject, like any part of the common law, to displacement by statute. On this hypothesis, that displacement has occurred by the specific provision made by the Citizenship Act for the granting of Australian citizenship to persons not already Australian citizens. The second is that there has never been any such common law doctrine.

120 In meeting that latter objection, the prosecutor invited attention to various aspects of the common law principles concerning allegiance. He relied upon the statement by McHugh J in *Re Patterson; Ex parte Taylor*[95], made with reference

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92 (1982) 151 CLR 101 at 111.

93 *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 at 337.

94 (1982) 151 CLR 101 at 111.

95 (2001) 75 ALJR 1439 at 1459-1460 [114]; 182 ALR 657 at 683-684. The prosecutor also relies upon the statement by Gaudron J in her dissenting judgment in *Nolan* (1988) 165 CLR 178 at 189:

(Footnote continues on next page)

to Holdsworth[96], that the common law rules concerning subjects and aliens "centre around" the duty of allegiance owed by the subject to the Crown. Holdsworth was speaking of the appearance in England in the course of the thirteenth century of the beginnings of "the modern rules of the common law, which define the persons who are to be accounted as British subjects"[97]. He went on to say that the doctrine of allegiance had its roots in the feudal idea of personal fealty and, significantly, that "it is the duty of allegiance … which differentiates the subject from the alien"[98].

121 That latter proposition, if it was designed by Holdsworth to apply to the state of the common law in England when he wrote between the World Wars, was erroneous. The principles respecting allegiance provided no sufficient discrimen between subjects and aliens. It may be that Holdsworth's subsequent treatment[99] of the restatement of the common law in *Calvin's Case*[100] in 1608 and the differentiation between alien friends and alien enemies indicates that his proposition respecting allegiance as the discrimen between subjects and aliens was intended to refer only to the position in the Middle Ages. In any event, it supplies no such discrimen in modern times.

122 First, whilst "allegiance" is a notion developed and applied in states with monarchical forms of government, in common law systems it is not so confined. This is exemplified by United States decisions. Early in the history of the United States, the common law of England was accommodated to the new republican order. The courts emphasised that the term "citizen" in the law of the United States was "precisely analogous" to the term "subject" in the common law, the "change of phrase [having] entirely resulted from the change of government"[101],

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> "[I]n the case of a community whose membership is conditional upon allegiance to a monarch, the status of alien corresponds with the absence of that allegiance."

In *Patterson*, Callinan J adopted that statement: (2001) 75 ALJR 1439 at 1511 [372]; 182 ALR 657 at 754.

96 *A History of English Law*, 3rd ed (1944), vol 9 at 72.

97 *A History of English Law*, 3rd ed (1944), vol 9 at 72.

98 *A History of English Law*, 3rd ed (1944), vol 9 at 72.

99 *A History of English Law*, 3rd ed (1944), vol 9 at 72-73.

100 (1608) 7 Co Rep 1a [77 ER 377].

101 *State v Manuel* 20 North Carolina Reports 144 at 152 (1838). See also *Hennessy v Richardson Drug Company* 189 US 25 at 34-35 (1903).

and that the allegiance had been due to the sovereign in a political, not a personal, capacity[102]. That is consistent with the state of affairs in Australia. In *Street v Queensland Bar Association*[103], Deane J and Dawson J treated the expression "subject of the Queen in right of Australia" as synonymous with the term "Australian citizen".

123 In *Carlisle v United States*[104], Field J, who delivered the judgment of the Supreme Court, explained the concept of "allegiance" as understood in modern times as follows:

> "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. … The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence."

Later, in delivering the elaborate judgment of the Supreme Court in *United States v Wong Kim Ark*, Gray J approved[105] these decisions. He also referred[106] to what was then recent English authority[107] in which it was said that, feudalism being long gone, it was to the sovereign in his or her politic not personal capacity that allegiance was due.

124 Secondly, in *Wong Kim Ark*, Gray J went on to describe the allegiance of resident aliens, saying[108]:

> "Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord

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102 *Gardner v Ward* 2 Mass 228(n) (1805).

103 (1989) 168 CLR 461 at 525, 541 respectively.

104 83 US 147 at 154 (1872).

105 169 US 649 at 663-664, 694 (1898).

106 169 US 649 at 663 (1898).

107 *In re Stepney Election Petition, Isaacson v Durant* (1886) 17 QBD 54 at 65-66.

108 169 US 649 at 693 (1898).

> Coke, in *Calvin's Case*[109] 'strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject'."

Gray J was construing the first sentence of s 1 of the Fourteenth Amendment:

> "All persons born or naturalized in the United States *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside." (emphasis added)

More recently, Gray J's statement was repeated in the judgment of the Supreme Court in *Plyler v Doe*[110].

125 Further, from what was said in this Court by Barwick CJ and Gibbs J in *Bradley v The Commonwealth*[111], it is clear that an alien, other than an enemy alien, is, whilst resident in Australia, entitled to the protection which the law affords to Australian citizens. The reservation by Gray J in *Wong Kim Ark*[112] that the allegiance of the alien continues only so long as the alien remains within the territory of the United States is, of course, now to be read in the light of the decision of the House of Lords in *Joyce v Director of Public Prosecutions*[113].

126 The decision in *Joyce* was discussed in submissions but it has no significance for present purposes. What is significant is the statement by Lord Jowitt LC[114]:

> "The natural-born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm."

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109 (1608) 7 Co Rep 1a at 6a [77 ER 377 at 384].

110 457 US 202 at 211 (1982). See also "Membership Has its Privileges and Immunities: Congressional Power to Define and Enforce the Rights of National Citizenship", *Note*, (1989) 102 *Harvard Law Review* 1925 at 1931-1932; Drimmer, "The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States", (1995) 9 *Georgetown Immigration Law Journal* 667 at 705-707.

111 (1973) 128 CLR 557 at 582. See also *Johnson v Eisentrager* 339 US 763 at 768-777 (1950).

112 169 US 649 at 693 (1898).

113 [1946] AC 347.

114 [1946] AC 347 at 366.

The protection of the laws of Australia which is the counterpart of a local allegiance due from a resident alien is not necessarily limited to such time as the alien remains in Australia. This is exemplified by the issue to and reliance by the prosecutor upon the certificate of identity, to which reference has been made.

127 The appellant in *Joyce* remained at all material times an alien, namely a natural-born American citizen, but he had been settled in England for 12 years when he applied for the British passport in question[115]. The Attorney-General, Sir Hartley Shawcross KC, had submitted[116] that a duty of allegiance on the part of an alien might arise in several ways: by residence; by the taking of an oath; by service under the Crown; or the grant of protection, for example, by the issue of a British passport. The disqualification provision in s 44(i) of the Constitution looks at this range of circumstances from the opposite viewpoint by asking whether the person in question:

> [i]s 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".

128 It was held in *Joyce* that the words "a man" used in the *Treason Act* 1351 (Eng) embraced a person under a duty of allegiance, whether a British subject or an alien[117]. The "material facts" identified by the Lord Chancellor were[118]:

> "that being for long resident here and owing allegiance [Joyce] applied for and obtained a passport and, leaving the realm, adhered to the King's enemies".

129 An individual may be under concurrent obligations of allegiance to more than one state. Writing shortly after, and with reference to *Joyce*, Sir Hersch Lauterpacht said[119] that the English law respecting the obligations of allegiance owed by resident aliens was fully in conformity with existing international practice. He added[120]:

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115 [1946] AC 347 at 348.

116 [1946] AC 347 at 356-357.

117 [1946] AC 347 at 371.

118 [1946] AC 347 at 369.

119 Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens", (1947) 9 *Cambridge Law Journal* 330 at 333.

120 Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens", (1947) 9 *Cambridge Law Journal* 330 at 335.

> "The alien resident in a foreign country continues to owe allegiance to the sovereign of his own State. That allegiance expresses itself in his continued subjection to the laws of his own country – though, more often than not, the home State considers it convenient to limit its claims to jurisdiction with regard to the acts of its nationals when abroad. But, while continuing to be bound by allegiance to his own State, the alien becomes subject to another allegiance – that concomitant with the protection of the law which shelters him. There is nothing technical or mercenary about that reciprocity of allegiance and protection. That reciprocity is a formal relation only in the sense that it is of no legal relevance whether there is at any given moment an equivalence of duty and benefit, of allegiance and protection, of an actual disposition to fidelity and actual capacity to afford protection."

130 Nothing in the notion of allegiance assists the case which the prosecutor seeks to make as to the loss, other than by statute, of his status as an alien and thus one within the reach of s 501(2) of the Act.

131 However, the prosecutor also relied upon what was said to follow from *Patterson*[121]. There the Court made orders absolute for certiorari to quash a decision to cancel the prosecutor's visa made in exercise of the power conferred by s 501(3) of the Act. This authorises the Minister to cancel a visa if the Minister reasonably suspects the person in question does not pass the character test and the Minister be satisfied that the cancellation is in the national interest. It will be apparent that s 501(3) is differently cast to s 501(2), but nothing turns upon the distinction for present purposes.

132 In *Patterson*, it was decided that s 64 of the Constitution permits the appointment of more than one Minister to administer one or more departments of state and that the respondent, a "Parliamentary Secretary", fell within the term "the Minister" in s 501(3). However, it was further held that the respondent had misunderstood the nature of the jurisdiction she was exercising under that provision by failing to appreciate that there would be no opportunity for the prosecutor to seek revocation of her decision. There had been a purported but not a real exercise of the statutory power and thus jurisdictional error. These holdings attracted clear majorities in the Court, with the absence of dissenting views.

133 In the present litigation, the prosecutor fixes upon the holding by four members of the Court in *Patterson* to the effect that, in its application to the prosecutor in that case, s 501 of the Act could not be supported as an exercise of

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121 (2001) 75 ALJR 1439; 182 ALR 657.

the power with respect to "aliens". The reasoning in the judgments by which that conclusion was reached is not coincident. To the extent that the reasoning depended upon drawing conclusions respecting the aliens power in the Constitution from doctrines respecting allegiance, then, as indicated above, the reasoning was not soundly based. To the extent that the reasoning in *Patterson* inserts into the universe occupied by Australian citizens and aliens a third class formed by those who are identified as non-citizens but non-aliens, the reasoning appears inconsistent with that in *Pochi* and *Nolan* and, at a more general level, *Lim*.

134 The argument for the present prosecutor sought to place him in that third class, and to do so by operation of the extra-statutory common law doctrine identified earlier in these reasons. It is by no means apparent that the reasoning by which this third class was identified in *Patterson* would apply to the prosecutor. He also relied upon notions expressed in some of the judgments in *Patterson* of "absorption" derived from the earlier immigration power cases and applied in *Patterson* to the aliens power.

135 The facts in *Patterson* may have presented what appeared to be a hard case but, for the reasons explained further above, I remain unable to accept any translation to those facts of the reasoning in the immigration decisions. To my mind, such a translation would entail the failure to construe a head of legislative power in s 51 in the manner indicated in *Grain Pool* and earlier authorities. *Patterson* also may demonstrate the wisdom in the practice of the Court determining a case on the basis of constitutional invalidity only when it cannot found the order it makes on other grounds.

136 The convergent reasoning in *Patterson* respecting the constructive failure to exercise jurisdiction supplies that case with a clear ratio decidendi. However, to my mind, the divergent reasoning concerning invalidity dooms an attempt to discern a further ratio decidendi for the decision. If the Court is to depart from previous decisions, particularly those involving the interpretation and application of the provisions of the Constitution, then it should be taken as having done so only in circumstances where what was decided in the earlier case, or (as here) cases, has been overthrown and replaced by fresh doctrine, the content of which is readily discernible. It is for these considerations that earlier in these reasons I have drawn from what was said by the Court in the judgments in *Pochi*, *Nolan* and *Lim*.

137 The question in the case stated should be answered "yes". The costs of the case stated should be for the Justice disposing of the cause.

138 KIRBY J. The Court has before it applications for constitutional writs of prohibition and for injunctions[122] and writs of certiorari and declarations. The applications are brought by Meng Kok Te and Dung Chi Dang. Both have named the Minister for Immigration and Multicultural Affairs ("the Minister") as respondent. Mr Te has also named the Administrative Appeals Tribunal ("the AAT") as a respondent. That Tribunal has submitted to the orders of this Court.

139 In the case of Mr Dang, Hayne J granted an order nisi directed to the Minister obliging him to show cause why a writ of prohibition or injunctive relief should not issue to prohibit the Minister from taking steps to detain and remove Mr Dang from Australia, as well as a writ of certiorari to quash the decision requiring such removal. In that matter, Hayne J stated a case setting out agreed facts. His Honour reserved to the Full Court the question whether, in the circumstances disclosed, s 501(2) of the *Migration Act* 1958 (Cth) ("the Act") validly authorised the Minister to cancel Mr Dang's visa to remain in Australia.

140 In Mr Te's case, no order nisi has been granted. Instead, Hayne J ordered[123] that Mr Te's application for relief be made by motion to the Full Court. Mr Te is thus an applicant for constitutional and other relief. Mr Dang is a prosecutor claiming orders absolute. It is convenient to describe each of them as an applicant. In substance, they present identical questions for decision.

141 Neither of the applicants was born in Australia. Neither is descended from, or has been naturalized as, an Australian citizen. Each contests the power of the Minister to cancel his visa and to order his deportation. In so far as such powers are derived from legislation based on the "immigration and emigration" power in the Constitution[124], each applicant submits that he has passed beyond the reach of that power, having become absorbed into the Australian community by the time the Minister acted against him. In so far as the decisions of the Minister are justified by legislation based on the constitutional power with respect to "naturalization and aliens"[125], each applicant disputes that he is an "alien". Each asserts that he is also beyond the reach of the "aliens" power, making invalid the purported application to him of the legislation pursuant to which the Minister has acted.

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122 Constitution, s 75(v). See also s 75(iii).

123 Pursuant to O 55 r 2, High Court Rules.

124 Constitution, s 51(xxvii).

125 Constitution, s 51(xix).

The facts

142 *Mr Te's case*: Having regard to the issues presented for decision, it is unnecessary for me to record all of the detailed facts concerning the lives of the applicants, their respective connections with Australia and criminal offences. There was no substantial dispute about the facts. Those specifically relevant to Mr Te's case are detailed elsewhere[126]. His unpromising story is elaborated by a little more agreed information about his early life. He was born in Cambodia in 1967 and grew up during the Khmer Rouge rule of that country, receiving only two years of formal schooling. During that time he was removed from his family and forced to work as a farm labourer. He sought escape in a camp for refugees in Thailand where he spent three years. It was from there in 1983, at the age of sixteen years, that he was admitted to Australia and granted a visa.

143 In 1992 Mr Te married Ms Tran who later became an Australian citizen. However, the couple separated in 1993 and were divorced in 1996. Altogether Mr Te has been in this country for nineteen years. However, of this period he has spent nearly six and a half years in prison for drug-related offences.

144 In 1998, Mr Te was notified on behalf of the Minister that he was liable to deportation. A deportation order was signed by a delegate of the Minister and served on Mr Te. An application for a review of the deportation order was made to the AAT in August 1998. That Tribunal affirmed the order. A challenge in the Federal Court of Australia against the validity of the order, and the consequential decision to detain him under the Act[127], was also rejected[128]. Mr Te has been in immigration detention since August 1998, making a total of approximately ten years in custody, with fewer than nine years at large in the Australian community. Mr Te seeks an order for certiorari quashing the decision of the AAT and an order for prohibition preventing the Minister from giving effect to the Tribunal's decision.

145 *Mr Dang's case*: Mr Dang's brushes with the law began about two years after his arrival in Australia in 1981 from Malaysia where he had lived after

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126 See reasons of Callinan J at [214]-[215].

127 Pursuant to the Act, s 254.

128 An appeal against the order of the primary judge in the Federal Court (Branson J) was dismissed by a Full Court of the Federal Court in February 1999. An application for special leave to appeal to this Court from that judgment was refused in September 1999. An application for constitutional writs and other relief was commenced in this Court but withdrawn.

fleeing Vietnam by boat with his mother and three sisters[129]. His life in Australia is also characterised by a series of convictions and incarceration, starting with short periods of imprisonment for fine default, followed by imprisonment for the offences of reckless injury and blackmail and later significant terms of imprisonment for possession of heroin, possession of a prohibited pistol, armed robbery and drug trafficking offences.

146 Despite undertaking drug rehabilitation courses, first in custody and then whilst at liberty, Mr Dang continued to lapse into crime. In May 1997, he was sentenced to 24 months imprisonment for heroin trafficking and for attempting to traffick in hashish. In November 1997 the Minister first ordered Mr Dang's deportation. He was held in immigration detention for seven months before the AAT set that order aside and he was released. During the period out of custody, Mr Dang met his future wife. He married her in October 1999. However, soon afterwards, he received a fresh notification of the intention of the Minister to cancel his visa, a decision confirmed by the Minister in June 2000.

147 Late in 2001, whilst awaiting the determination of objections to the Minister's second decision, Mr Dang was arrested on fresh charges of possession of heroin and amphetamines. At the time of the hearing before this Court he was in custody pending trial for those offences. Whilst so held, his son, an Australian citizen, was born. Apart from his wife and son, he has an extended family in Australia, all of whom are Australian citizens[130].

148 Of his twenty-one years in Australia, Mr Dang has spent about two months on visits overseas (from which he was permitted to return); about one year and eight months in prison for various offences; two years and two months in prison on charges that did not result in convictions; about two months in prison in connection with a charge that resulted in conviction with a suspended sentence of imprisonment; nearly seven months in immigration detention; and the period since September 2001 on remand, awaiting the hearing of his present charges. In all, Mr Dang has therefore spent a total of about five and a half years of his time in Australia in custody of various kinds.

149 *Common factual features*: The common features of the applicants' cases include arrival in Australia as an adolescent, effectively as a refugee granted asylum; an involvement, after a short interval, in a series of criminal offences, some of them serious; a continuation of such criminal activities or alleged activities lasting until shortly before these proceedings were brought; a

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129 The detailed history and facts about Mr Dang are set out in the reasons of Callinan J at [213].

130 See reasons of Callinan J at [213].

participation in drug-related offences, including trafficking in drugs of dependence with potentially serious consequences for other members of the Australian community; and a failure to obtain Australian citizenship. Both applicants are still in custody.

150 Whilst Mr Te's aggregate custody (approximately ten years) is longer than Mr Dang's (approximately five and a half years), the difference is largely explained by a longer period of immigration detention in the case of Mr Te. With so many members of his family, including his wife and son, now Australian citizens Mr Dang, to that extent, enjoys a closer connection with the Australian community than Mr Te does. But both present a depressing record of criminal conduct during their time in this country.

151 Counsel for the applicants suggested that the involvement of each applicant in addiction to, and trafficking in, drugs of dependence should be viewed as an unfortunate consequence of the disruption of their lives during and after their childhood. If they were otherwise beyond the power of deportation under the Constitution, their frailties and offences connected with such drugs were to be viewed as characteristics shared by them with other members of the Australian community. They were a consequence of having, and admitting, a wide variety of persons in the Australian population. In short, accepting the occasional not so good with the good. The deportation of Mr Dang, in particular, would sever close contact between him, his wife and son and other family members, thereby resulting in serious consequences for many Australian citizens who, one infers, regard Mr Dang as part of their Australian family.

The applicable legislation

152 *Constitutional underpinning*: It was common ground that the outcome of the applications before this Court would be determined by the answer to the question whether s 200 of the Act (in its application to Mr Te) and s 501 of the Act (in its application to Mr Dang) were validly supported by either of the constitutional powers of the Parliament propounded by the Minister.

153 *Section 200 of the Act*: By s 200 of the Act, it is provided that "the Minister may order the deportation of a non-citizen to whom this Division applies". The Division in question is Div 9 ("Deportation") of Pt 2 ("Control of arrival and presence of non-citizens"). The expression "non-citizen" is defined by s 5 of the Act to be a "person who is not an Australian citizen". Mr Te is such a person.

154 Mr Te was convicted on 15 June 1992 of an offence of drug trafficking. He was then sentenced to twelve months imprisonment. The offence of which he was convicted was found to have been committed on 5 June 1991. Because he had arrived in Australia in July 1983, the offence was committed by him when he had been in Australia for a period of less than ten years. During that time the

permanent residence visa granted to him on first arrival had been continued in effect by regulation[131].

155 Although the above sentence imposed on Mr Te was varied following an appeal, to provide for the suspension of three months imprisonment, the primary sentence remained that of twelve months imprisonment. Therefore, Mr Te fell within the terms of s 201 of the Act[132]. The provisions of s 200 were thus enlivened. The only relevant basis for him to avoid the consequences of the order under the Act was the constitutional challenge now presented. Mr Te submitted either that s 200 was constitutionally invalid as impermissibly wide in its purported extension to him or that it should be read down so as to be inapplicable to his case, effectively because he was now neither an alien nor an immigrant.

156 *Section 501 of the Act*: In the case of Mr Dang, an initial decision was made by a delegate of the Minister pursuant to s 200 of the Act. However, as stated, that decision was set aside in September 1998 by the AAT on the basis that Mr Dang had shown genuine efforts towards rehabilitation. Changes to the Act came into force in June 1999. These resulted in a fresh notification to Mr Dang of the Minister's intention to cancel his visa. Thereafter, following compliance with procedural requirements, the Minister cancelled Mr Dang's visa to remain in Australia as a permanent resident. He did so relying on s 501(2) of the Act[133].

157 There is no dispute that Mr Dang's criminal record is, within s 501(7), a "substantial criminal record" by virtue of which he would not "pass the character test". Accordingly, in Mr Dang's case, there is no doubt that, by s 501(2) the Minister was empowered to cancel the visa granted to Mr Dang as a permanent resident unless s 501(2) was constitutionally invalid as purporting to apply to Mr Dang in a way that would take its provisions beyond the constitutional source of the law-making power of the Parliament or unless s 501(2) were to be read down, for similar reasons, so as to avoid exceeding constitutional power[134].

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131 Pursuant to the Migration Reform (Transitional Provisions) Regulations (Cth) [No 261 of 1994], reg 4.

132 Set out in the reasons of Gaudron J at [47] .

133 Set out in the reasons of Gaudron J at [65].

134 *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 ("*Taylor*") at 1497 [310]; 182 ALR 657 at 736.

The constitutional power with respect to aliens

158 *Pochi's case*: To support the validity of the provisions of the Act, pursuant to which he had acted to order the deportation of the applicants, the Minister relied principally on s 51(xix) of the Constitution affording the Parliament the power to make laws with respect to "naturalization and aliens".

159 The word "alien" derives from the Latin *alienus*, meaning belonging to another person or place[135]. Dictionary meanings include "one born in or belonging to another country who has not acquired citizenship by naturalisation and is not entitled to the privileges of a citizen" or "a foreigner"[136]. Because the word involves a constitutional concept, it is ultimately for this Court to define its outer boundaries in accordance with the Constitution. Whilst the power is conferred on the Parliament to make laws with respect to "aliens", and whilst such laws may, quite properly, include attempts to flesh out the meaning of the constitutional term, such attempts cannot be conclusive. This was a point made by Gibbs CJ in *Pochi v Macphee*[137]:

> "It is true that s 51(xix) presents some difficulties. Clearly the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word. This question was not fully explored in the present case, and it is unnecessary to deal with it."

160 Nevertheless, in *Pochi,* Gibbs CJ went on to say[138]:

> "However, the Parliament can in my opinion treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian."

161 The Minister submitted that *Pochi* resolved the issue now before this Court. *Pochi* was a case of an Italian immigrant who had come to Australia in 1959 at the age of 20 years. In 1974 he had applied for the grant of Australian

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135 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 ("*Nolan*") at 183; *Taylor* (2001) 75 ALJR 1439 at 1459 [114] per McHugh J; 182 ALR 657 at 683.

136 *Macquarie Dictionary*, 2nd ed (1991) at 42 cited by McHugh J in *Taylor* (2001) 75 ALJR 1439 at 1459 [114]; 182 ALR 657 at 683.

137 (1982) 151 CLR 101 ("*Pochi*") at 109 per Gibbs CJ.

138 (1982) 151 CLR 101 at 109-110.

citizenship[139]. His application was approved but the approval was not notified to him. In consequence, he did not take the oath or affirmation provided[140]. No Australian citizenship certificate was issued to him. He was not naturalized. Then, in 1977, he was convicted of a drug offence. His challenge to the constitutionality of the statutory provision pursuant to which the Minister had ordered his deportation was rejected on the footing that he neither had Australian nationality by birth nor had he acquired it by naturalization. For that reason he was an "alien" and the law providing for the Minister to deport him was constitutionally valid[141].

162 Although, in the course of the reasons of Gibbs CJ in *Pochi* (in which Mason and Wilson JJ concurred), reference was made to the status of British subjects[142], it was unnecessary in that case for this Court to determine any special features of that status for the purpose of deciding Mr Pochi's challenge. Gibbs CJ cited the rule of the common law stated by Blackstone in his *Commentaries*[143]:

> "Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it."

163 By this dichotomy, Mr Pochi was an "alien". It was therefore open to the Parliament to treat him as an "alien" and to provide for his deportation, as it had done. The Minister argued that precisely the same reasoning applied to the present applicants. He urged the correctness of the dichotomy expressed in *Pochi* – an "alien" is a non-citizen, nothing more nor less.

164 *Nolan's case*: In *Nolan*[144], the peculiarity of the status of "natural-born subjects … born within the dominions of the crown of England", other than Australia, arose for decision.

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139 The relevant facts are in the reasons of Gibbs CJ: see *Pochi* (1982) 151 CLR 101 at 104.

140 In the *Australian Citizenship Act* 1948 (Cth), s 15: see *Pochi* (1982) 151 CLR 101 at 104.

141 *Pochi* (1982) 151 CLR 101 at 112.

142 *Pochi* (1982) 151 CLR 101 at 108-109.

143 8th ed (1778), bk 1, c 10 at 366. See *Pochi* (1982) 151 CLR 101 at 107-108.

144 (1988) 165 CLR 178.

165 Mr Nolan was a subject of the Queen and citizen of the United Kingdom. He came to Australia when he was almost ten years of age, lived here until, at the age of twenty-eight, following convictions and more than nine years in prison, an order was made by the then Minister for his deportation under provisions of the Act. As it then stood, the Act provided in terms similar to those invoked in the case of Mr Te[145].

166 Mr Nolan's challenge required this Court to consider whether the dichotomy principle in *Pochi* had been expressed too widely and should be refined for application to cases of persons who were British subjects and permanent residents of Australia but who had nonetheless failed to become Australian citizens. Six members of the Court[146] held that the status of British subject (and citizen of the United Kingdom) made no difference. The majority concluded that the decision in *Pochi* was applicable to Mr Nolan, and inconsistent with his contentions. The Court concluded that such contentions were incompatible with[147]:

> "… the emergence of Australia as an independent nation, the acceptance of the divisibility of the Crown which was implicit in the development of the Commonwealth as an association of independent nations and the creation of a distinct Australian citizenship. Those developments necessarily produced different reference points for the application of the word 'alien'. Inevitably, the practical designation of the word altered so that, while its abstract meaning remained constant, it encompassed persons who were not citizens of this country even though they might be British subjects or subjects of the Queen by reason of their citizenship of some other nation."

167 In *Nolan*, Gaudron J dissented. Her Honour held that the provision of the Act, invoked to sustain the Minister's order in that case, was invalid "in so far as it purports to operate with respect to non-alien British subjects who had been absorbed into the Australian community prior to the section coming into operation in 1984"[148]. Her Honour favoured reading the provisions of the Act down so as to confine them to their constitutionally permissible operation. However, the dichotomy principle was reinforced by the majority in *Nolan*.

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145 The Act, s 12: see *Nolan* (1988) 165 CLR 178 at 181-182.

146 Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

147 (1988) 165 CLR 178 at 185-186.

148 (1988) 165 CLR 178 at 195-196.

168 It is necessary to outline this history of the decisions of this Court[149] in order to understand the significance of the most recent pronouncement on the subject of the "aliens" power.

169 *Taylor's case*: In *Taylor*[150] a majority of this Court held that Mr Taylor was not an "alien" within the meaning of s 51(xix) of the Constitution. As it was agreed that he was also no longer an "immigrant" the provisions of the Act supporting his detention and removal from Australia as a prohibited "non-citizen" were not valid in their application to him. They had to be read down so as to exclude his case[151]. Mr Taylor, like Mr Nolan, had been born in the United Kingdom. By his birth he owed allegiance to the Crown in that country. He had come to Australia as a young child on his father's passport in 1966 under the Assisted Migration Scheme[152]. He lived here continuously for thirty years without leaving the country before being convicted of serious criminal offences. In 1999, the Minister purported to cancel Mr Taylor's "visa". When, in 2000, by consent, this decision was quashed, a Parliamentary Secretary to the Minister, purported to cancel Mr Taylor's visa for a second time, pursuant to the provisions of the Act. She acted under the section of the Act pursuant to which the Minister has now ordered the deportation of Mr Dang[153].

170 In the present proceedings, it was submitted that differences within the reasoning of the majority on the constitutional argument in *Taylor* left standing the dichotomous principle as to the meaning of the word "alien" in s 51(xix) of the Constitution. The Minister argued that the Court should prefer the reasoning on the "aliens" power expressed by the minority in *Taylor* on the footing that the differences within the reasoning of the majority left it arguable that *Taylor* does not contain a "binding statement of constitutional principle"[154]. That submission should be rejected.

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149 See also *Polites v The Commonwealth* (1945) 70 CLR 60 at 69 and *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 64.

150 (2001) 75 ALJR 1439; 182 ALR 657.

151 *Taylor* (2001) 75 ALJR 1439 at 1450 [52] per Gaudron J, 1464 [136] per McHugh J, 1511-1512 [377]-[378] per Callinan J and at 1499 [318] of my own reasons; 182 ALR 657 at 670-671, 690, 755, 738.

152 *Taylor* (2001) 75 ALJR 1439 at 1447 [30] per Gaudron J, 1455 [92] per McHugh J; 182 ALR 657 at 666, 678.

153 The Act, s 501: see *Taylor* (2001) 75 ALJR 1439 at 1456 [96]; 182 ALR 657 at 679.

154 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.

171 First, there is no doubt that the issue of the correctness of the holding in *Nolan* was presented for decision and addressed by a majority of the members of this Court in *Taylor*. For those members of the Court who favoured relief to Mr Taylor based on the constitutional argument, it was not strictly necessary to question the correctness of *Pochi* because Mr Pochi was not a "natural-born subject" of the Crown.

172 In *Taylor*, Gummow and Hayne JJ[155], who were in the minority on this point, appealed for adherence to the reasoning in *Pochi* and to the decision in *Nolan*. They pointed out that the *Migration Amendment Act* 1983 (Cth), introducing the criterion of operation of "non-citizen", had been enacted in reliance upon the reasoning of the six members of the Court in the majority in *Nolan*. It cannot therefore be doubted that this Court was required in *Taylor* to face up to the serious question of whether such recent majority reasoning was so flawed that the Constitution obliged that it be overruled. Notwithstanding the powerful considerations for adhering to *Nolan*, acknowledged by all Justices in *Taylor*, a majority concluded that *Nolan* should be overruled. Each member of the majority expressly accepted that necessity. Each concluded that the step should be taken[156].

173 Secondly, the members of the Court who adopted the view that *Nolan* should be overruled, based the relief afforded to Mr Taylor on that reasoning. McHugh J[157] and Callinan J[158] based their agreement in the orders of the Court for writs of certiorari and prohibition only on the conclusion that Mr Taylor was not an "alien" for the purposes of the Constitution. Similarly, Gaudron J held that prohibition should issue as s 501 of the Act could not be validly applied to Mr Taylor since he was outside the "aliens" power[159]. Additionally Gaudron J considered, and accepted, a finding of jurisdictional error.

174 Thirdly, it is inherent in the reasoning of four members of this Court in *Taylor* that the simple notion of a dichotomy between an Australian citizen and a

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155 In the part of their reasons under the heading "Precedent and prudence": see *Taylor* (2001) 75 ALJR 1439 at 1485 [248]; 182 ALR 657 at 719.

156 *Taylor* (2001) 75 ALJR 1439 at 1448 [38]-[40] per Gaudron J, 1455 [89]-[91] per McHugh J, 1511-1512 [376]-[378] per Callinan J, and at 1495-1497 [300]-[307] of my own reasons; 182 ALR 657 at 667-668, 677-678, 754-755, 733-735.

157 *Taylor* (2001) 75 ALJR 1439 at 1464 [136]; 182 ALR 657 at 690.

158 *Taylor* (2001) 75 ALJR 1439 at 1512 [378]-[382]; 182 ALR 657 at 755.

159 *Taylor* (2001) 75 ALJR 1439 at 1450 [53]; 182 ALR 657 at 671.

constitutional "alien" could no longer be maintained. I agree with Gaudron J that *Taylor* "clearly held that provisions of the Act permitting the detention and removal of non-citizens were invalid in their application to a person who had been born in the United Kingdom, had entered Australia before the coming into effect, in 1987, of the *Australian Citizenship Amendment Act* 1984 (Cth) … and had been absorbed into the Australian community but had not taken out Australian citizenship"[160].

175 Further, as McHugh J points out, the majority in *Taylor* overruled *Nolan*, "to the extent that it purported to state an exclusive test of alienage"[161]. There was no contest that Mr Taylor was not an Australian citizen. Yet he was held not to be an "alien". It follows that, to the extent that the Minister, or anyone else, still hankers for a return to the simple distinction between alienage and the status of citizenship under Australian legislation, that principle does not survive the decision in *Taylor*. It remains to identify precisely what the new principle is. But one thing is certain after *Taylor*. For Australian constitutional purposes, the word "alien" in s 51(xix) of the Constitution is *not* conclusively defined to be all other persons in the world who are not Australian citizens[162].

176 Obviously, Mr Taylor brought his proceedings for himself. But it is impossible to regard his case as one confined to him personally. Necessarily, the decision in *Taylor* was concerned with persons in the class of which Mr Taylor is a member. That fact presents two further questions, only one of which had to be addressed in Mr Taylor's case. The first is: Who constitute the class of persons who are not citizens, but who are "natural-born subjects" of the Crown in Australia, like Mr Taylor, who are not "aliens" within the decision in that case? And the second is: Does the identification of that class necessarily postulate, or permit the existence of, a broader category of non-citizen non-aliens that extends to include non-citizens such as Mr Te and Mr Dang?

Non-citizen, non-alien British subjects

177 There can be no real doubt about the rule for which *Taylor* stands. *Taylor* held that certain persons, resident in Australia, who are subjects of the Crown, in the sense of being born in the dominions of the Crown other than Australia and who came to Australia as migrants at a certain time are not constitutional "aliens" although they have not been naturalized as Australian citizens.

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160 Reasons of Gaudron J at [50].

161 Reasons of McHugh J at [89]. See also reasons of Callinan J at [226].

162 See reasons of McHugh J at [85].

178 The case of Mr Taylor was relatively clear cut, once the impediment of the dichotomy in *Pochi* and *Nolan* was overcome. He had been in Australia for thirty years before his offences took place that grounded the successive purported decisions to deport him. It was common ground, accepted by the Minister that, for the purposes of the migration power, Mr Taylor had been absorbed into the Australian community[163] and could not, at least on that basis, be deported[164]. He had grown "out of the condition of being an immigrant"[165]. However, it was also inherent in the reasoning of, and orders agreed to by, the majority in *Taylor*, that Mr Taylor was not an "alien" because he was part of the Australian community or owed the necessary allegiance and could not retrospectively be deprived of that status by amendments to Australian statute law[166].

179 The explanations of why the class of persons to whom Mr Taylor belonged (British subjects and United Kingdom citizens arriving before 1 May 1987) were not "aliens" were expressed in slightly different terms by the members of the Court in the majority on that point. Thus, Gaudron J explained it in terms of membership of the body politic that constitutes the Australian community[167]. I used a similar criterion of the absorption into the Australian community, from their arrival, of British subjects of his class. Like Gaudron J[168], I treated 1 May 1987 as a critical date after which the exceptional statutes providing a special status to such non-citizen British subjects ceased to be engaged, reflecting developments by that time not only in Australia's statute law but also in the constitutional notion of "alien"[169].

180 In his reasons, McHugh J explained membership of, and commitment to, the Australian community by reference to the traditional common law notion of allegiance. Referring to amendments to the *Royal Style and Titles Act* 1973

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163 *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 372.

164 *Taylor* (2001) 75 ALJR 1439 at 1447 [31]-[32] per Gaudron J; 182 ALR 657 at 666.

165 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 64.

166 See reasons of McHugh J at [90].

167 *Taylor* (2001) 75 ALJR 1439 at 1448-1450 [41]-[51] per Gaudron J; 182 ALR 657 at 668-670.

168 *Taylor* (2001) 75 ALJR 1439 at 1496-1497 [304]-[305], [308]; 182 ALR 657 at 734-735. See also *Nolan* (1988) 165 CLR 178 at 190 per Gaudron J.

169 *Taylor* (2001) 75 ALJR 1439 at 1498 [313]; 182 ALR 657 at 737.

(Cth), McHugh J accepted that a British subject, owing allegiance to the Queen of the United Kingdom, continued (if living in Australia after that Act came into force) to owe such allegiance to Her Majesty as Queen of Australia[170]. In his reasons, Callinan J agreed with my reasoning[171], although he also expressed agreement with the reasons of McHugh J[172].

181 The result is not as complicated as the Minister suggested in his endeavour to persuade this Court to return so quickly to the dichotomy of citizen and alien that was rejected in *Taylor*. Allegiance to the monarch or head of state of a country is the traditional way, in a constitutional monarchy, by which alienage is excluded and membership of the community or body politic of that country is signified. It is ordinarily the procedure followed for "naturalization". For that reason, for most of the time relevant to Mr Taylor's case, the oath (or affirmation) of allegiance taken by new Australian citizens upon naturalization was not, as such, to Australia or the Australian community, Constitution and laws but to the Queen (after 1973 as Queen of Australia[173]).

182 It follows that the difference between the reasoning of Gaudron J and McHugh J in *Taylor* is essentially upon a matter of detail concerning the way in which a group of non-alien British subjects, resident in Australia, were formally associated with Australia although not citizens and never having been naturalized. It is the clear decision of four members of this Court, and thus of the Court, that a group of migrants who came to Australia before 1 May 1987 as "natural-born subjects" of the Crown (at least in the case of British subjects and United Kingdom citizens) are not "aliens" for constitutional purposes. It would be a serious legal error to mistake that holding and to pretend that the dichotomy of "alien" and "citizen" is still in place. It is not. Such persons are within an exceptional class of non-citizen, non-aliens. In my view, such persons cannot validly be deprived of that status by statute, based on the "aliens" power in the Constitution.

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170 *Taylor* (2001) 75 ALJR 1439 at 1462 [124]-[125] per McHugh J; 182 ALR 657 at 686-687; cf Holdsworth, *A History of English Law*, 3rd ed (1944) vol 9 at 72 cited by McHugh J in *Taylor* (2001) 75 ALJR 1439 at 1459-1460 [114]; 182 ALR 657 at 684. See also *Nolan* (1988) 165 CLR 178 at 189 per Gaudron J and *Taylor* (2001) 75 ALJR 1439 at 1511 [372] per Callinan J; 182 ALR 657 at 754.

171 *Taylor* (2001) 75 ALJR 1439 at 1511-1512 [377]; 182 ALR 657 at 755.

172 *Taylor* (2001) 75 ALJR 1439 at 1511 [376], 1512 [378]; 182 ALR 657 at 755.

173 *Australian Citizenship Act* 1948 (Cth), s 15(1) and Sch 2. A new form of oath and affirmation, pledging loyalty to "Australia and its people" in the place of the Queen in Sch 2 was introduced by the *Australian Citizenship Amendment Act* 1993 (Cth).

183 Nothing in the reasoning of the majority in *Taylor* is inconsistent with the principles of constitutional interpretation enunciated in *Grain Pool of Western Australia v Commonwealth*[174]. The class of British subjects considered in *Taylor*, of which Mr Taylor was a member was not a novel or unknown one that emerged later in the century. That class long existed. Its members were long granted special status. Even after the introduction of Australian citizenship, while not citizens, they would not be classed as constitutional "aliens". Indeed, it was reliance on that special status that may, in practice, have contributed to a failure by many such long-term residents to go through the formal process of naturalization. They and their fellow Australians did not then regard this formality as essential. The passage of time, which strengthened their bonds with, and membership of, the Australian community and society, did not result in their falling into the category of "aliens". However, as an outcome of the evolution of constitutional realities including Australia's relationship with the United Kingdom, by 1 May 1987, that position had changed. Such a change was reflected in legislation enacted finally terminating the special status of British subjects who arrived after that date and who did not take up Australian citizenship.

184 The principle established by *Taylor* does not avail either of the present applicants. Neither was a "natural-born subject" of the Crown. Still less was either within the category of persons admitted to Australia as migrants who were British subjects (or citizens of the United Kingdom) before 1 May 1987. They were both aliens on their entry into this country. Therefore, neither of the applicants can invoke the reasoning in *Taylor* to claim an exemption from the statutory powers authorising his deportation.

185 However, the important question presented by the present proceedings is whether, one clear exception having been established to the dichotomy urged by the Minister and favoured by this Court's earlier reasoning in *Pochi* (as well as the majority in *Nolan* and the minority on this point in *Taylor*) a further category of exception to the "aliens" power exists in respect of other non-citizens, which is broad enough to encompass the applicants.

The possibility of other non-citizens, non-aliens

186 *The applicants' arguments*: Drawing upon reasoning expressed in *Taylor*[175], the applicants sought to argue that, even if at one stage they had been

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174 (2000) 202 CLR 479.

175 *Taylor* (2001) 75 ALJR 1439 at 1449 [42] per Gaudron J, 1459 [114] per McHugh J, 1481 [224]-[225] per Gummow and Hayne JJ, 1511-1512 [377]-[378] per Callinan J and 1496 [304] of my own reasons; 182 ALR 657 at 668, 683-684, 713, 755, 734.

"aliens" after their arrival in Australia, each of them had ceased to be so before the Minister purported to make a decision to deport him. Three reasons were advanced to support this conclusion. They were expressed severally and cumulatively. These were:

(1) That each applicant had renounced his allegiance to the country of his nationality of birth and signified his allegiance to Australia by coming here as a refugee to make a new life, thus being subject, upon arrival, to the obligations of such allegiance and owing allegiance to no other country;

(2) That each had thereafter become members of the Australian community constituting the body politic of Australia and, as such, owed allegiance to the Queen of Australia; and

(3) That each had been in Australia for a period of time sufficient to have been absorbed into the Australian community so that, by analogy with the Court's decisions on the immigration power, the legislative power of the Parliament to enact a law based on the "aliens" power no longer extended to them or persons in a similar position.

187 *Change of allegiance*: In support of the contention that the applicants had changed their allegiance by coming to Australia, reliance was placed on what the House of Lords said in *Joyce v Director of Public Prosecutions*[176]:

> "The natural-born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm."

188 To avoid the suggestion that the duty owed by the alien entering the country was merely "local allegiance", owed temporarily by a national of another country whose true allegiance lay elsewhere[177], the applicants pointed out that they had abandoned their respective countries of nationality by flight from conditions of oppression and mortal danger. In each case, by proceeding to Australia, asserting a refugee status and seeking protection here, it was submitted, they had publicly and effectively renounced any residual allegiance to their country of nationality and affirmed their desire and intention to make Australia their permanent home and place of allegiance and personal loyalty.

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176 [1946] AC 347 ("*Joyce*") at 366.

177 *Calvin's Case* (1608) 7 Co Rep 1a at 5b [77 ER 377 at 383]; *Joyce* [1946] AC 347 at 366-367; *Taylor* (2001) 75 ALJR 1439 at 1459 [114]; 182 ALR 657 at 683-684.

189 The applicants therefore argued that they owed a duty of allegiance in reciprocity for the duty of protection owed to them by Australia. The well-founded fear of persecution that had grounded their admission as refugees to Australia, and consequently as permanent residents in the first place, indicated that they could no longer look to their country of birth and original nationality for protection. Accordingly, from their arrival to the present time their allegiance was to the Queen of Australia or, put in the terms of later legislation, to the Australian people and community.

190 These arguments are unconvincing. So far as the suggested renunciation of the allegiance owed by the applicants to their countries of birth, it is a matter of controversy as to whether it is open to a person unilaterally and privately to effect such a renunciation[178]. However that may be, there are significant impediments in the path of accepting the applicants' submissions as to their own cases. The definition of "refugee" in the Convention relating to the Status of Refugees[179], incorporated as part of Australian municipal law[180], clearly envisages that a person seeking refugee status retains his or her nationality at the time of the claim for protection from a country (such as Australia) which is party to the Convention[181]. Moreover, at the time of their departure from their respective countries of birth and nationality, each of the applicants was a minor[182]. Each was unable for some time afterwards to formulate the will to renounce allegiance to one country and to declare it for another, as by a public act in the form of an acknowledgment of allegiance to the Queen of Australia or the Australian community[183].

191 Change of allegiance so as to terminate a person's status as an alien could not, at least ordinarily, be left to the subjective inclination of the individual, still less of a minor in the care of his or her parent. A change of allegiance, in the sense of adherence to one nationality in the place of another, normally involves

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178 cf *Kenny v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 42 FCR 330 ("*Kenny*") at 339 per Gummow J.

179 Done at Geneva, on 28 July 1951 (1954 ATS 5), as amended by the Protocol relating to the Status of Refugees, done at New York on 31 January 1967 (1973 ATS 37) ("Refugees Convention").

180 The Act, s 36. See also the definition of "Refugees Convention" in s 5.

181 Refugees Convention, Art 1A(2).

182 cf *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 377-378.

183 *Pochi* (1982) 151 CLR 101 at 111 per Gibbs CJ.

reciprocal conduct by a formal and public act, signifying the solemn change and the acceptance of the new privileges and responsibilities that are involved. Such formalities are not usually required, but assumed, in the case of a "natural-born" subject or citizen. In some countries (and in some parts of Australia at different times in this country's history), school children have pledged their allegiance to the head of state or the country, its Constitution and laws[184]. But for a change of allegiance, mere subjective alterations of feelings on the part of the individual concerned would not be enough. Were it otherwise, such feelings would be liable to further imperceptible variations. For the attachment of civic privileges and obligations, it is neither unusual nor outside the contemplation of the Constitution, to provide by law a formal, public and reciprocal acknowledgment of "naturalization", in accordance with statute[185]. For the Parliament to so provide, as it does[186], is undoubtedly within constitutional power.

192 It follows that the basic flaw in the applicants' arguments concerning allegiance is that they confuse what the law describes as "local" allegiance with the other categories of allegiance recognised by the common law, namely "natural" or "acquired" allegiance[187]. Local allegiance is nothing more than the duty of anyone in Australia to comply with the Constitution and laws of this country. This form of "allegiance" may impose obligations, the breach of which would have serious consequences[188]. But owing this form of allegiance does not change the status of persons who are "aliens" within s 51(xix) of the Constitution. The contrary suggestion would be absurd. It would reduce Australian nationality

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184 eg *Education Act* 1958 (Vic), s 24(1): "In every State school there shall be observed in accordance with this section a ceremony at which the pupils acknowledge their role as citizens of Australia". Before 1983 the section provided for a declaration including the words: "I love God and my country; I honour the Flag; I will serve the Queen …".

185 *Kenny* (1993) 42 FCR 330 at 338.

186 *Australian Citizenship Act* 1948 (Cth), s 41 ("Formalities regarding pledge of commitment").

187 *Halsbury's Laws of England*, 4th ed, vol 8(2), par 29.

188 *Taylor* (2001) 75 ALJR 1439 at 1466 [148] per Gummow and Hayne JJ; 182 ALR 657 at 693, instancing liability to punishment for acts of treason; Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, (1901) at 599 states: "Although aliens resident in a British country owe no local allegiance to the Crown, they are bound equally with British subjects to obey the laws of the country". In this passage the authors appear to be referring to the allegiance of the kind that is required of a person *qua* British subject and not "local allegiance" as it is understood here.

to insignificance by, in effect, conferring it on all those who temporarily come within the jurisdiction and owe "local" allegiance for that reason. The applicants' argument of allegiance therefore fails.

193 *Membership of the body politic*: If, however, membership of the body politic of the nation[189] involves an idea in any way broader than, and different to, the notion of allegiance, the applicants' assertion that they qualify by this test is not available on the facts of their cases. Neither applicant went through the formal process of naturalization. Neither was, by Australian law, an "elector", as Mr Taylor was, for federal and State elections[190]. Neither was qualified, as Mr Taylor was, to participate in a referendum to alter the Constitution of the Commonwealth[191]. Neither was liable, as Mr Taylor was, to jury service and other like civic responsibilities and privileges in Australia. There are therefore a number of important and relevant distinctions between Mr Taylor's case and those of the applicants.

194 Such features of Mr Taylor's case contributed to my conclusion that he was not an "alien" because, although not an Australian citizen, he was effectively equated to one from the moment he arrived in Australia with his family as an assisted migrant. This was a position that was maintained and reflected in the legislative provisions that applied to people such as Mr Taylor arriving before 1 May 1987. No such considerations applied to either of the applicants. They are not, nor ever have been, non-citizen British subjects with a special status in Australia. They may complain that this distinguishes them unfairly from other migrants of the class of whom Mr Taylor was a member. But that distinction lies deep in Australia's history, constitutional arrangements and earlier legislation. The special association with the Australian body politic to which Mr Taylor could appeal is not available to either of the applicants.

195 *Termination of the power*: This leaves, finally, the applicants' argument that a point is reached where a person, although initially upon entry into Australia an "alien" for constitutional purposes, and never naturalized, is sufficiently long in this country, with enough connections to the Australian community, that he or she is to be regarded as having been absorbed into that community, so that the aliens power (like that over migration) must be regarded as spent in that person's case.

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189 *Taylor* (2001) 75 ALJR 1439 at 1447 [33] per Gaudron J; 182 ALR 657 at 666.

190 *Taylor* (2001) 75 ALJR 1439 at 1447 [30] per Gaudron J, 1456 [92] per McHugh J, 1510-1511 [370] per Callinan J, and 1489 [269]-[270] of my own reasons; 182 ALR 657 at 666, 678, 753, 724-725.

191 *Taylor* (2001) 75 ALJR 1439 at 1493 [287]-[288]; 182 ALR 657 at 730.

196 To make this proposition good, the applicants would have to overcome the explicit holding of this Court in *Pochi* that alien status cannot be lost by absorption into the Australian community[192]. Beyond that, the applicants had to face the obstacle of many other observations in this Court over the years, to similar effect, both before and after *Pochi*. Thus, in 1925, Isaacs J described naturalization as the process by which an alien crosses "the frontier of nationality" and achieves "incorporation into Australian citizenship" and entry "into the Australian community … as a fellow-subject of the King"[193]. It is clear that, in this passage, at least in the case of persons who were not already "natural-born subjects" of the Crown, a formal act of allegiance, not simply residence or the passage of time, was seen as necessary in order to pass beyond alienage. To the same effect were the remarks of Mason CJ in *Cunliffe v The Commonwealth*[194], stating explicitly that "an alien who has been absorbed into the Australian community ceases to be an immigrant, though remaining an alien".

197 In support of this distinction, the Minister argued that, were it otherwise, there would be no separate function for the "aliens" power in the Constitution to fulfil, beyond that already covered by the power to make laws with respect to immigration. The point was also made that the constitutional words were different – "immigration" referring to a process and "aliens" referring to persons of a particular legal status.

198 There is much force in these arguments. They are also consistent with the opinion of McHugh J in *Taylor* that, subject to the qualification of British subjects like Mr Taylor living in Australia who arrived before the given date and who thereafter owed allegiance to the Queen as Queen of Australia, the "general proposition" was that "it is open to the Parliament to treat as an alien any person who is not an Australian citizen"[195].

199 But against these arguments, the applicants returned to what they suggested was the fundamental basis, or conceptual foundation, of the decision in *Taylor*. This, they submitted, was the constitutional quality of the word "alien", the ultimate obligation to give it a meaning uncontrolled by legislation purportedly enacted in terms of the grant and acceptance that once one class of exception was provided (as in *Taylor*) others might, with time and later cases, be revealed.

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192 *Pochi* (1982) 151 CLR 101 at 111.

193 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 88.

194 (1994) 182 CLR 272 at 295.

195 *Taylor* (2001) 75 ALJR 1439 at 1461 [121]; 182 ALR 657 at 686.

200 Various extreme cases were suggested whereby non-citizens, who were long-term residents although never naturalized (often for legitimate reasons), might exceptionally be regarded as outside the aliens power in the Constitution. The spectre of a ninety year old non-citizen, proposed for expulsion as an "alien" although she had lived peacefully in Australia virtually all her life, was put forward to test the outer perimeter of the aliens power. Similarly, a person resident in Australia for sixty years, who had served in its Armed Forces or police who believed he had been naturalized but through some mistake or slip had not formally accomplished the change of status. Or the position of a person, long resident in Australia, purportedly excluded from citizenship as a result of discriminatory or restrictive laws enacted by the Parliament. There have been such provisions in the past, for example, restricting the acquisition of Australian citizenship by descent to persons born overseas to citizens through the male line[196]. If such restrictions could exist in the past they, or others like them, could (so the applicants argued) be reinstated by future legislation. This Court should therefore be wary of restoring too uncritically the suggested dichotomy between a constitutional "alien" and a statutory citizen in cases outside the transitional class of British subjects arriving before 1987 and non-citizens, such as Mr Taylor. As Gibbs CJ observed in *Pochi*, s 51(xix) presents certain difficulties. The scope of the power is ultimately stated by the Constitution. Its outer boundary is determined by this Court, not by legislation enacted by the Parliament.

201 It is not necessary in these proceedings to consider extreme cases of the types mentioned. The facts of the applicants' cases fall so far short of such instances that it is unnecessary to canvass them further. Far from showing allegiance or being absorbed into the Australian body politic, the repeated conduct of the applicants constitutes a public renunciation of the norms of the community. Far from there being any long-term participation in the duties and obligations of civic life, that might conceivably in a particular case be treated as equivalent to a public demonstration of allegiance, commitment or adherence to the Australian community, each of the applicants has repeatedly broken this country's laws. It is indeed a most serious decision, in the case of Mr Dang, to break up a family, and especially to separate a person from his wife and son, both Australian citizens[197]. However, that is a decision which, if there is power, is conferred by law on the Minister. This Court has no power to review the merits of the Minister's decision.

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196 See s 11 of the original *Nationality and Citizenship Act* 1948 (Cth).

197 *Pochi* (1982) 151 CLR 101 at 115; cf *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 at 647 per Deane J; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 599, 603-604 per Smithers J.

202 The only question before the Court in each of the proceedings is whether the power exists, in the case of the applicants, to sustain the several provisions of the Act under which the Minister has ordered their deportation. In my view, each of the applicants was on arrival in Australia, and remains, an "alien". It cannot be said in either case that they have passed beyond the reach of the aliens power, even assuming that to be constitutionally possible. Each of them was therefore liable to the order of deportation made by the Minister. Neither of them has established that the Act, as it applied to him, exceeded the law-making powers of the Parliament.

The immigration power

203 Once it is demonstrated that the constitutional power to make laws with respect to aliens is sufficient to support the provisions of the Act under which the Minister made his orders addressed to each of the applicants, those provisions of the Act are valid in that respect. It is therefore unnecessary to consider any additional constitutional source of validity that might arise from the immigration power[198].

204 Nor would any conclusion that the applicants, or either of them, had been absorbed into the Australian community so as to take them beyond the reach of the immigration power be sufficient to change in any way the legislative authority conferred on the Parliament in the applicants' cases pursuant to the aliens power. It is therefore irrelevant to consider that question. I will refrain from doing so.

Orders

205 I therefore agree in the orders proposed.

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198 51(xxvii). See *O'Keefe v Calwell* (1949) 77 CLR 261 at 276-277; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 373, 379-381.

HAYNE J.

Re Minister for Immigration and Multicultural Affairs & Anor;
Ex parte Meng Kok Te

206 The facts which give rise to this matter are set out in the reasons of other members of the Court. I do not repeat them.

207 The application for orders absolute should be dismissed with costs. For the reasons I give in *Re Minister for Immigration and Multicultural Affairs; Ex parte Dung Chi Dang*, s 200 of the *Migration Act* 1958 (Cth), in its application to the applicant, is a valid law with respect to aliens.

Re Minister for Immigration and Multicultural Affairs;
Ex parte Dung Chi Dang

208 The facts which give rise to this matter are set out in the reasons of other members of the Court. I do not repeat them.

209 The prosecutor was born outside Australia to parents neither of whom was then an Australian. He has never been naturalised as an Australian. He is, therefore, an "alien" as that expression is to be understood in s 51(xix) of the Constitution[199]. It follows that, in its application to the prosecutor, s 501 of the *Migration Act* 1958 (Cth) is a valid exercise of the legislative power with respect to aliens. Whether in this or in other applications the section can be supported by other heads of power is a question I need not consider.

210 The status of alien is not lost or altered by the fact that the person in question may have lived in Australia for a long time, or may have cut all the ties which once existed with the body politic of the place where that person was born or with the country of which he or she was formerly a subject or citizen. That the person in question is and has for some years been subject to the laws of this country and in *that* sense owes fidelity and obedience to, and derives protection from, the laws of this country[200] is not to the point. Alienage is a status fixed by reference to descent and place of birth and it may be altered only by, or pursuant to, legislation.

211 I do not accept that concepts of "absorption", developed in considering the reach of s 51(xxvii) of the Constitution – the immigration and emigration power – have a place in considering who is an alien. For the reasons given by

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199 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185.

200 *Carlisle v United States* 83 US 147 at 154 (1872) per Field J.

Gummow J, with which I agree, *Re Patterson; Ex parte Taylor*[201] does not require a contrary conclusion.

212 The question in the case stated should be answered "Yes". The costs of the case stated should be for the Justice disposing of the matter.

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201 (2001) 75 ALJR 1439; 182 ALR 657.

213 CALLINAN J. Both applicants whose cases were heard together sought relief under s 75(v) of the Constitution. In the case of *Dang*, Hayne J has stated a case as follows:

> "The applicant was born in the Republic of Vietnam (South Vietnam) on 29 January 1968.
>
> From about 1975 to about 1981 the applicant's father (who had been a soldier in the army of the former Republic of Vietnam) was held in a re-education camp by the government of the Socialist Republic of Vietnam ('Vietnam').
>
> The applicant attended school in Vietnam for 9 years.
>
> In 1980 the applicant, his mother and 3 of his sisters fled Vietnam by boat and went to Malaysia, where they resided until July 1981. On 14 April 1981 they were accepted for travel to Australia on a Class 302 Emergency Permanent Visa. The applicant together with his mother and 3 of his sisters entered Australia on the visa on 14 July 1981.
>
> After their arrival in Australia, the applicant, his mother and 3 of his sisters lived in Richmond, Victoria, in Victorian Ministry of Housing accommodation. The applicant attended Richmond High School from years 7 to 10 and Collingwood Technical School for part of year 11.
>
> On 1 March 1983 the Children's Court of Victoria placed the applicant on a supervision order for six counts of theft.
>
> After leaving school in about 1985, the applicant worked over a number of years in 7 positions as an apprentice jeweller, in manufacturing, as a waiter, as a shop assistant and as a driver.
>
> In 1985 the applicant's mother applied for citizenship. The applicant recalls that he also applied for citizenship at this time. The respondent's Department has caused a search to be conducted of its computerised records systems, and those systems record that on 26 August 1985 the applicant's mother and 2 dependants (neither of whom was the applicant) applied to become Australian citizens, and citizenship was acquired by them on 28 January 1987. No record of any such application by the applicant appears. In any event, the applicant was not granted citizenship.
>
> In 1986 the applicant's mother sponsored 2 of the applicant's other sisters to migrate to Australia.
>
> The applicant began to use cannabis in 1987.

Between 24 March 1987 and 5 November 1987 the applicant was remanded on a charge of murder, of which he was acquitted on 5 November 1987.

On 21 October 1988 the applicant was fined $600 for assault by kicking and $400 for resisting arrest.

On 20 April 1989 the applicant departed Australia for Vietnam, travelling on a Certificate of Identity issued by the Commonwealth of Australia on 17 April 1989 and numbered C5102138 ('the Certificate of Identity'), and possibly holding some form of authorisation to enter Vietnam.

On 31 May 1989 the applicant re-entered Australia holding the Certificate of Identity.

Between 7 and 14 July 1989 the applicant was imprisoned in default of payment of fines.

Between 2 August 1989 and 17 October 1989 the applicant was remanded on charges including recklessly causing injury (for which a sentence was imposed on 9 April 1990). The applicant was released on bail on 17 October 1989.

On 20 January 1990 the applicant departed Australia for Vietnam, travelling on the Certificate of Identity, and possibly holding some form of authorisation to enter Vietnam. On 14 February 1990 the applicant re-entered Australia holding the Certificate of Identity.

On 9 April 1990 the applicant was sentenced to 3 months imprisonment for recklessly causing injury, which sentence was wholly suspended for 12 months.

In about 1990 or 1991 the applicant began to use heroin, at first spasmodically and from about 1995, heavily.

Between 8 September 1990 and 31 January 1991 the applicant was remanded (on blackmail and theft charges). He was released on bail on 31 January 1991.

Between 9 February 1991 and 13 March 1991 the applicant was remanded for trial (on the blackmail charge). He was released on the grant of trial bail on 13 March 1991.

Between 19 July 1991 and 12 January 1992 the applicant was imprisoned, having been sentenced to imprisonment for 18 months for possession of heroin. He was released on the expiry of the sentence on 12 January 1992.

In 1992 the applicant's father and grandmother migrated to Australia as permanent residents.

On 5 August 1992 the applicant was fined $100 for being found in a common gaming house.

In May 1993 the applicant met a Youth Worker employed by Brosnan Centre. Later he undertook drug rehabilitation courses in custody and maintained regular contact with this Youth Worker.

On 30 August 1993 the applicant was sentenced to 4 months imprisonment, suspended for 24 months, for possession of a prohibited pistol, fined $600 for possession of an unregistered firearm, and fined $400 for use of a drug of dependence.

Between 27 December 1993 and 11 August 1994 the applicant was remanded on armed robbery charges. He was released on the grant of bail on 11 August 1994.

Between 12 September 1994 and 23 February 1995 the applicant was remanded for trial (on the armed robbery charges and associated charges). He was acquitted and released on 23 February 1995.

On 3 November 1994, Kim Phung Phan, the applicant's future wife, became an Australian citizen.

Between 1 February 1996 and 14 August 1996 the applicant was remanded on drug trafficking charges. He completed a drug education program at the Melbourne Remand Centre in April 1996. He was released on the grant of bail on 14 August 1996 conditional on his attendance at the Odyssey House Residential Programme for drug rehabilitation.

In August 1996 the applicant was admitted to the Odyssey House Residential Programme for drug rehabilitation. His completion of that programme was interrupted when he was sent to prison in May 1997.

On 26 March 1997 the applicant was sentenced to 36 months imprisonment for trafficking in heroin and in cannabis. The sentence was suspended for 15 months.

On 27 May 1997 the applicant was sentenced to 24 months imprisonment for heroin trafficking and for attempting to traffick in hashish. His suspended sentence of 26 March 1997 was restored. He was ordered to serve 9 months of his new sentence cumulatively with the suspended sentence of 36 months with a minimum term of 15 months to be served before being eligible for parole. Parole was granted on 24 February 1998. In the event, the applicant was imprisoned under these sentences from 16

May 1997 to 24 February 1998 (and the days he served on remand in 1996 and prior to sentencing on 27 May 1997 were credited toward his sentence). While he was in gaol, he continued to work with the Youth Worker he had met in 1993, who later reported an improvement in the applicant's attitude and outlook.

On 28 November 1997 the Minister ordered the deportation of the applicant pursuant to section 200 of *Migration Act*, 1958.

Between 24 February 1998 and 17 September 1998 the applicant was held in immigration detention.

On 17 September 1998 the Administrative Appeals Tribunal set aside the deportation order and the applicant was released from immigration detention.

After his release, the applicant was employed as a waiter.

The applicant met his future wife, Kim Phung Phan, on 13 December 1998.

On 20 September 1999 the respondent's Onshore Protection Section wrote an assessment to the effect that Refugees Convention did not apply to the applicant.

On 2 October 1999 the applicant married Kim Phung Phan.

In about October 1999 the applicant's wife was pregnant, but later suffered a miscarriage.

On 18 October 1999 the applicant received a notice dated 28 September 1999 of intention to cancel his visa.

On 27 June 2000 the respondent signed a document indicating that he agreed (inter alia) that 'Mr Dang's visa should be cancelled'.

On 25 May 2001 the respondent's Department sent a letter of that date to the applicant's solicitors enclosing a letter dated 7 May 2001 notifying the applicant of the Minister's decision to cancel his visa, a notice of visa cancellation of the same date, a document entitled 'information about review rights', a document entitled 'issues for consideration for possible visa cancellation' and three attachments marked 'A', 'B' and 'C' to that document.

On 15 August 2001, a *Memorandum of Understanding* was concluded between Australia and Vietnam relating to the re-admission to Vietnam of Vietnamese citizens deported or removed from Australia.

On 19 September 2001 police arrested the applicant alleging that he was in possession of heroin and amphetamines. The applicant is now on remand in the Melbourne Assessment Prison.

On 12 December 2001 Starboy Tien Vuong Dang, the son of the applicant and his wife, was born an Australian citizen.

As at the date of this statement of agreed facts, since first entering Australia on 14 July 1981, the applicant has:

(a) spent 66 days outside Australia;

(b) spent 663 days in prison serving sentences for convictions of various offences;

(c) spent 794 days in prison on remand in connection with various charges which did not result in convictions;

(d) spent 76 days in prison on remand in connection with a charge which resulted in conviction and a suspended sentence of imprisonment;

(e) spent 205 days in immigration detention;

(f) spent 198 days on his current term of remand.

The applicant's family in Australia now includes his wife, Kim Phung Phan, their son Starboy Tien Vuong Dang, his father Thieu Van Nguyen, his mother Thi Hong Pham, his grandmother Thi Pheo Pham, his brother Chi Thanh Pham, and 4 of his sisters: Yen Bach Pham, Nguyet Thu Nguyen, Anh Ngoc Pham, Kim Anh Nguyen, all of whom are Australian citizens. (One sister, Thu Huong Nguyen has been missing since 1998). His family in Australia also includes nine nephews and nieces, and the applicant is also related by marriage to about five other Australian citizens.

At no time has the applicant been granted Australian citizenship under the *Australian Citizenship Act* 1948 (Cth)."

214 Te was born in Cambodia. He fled that country to Thailand where he remained for three years. He entered Australia in 1983 on a Cambodian Refugee Humanitarian Visa. On arrival he was granted the status of permanent resident. He has not left Australia since his arrival. He has married and divorced here and is childless. After only four years in this country he began to acquire a criminal record. On 14 July 1987 he was convicted at the Melbourne Magistrates Court on one count of resisting police/arrest (fined $150), one count of behaving in an offensive manner in a public place (fined $150) and one count of hindering police (fined $100). He committed the offence of "Traffick of a Drug of

Dependence" on 5 June 1991 for which he was sentenced to 12 months imprisonment on 15 June 1992. On 10 September 1991 he was convicted at the Melbourne Magistrates Court on one count of unlawful assault, one count of assault in company, one count of assault by kicking and one count of failing to answer bail. Te was fined $200 on each charge. Next, on 15 June 1992 he was convicted at the Melbourne Magistrates Court on two counts of "Possession of a Drug of Dependence" and sentenced to 12 months imprisonment. Te was also convicted on the same date on one count of "Traffick Drug of Dependence" and was sentenced to 12 months imprisonment in respect of that. On appeal, the sentence was altered to 12 months imprisonment of which three months was suspended. On 12 February 1994 Te was convicted at the Melbourne County Court on a charge of [being] "Found in a Common Gaming House" and fined $50. Last, on 29 May 1996 Te was convicted in the County Court of Victoria of the offence of "Traffick in a Drug of Dependence" (one count). He was sentenced to a term of imprisonment of seven years with a non-parole period of five years.

215 In Te's case an Order Nisi was granted by Hayne J for writs of certiorari and prohibition (or an injunction) on grounds that he was an absorbed person and was not an alien, and that there was no relevant nexus between either the constitutional aliens or immigration power, and the prosecutor. On that basis, the applicant contended, ss 200 and 203 of the *Migration Act* 1958 (Cth) ("the Act") had no application to him and he was not amenable to an order for deportation under them.

216 Section 200 empowers the first respondent to order the deportation of a non-citizen to whom Div 9 of Pt 2 of the Act applies, and is concerned, among other things, with the deportation of criminals.

217 It is not argued in either case that the offences in question were not serious offences within the meaning of s 203 of the Act which provides as follows:

> "**203 Deportation of non-citizens who are convicted of certain serious offences**
>
> (1) Where:
>
> (a) a person who is a non-citizen has, either before or after the commencement of this subsection, been convicted in Australia of an offence;
>
> (b) at the time of the commission of the offence the person was not an Australian citizen; and
>
> (c) the offence is:

(i) an offence against section 24, 24AA, 24AB, 24C, 25 or 26 of the *Crimes Act* 1914; or

(ii) an offence against section 6 of that Act that relates to an offence mentioned in subparagraph (i) of this paragraph; or

(iia) an offence against section 11.1 or 11.5 of the *Criminal Code* that relates to an offence mentioned in subparagraph (i) of this paragraph; or

(iii) an offence against a law of a State or of any internal or external Territory that is a prescribed offence for the purposes of this subparagraph;

then, subject to this section, section 200 applies to the non-citizen.

(2) Section 200 does not apply to a non-citizen because of this section unless the Minister has first served on the non-citizen a notice informing the non-citizen that he or she proposes to order the deportation of the non-citizen, on the ground specified in the notice, unless the non-citizen requests, by notice in writing to the Minister, within 30 days after receipt by him or her of the Minister's notice, that his or her case be considered by a Commissioner appointed for the purposes of this section.

(3) If a non-citizen on whom a notice is served by the Minister under subsection (2) duly requests, in accordance with the notice, that his or her case be considered by a Commissioner appointed for the purposes of this section, the Minister may, by notice in writing, summon the non-citizen to appear before a Commissioner specified in the notice at the time and place specified in the notice.

(4) A Commissioner for the purposes of this section shall be appointed by the Governor-General and shall be a person who is or has been a Judge of a Federal Court or of the Supreme Court of a State or Territory, or a barrister or solicitor of the High Court or of the Supreme Court of a State or Territory of not less than 5 years' standing.

(5) The Commissioner shall, after investigation in accordance with subsection (6), report to the Minister whether he or she considers that the ground specified in the notice under subsection (2) has been established.

(6) The Commissioner shall make a thorough investigation of the matter with respect to which he or she is required to report, without

regard to legal forms, and shall not be bound by any rules of evidence but may inform himself or herself on any relevant matter in such manner as he or she thinks fit.

(7) Where a notice has been served on a non-citizen under subsection (2), section 200 does not apply to the non-citizen because of this section unless:

(a) the non-citizen does not request, in accordance with the notice, that his or her case be considered by a Commissioner;

(b) the non-citizen, having been summoned under this section to appear before a Commissioner, fails so to appear at the time and place specified in the summons; or

(c) a Commissioner reports under this section in relation to the non-citizen that he or she considers that the ground specified in the notice has been established."

Nor was it suggested that either applicant should be treated differently because of any differences in the offences committed, their gravity, or the penalties imposed, and the periods spent in prison in respect of them.

Applicants' submissions

218 The applicants' first submission is that they are persons who have been absorbed within the community for a number of reasons: they had entered Australia with the intention of making the country their permanent home, and had been granted permanent resident visas upon arrival; each had lived about half his life in Australia, had attended school and had been employed in Australia. Te has not left Australia since first arriving, and Dang has returned to Australia after two absences from it. Each married Australian residents and regarded Australia as his home.

219 It follows, the applicants submit, that they are beyond the immigration power contained in s 51(xxvii) of the Constitution.

220 The argument, that they are beyond the immigration power because they are absorbed citizens should be rejected. They were not British non-citizens who entered Australia before 1984 or 1987. Neither owed allegiance to the Queen in right of Australia or elsewhere at any time. An obligation to obey the laws of Australia extends to anyone within the territorial reach of Australian law, no matter to whom the persons affected by them owe allegiance and does not give rise to any national status. The applicants have never been naturalized. Indeed they have never sought Australian citizenship.

221 Blackstone[202] explains the difference between natural allegiance due from birth of a person born within the king's dominion, and local allegiance. A person owing the former cannot unilaterally renounce allegiance: it is intrinsic and primitive and requires for its divestment, "the concurrent act of that prince to whom it was first due." There is nothing to suggest that there has been any such concurrent act on the part of the sovereign authorities in the countries from which these applicants fled. Nor is there any suggestion that they have done any other unequivocal acts, if I were to assume that some such acts might suffice to change their status, to renounce their natural allegiances and to acknowledge allegiance to the sovereign authority of Australia.

222 The applicants argue that "allegiance" is not confined to natural born subjects. They cite Lord Jowitt LC in *Joyce v Director of Public Prosecutions*[203] for a proposition that a naturalized subject owes allegiance from his naturalization, and an alien from the day when he comes within the realm. As persons within the country, they continue, they owe more than mere local allegiance such as may be owed by an alien whose true allegiance lies elsewhere. Allegiance can be established even though it did not previously exist. Similarly, it can cease to exist, either involuntarily, as occurs when a person resides in territories which cease to be governed by the sovereign power[204], or by some other act of the sovereign power[205], or voluntarily, by an act of renunciation of allegiance[206].

223 The applicants further submit that by their flight, as refugees from their countries of birth, and their seeking and obtaining of refugee status in this country, they brought the sovereign under a duty to protect them, and, accordingly, there is a reciprocal obligation imposed upon them, of allegiance to the sovereign. They are subject to the laws of Australia: therefore they are people of Australia and citizens of this country. Although citizenship is a

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202 See *Commentaries on the Laws of England,* 15th ed (1809), bk 1, c 10 at 369-371.

203 [1946] AC 347 at 366.

204 *Doe d Thomas v Acklam* (1824) 107 ER 572 at 579, cited by McHugh J in *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1460 [116]; 182 ALR 657 at 684.

205 *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1481 [224] per Gummow and Hayne JJ; 182 ALR 657 at 713.

206 It has been said that at common law the natural born subject could never abandon allegiance, see Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 50-51; *Joyce* at 366.

sufficient condition for membership of the Australian body politic, it is not a necessary condition. Judged from a constitutional – rather than a statutory – perspective, the fundamental criterion of membership is allegiance to the Queen of Australia[207].

224 The applicants argue that, to the extent that the decision of this Court in *Pochi v Macphee*[208] may have declared that alien status cannot be lost by absorption[209], leave should be granted to the applicants to reopen that decision and that it should be overruled. Finally, the applicants submit, the denotation of the word "alien" must evolve to take account of the changed conditions of the late 20th and early 21st centuries, and in particular to accommodate the acceptance of displaced persons into the Australian community as protected persons.

225 In support of their submissions the applicants refer to the judgment of McHugh J in *Re Patterson; Ex parte Taylor*[210].

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207 *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1491 [276] per Kirby J; 182 ALR 657 at 726-727; cf at 1449 [42]-[43] per Gaudron J; 182 ALR 657 at 668-669.

208 (1982) 151 CLR 101.

209 (1982) 151 CLR 101 at 111.

210 (2001) 75 ALJR 1439 at 1458-1459 [110]; 182 ALR 657 at 682-683.

> "A recent example of this process of the denotation of constitutional terms becoming enlarged in the context of Australia's emergence as a sovereign state is *Sue v Hill*. In *Sue v Hill*, the Court held that the term 'foreign power' in s 44(i) of the Constitution now includes the United Kingdom although in 1901 and for long after the United Kingdom was not a 'foreign power' within the meaning of that term. Consequently, the first respondent, Mrs Hill, who had been born in England but had taken out Australian citizenship, was the subject of a foreign power and incapable of being chosen as a member of the Senate. Three Justices of the Court said [(1999) 199 CLR 462 at 496 [78]]:
>
> > 'Whilst the text of the Constitution has not changed, its operation has. This reflects the changed identity of those upon whose advice the sovereign accepts that he or she is bound to act in Australian matters by reason, among other things, of the attitude taken since 1926 by the sovereign's advisers in the United Kingdom. The Constitution speaks to the present and its interpretation takes account of and moves with these developments.'"
>
> See also Gaudron J at [35], [48], [50], McHugh J at [90], [122], [124], [125], Kirby J at [290], [304], Callinan J at [373], [378].

The applications should fail

226 *Patterson* does not assist the applicants. This is so because the applicant there was neither an alien nor any longer an immigrant. This was so because he was a British subject already owing allegiance to the Queen on his entry into Australia long before the enactment of the *Australia Acts* in 1984 (effective from 1987), at a time when British subjects were entitled to vote in Federal elections, and a considerable time (15 years), sufficient for his absorption into the community, before the commission of the offences of which he was convicted.

227 There is another answer to the applicants' claim to be beyond the reach of both the immigration power and the aliens power by reason of their absorption within the community, even if I were to assume, that a non-citizen may come to be beyond the reach of the aliens power after absorption. That neither has applied for citizenship is certainly relevant to this issue. But more relevant, and conclusive, is the fact that their criminal activities are incompatible with absorption within the community. Knox CJ in *Ex parte Walsh and Johnson; In re Yates*[211] , in discussing the reach of the immigration power denied its extension to people, who among other things had become "*part* of [Australia's] people." One aspect of the decision in this Court in *The Queen v Forbes; Ex parte Kwok Kwan Lee*[212] is to require the disregarding as a period of absorption, time spent in this country, illegally, that is, time spent after the expiration of a temporary visa. Davies J, correctly in my opinion in *Re Ang and Minister for Immigration and Ethnic Affairs*[213] held that the applicant there, but for his crime of dealing in heroin, and imprisonment for it, would have become absorbed into the community. A relevant meaning of "absorb" is to become part of, to cease to exist apart from[214]. To be absorbed, a person must fit into, live in the community, and seek to make himself a member of the community, and to participate in the lawful activities of it. Committing serious crimes against the community, and, as a result, becoming liable to spend, and spending substantial periods in prison are the antithesis of these.

228 Neither applicant has been absorbed within the Australian community. They remain within the reach of both the immigration and aliens powers.

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211 (1925) 37 CLR 36 at 62.

212 (1971) 124 CLR 168.

213 (1980) 2 ALD 785.

214 See *Shorter Oxford English Dictionary*, 3rd ed (1973) vol 1 at 8.

229 The application in the case of Te should be dismissed with costs. For the reasons given by Gaudron J[215] I would seriously doubt whether "absorption" can put persons such as the applicants beyond the reach of the aliens power. I do not need however to decide this appeal on that basis, and refrain from doing so, sharing as I do, some of the concerns expressed by Kirby J[216] with respect to very long term residents of Australia. In the case of Dang the matter should be remitted to Hayne J for further consideration and disposition, including with respect to costs.

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215 See reasons of Gaudron J at [56]-[59].

216 See reasons of Kirby J at [200]-[201].