HIGH COURT OF AUSTRALIA

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

RE MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

EX PARTE AMOS BODE AME APPLICANT/PROSECUTOR

Re Minister for Immigration and Multicultural and Indigenous Affairs;
Ex parte Ame
[2005] HCA 36
4 August 2005
M146/2004

ORDER

Questions in the Case Stated answered as follows:

1. Q. *On the proper construction of regulation 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations 1975 and the Papua New Guinea Constitution, did the Applicant cease to be an Australian citizen under the* Australian Citizenship Act 1948 *on Independence day?*
   A. *Yes.*

2. Q. *If the answer to question (1) is "Yes", is regulation 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations 1975 authorised by s 6 of the* Papua New Guinea Independence Act 1975*?*
   A. *Yes.*

3. Q. *If the answer to questions (1) and (2) is "Yes", is s 6 of the Papua New Guinea Independence Act 1975, to the extent that it authorises regulation 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations 1975, invalid in that it is not supported by s 51(xix), (xxvii), (xxix) or (xxx) of the Constitution, ss 51(xxxix) and 61 of the Constitution, the "implied nationhood" power, s 122 of the Constitution, or any other head of Commonwealth power?*
   A. *No.*

4. Q. *Once the [applicant's] bridging visa … has expired, are ss 189, 196 and 198 of the* Migration Act 1958 *capable of valid application to the applicant on the basis that:*

1) he is an alien, within the meaning of section 51(xix) of the Constitution; or

2) in their application to him those provisions are laws with respect to immigration within section 51(xxvii) of the Constitution; or

3) on any other basis?

A. (1) Yes.

5. Q. *Who should pay the costs of the Stated Case and the hearing of the Stated Case before the Full Court of this Court?*

A. The applicant.

Representation:

K Rubenstein with G J Williams for the prosecutor (instructed by Clothier Anderson & Associates)

D M J Bennett, QC, Solicitor-General of the Commonwealth with G R Kennett and G A Hill for the respondent (instructed by the Australian Government Solicitor)

CATCHWORDS

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame

Immigration – Applicant born in Papua prior to 1975 – Applicant acquired Australian citizenship by birth but required an entry permit to enter or reside in Australia – Applicant in Australia without a substantive visa – Whether ss 189, 196 and 198 of the *Migration Act* 1958 (Cth) could apply to the applicant – Whether the applicant ceased to be an Australian citizen under the *Australian Citizenship Act* 1948 (Cth) when Papua New Guinea became an independent sovereign state in 1975 by virtue of *Papua New Guinea Independence Act* 1975 (Cth) and regulations made thereunder – Whether the applicant became a citizen of Papua New Guinea by virtue of the provisions of the Papua New Guinea Constitution – Whether the applicant had a right of permanent residence in Australia within the meaning of the Papua New Guinea Constitution.

Statutes – Whether the *Papua New Guinea Independence Act* 1975 (Cth), s 6 validly authorised the making of a regulation affecting citizenship.

Constitutional Law (Cth) – Territories – Where Papua and New Guinea were acquired as external territories by the Commonwealth and then relinquished – Ambit of the law-making power conferred by s 122 of the Constitution respecting relations between Australia and inhabitants of an external territory – Whether power may be exercised to change a person's status from non-alien to alien without that person's consent.

Constitutional law (Cth) – Naturalization and aliens – Whether the legislative power conferred in s 51(xix) of the Constitution may be exercised to change a person's status from alien to non-alien without that person's consent.

Constitution, ss 51(xix), 122.
Constitution of the Independent State of Papua New Guinea, ss 64, 65.

Migration Act 1958 (Cth), ss 189, 196, 198.
Papua New Guinea Act 1963 (Cth), ss 4, 5, 6.
Papua New Guinea Independence Act 1975 (Cth), ss 4, 6.
Papua New Guinea Independence (Australian Citizenship) Regulations 1975 (Cth), reg 4.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. The applicant was born on 20 May 1967, in Pale village, Ialibu district, in the Southern Highlands province of Papua. At the time, Papua was administered by Australia as a Possession of the Crown and as part of an administrative union known as the Territory of Papua and New Guinea. The applicant's four grandparents also were born in the Ialibu district of Papua. He was aged eight when, on 16 September 1975 ("Independence Day"), Papua New Guinea became an independent sovereign state by the name of the Independent State of Papua New Guinea. In 1967, Papua was part of "Australia" for the purposes of the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act"). Persons born in Papua after the commencement of the Citizenship Act, such as the applicant, acquired the status of Australian citizens by birth. Nevertheless, under the *Migration Act* 1958 (Cth) ("the Migration Act") such persons required an entry permit in order to be entitled to enter or reside in any of the States or internal Territories[1].

2 This case concerns the citizenship changes that occurred on Independence Day.

3 The applicant did not enter, or apply for any right to enter, any of the States or internal Territories of Australia ("mainland Australia") before Independence Day. He has never applied to become an Australian citizen by naturalization or by registration under the Citizenship Act. The applicant last entered Australia on 3 December 1999, as the holder of a visa which expired on 3 March 2000. Since then he has held a series of visas, the most recent of which is a bridging visa that will expire no later than 28 days after the completion of these proceedings. He does not currently hold a substantive visa.

4 The applicant has commenced proceedings against the Minister for Immigration and Multicultural and Indigenous Affairs seeking writs of prohibition and mandamus and a declaration. The Minister contends that ss 189, 196 and 198 of the Migration Act apply to the applicant. The applicant contends that he did not cease to be an Australian citizen on Independence Day, that he is not an alien, and that the provisions of the Migration Act referred to do not validly apply to him. Those contentions have been further refined in a series of

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1 *See Minister for Immigration and Multicultural and Indigenous Affairs v Walsh* (2002) 125 FCR 31 at 35-36 [15]-[21].

questions stated by a Justice for the opinion of the Full Court. The questions are as follows:

"1. On the proper construction of regulation 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations 1975 and the Papua New Guinea Constitution, did the Applicant cease to be an Australian citizen under the *Australian Citizenship Act 1948* on Independence day?

2. If the answer to question (1) is 'Yes', is regulation 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations 1975 authorised by s 6 of the *Papua New Guinea Independence Act 1975*?

3. If the answer to questions (1) and (2) is 'Yes', is s 6 of the *Papua New Guinea Independence Act 1975*, to the extent that it authorises regulation 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations 1975, invalid in that it is not supported by s 51(xix), (xxvii), (xxix) or (xxx) of the Constitution, ss 51(xxxix) and 61 of the Constitution, the 'implied nationhood' power, s 122 of the Constitution, or any other head of Commonwealth power?

4. Once the [applicant's] bridging visa … has expired, are ss 189, 196 and 198 of the *Migration Act 1958* capable of valid application to the applicant on the basis that:

    1) he is an alien, within the meaning of section 51(xix) of the Constitution; or

    2) in their application to him those provisions are laws with respect to immigration within section 51(xxvii) of the Constitution; or

    3) on any other basis?

5. Who should pay the costs of the Stated Case and the hearing of the Stated Case before the Full Court of this Court?"

The Independent State of Papua New Guinea

5 The former Possession of British New Guinea was placed under the authority of the Commonwealth of Australia by Letters Patent dated 18 March 1902, and was accepted by the Commonwealth, as the Territory of Papua, by s 5 of the *Papua Act* 1905 (Cth). The former German possession of New Guinea was placed under Australian administration by Mandate of the League of Nations in 1920. It was administered by Australia, as the Territory of New Guinea, under the *New Guinea Act* 1920 (Cth). After 1945, the two Territories were administered jointly under legislation of the Commonwealth[2]. Even so, the two Territories kept their separate identities. Papua remained "a possession of the Crown". New Guinea was a "Trust Territory" administered by Australia under an agreement approved by the United Nations.

6 The author of a work on the history of the Constitution of Papua New Guinea wrote[3]:

> "Before Independence, most Papua New Guineans had no 'real' citizenship. Those born in Papua were technically Australian citizens, but they had no right to enter or remain in Australia, or even to leave their own country. Those born in New Guinea had the status of 'Australian Protected Persons'. Although in the years immediately prior to Independence permission to enter or to leave the country was readily granted and the Papua New Guineans were issued with Australian passports, the technical barrier remained." (reference omitted)

7 On 18 November 1963, the *Papua and New Guinea Act* 1963 (Cth) established a House of Assembly to make laws for the peace, order and good government of the Territory of Papua and New Guinea. On 9 July 1974, the House of Assembly resolved that Papua New Guinea move to independent status. On 13 August 1974, the Constitutional Planning Committee, which had been established to prepare a draft Constitution, reported to the Chief Minister of Papua New Guinea. On 18 June 1975, the House of Assembly nominated

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2 *Papua-New Guinea Provisional Administration Act* 1945 (Cth); *Papua and New Guinea Act* 1949 (Cth); *Papua and New Guinea Act* 1963 (Cth).

3 Goldring, *The Constitution of Papua New Guinea: A Study in Legal Nationalism*, (1978) at 204.

16 September 1975 as the date on which Papua New Guinea was to become an independent state. On Independence Day (16 September 1975) Papua New Guinea became an independent sovereign state by the name of the Independent State of Papua New Guinea, having a constitution established, adopted and given to themselves by the people of Papua New Guinea acting through their Constituent Assembly.

8 The *Papua New Guinea Independence Act* 1975 (Cth) ("the Papua New Guinea Independence Act") provided, in s 4, that on the expiration of the day preceding Independence Day, Australia would cease to have any sovereignty, sovereign rights or rights of administration in respect of or appertaining to the whole or any part of Papua New Guinea.

Citizenship under the Papua New Guinea Constitution: "no man ... can stand in more than one canoe"

9 The Papua New Guinea Constitution was developed against an historical background of colonialism, ownership of land and business enterprises by people other than the indigenous inhabitants, and importation of foreign labour. The Constitutional Planning Committee attached high importance to the need to identify citizenship in a manner that affirmed the status of the indigenous inhabitants and related the concept of nationhood to citizenship. Chapter 4 of the Committee's Final Report said:

> "2. Papua New Guinean citizens will have certain rights (and obligations) that will be theirs alone. Only Papua New Guinean citizens will have the right to vote at elections, or to stand, for local government bodies, provincial assemblies and the National Parliament. They will have the right to be appointed to posts in government and private enterprise for which they are otherwise qualified. They will be eligible for services and other benefits the government may provide – in health, education, and economic development. They will receive protection from the Papua New Guinea Government when they travel abroad on its passports. And, in turn, they will owe their country certain obligations – to pay taxes, to uphold its laws, and to serve it in peace and in war.
>
> ...
>
> 14. A weak citizenship law will help no one. It will not serve the interests of our indigenous people. It will not serve those of the foreigners among us, nor those of overseas investors." (emphasis in original)

10 The Report saw dual citizenship as incompatible with a strong citizenship law. It said that people in all parts of the country had expressed opposition to the idea of dual citizenship. It went on:

> "84. Our country stands on the threshhold [sic] of independence. The Papua New Guinea citizenship law will form part of the foundations of our country's freedom, independence and identity as a nation state. It is an essential part of those foundations because it states in law who the people are who belong to Papua New Guinea. These people will be the citizens of Papua New Guinea.
>
> ...
>
> 88. The people of Papua New Guinea have told us clearly and firmly that they do not believe that a person can be fully committed to more than one country. In making this point, they have frequently resorted to imagery; no man, it is said, can stand in more than one canoe."

11 The Committee proposed three methods of acquisition of citizenship: automatic citizenship; citizenship by registration; and citizenship by naturalization. The Report stated:

> "20. The vast majority of the inhabitants of Papua New Guinea will become citizens of Papua New Guinea <u>as of right</u> when our recommendations come into force. They will <u>automatically</u> become Papua New Guineans. They will not have to do anything in order to become citizens. They will simply be <u>defined by law</u> as citizens.
>
> 21. Any person who was born in Papua New Guinea before the citizenship law comes into force ... shall be a citizen of Papua New Guinea if:
>
> . he or she is not a 'real' citizen of a foreign country; and
>
> . he or she has at least two indigenous grandparents.
>
> 22. For the purposes of this provision, persons who are Australian citizens by virtue only of their birth in Papua, and persons who are Australian Protected Persons, are regarded as holding no real foreign citizenship, <u>provided that</u> they have not been granted the right to reside in Australia." (emphasis in original)

12 The reason why persons who were Australian citizens by virtue only of their birth in Papua (persons such as the applicant and almost all other indigenous Papuans as at Independence Day) were regarded as holding no "real" foreign citizenship appears from what has been noted above. Although technically Australian citizens, under the Migration Act that citizenship did not of its own force give them the right to enter, or remain in, mainland Australia. To have a right of residence in Australia, they needed to apply for, and be granted, such a right. Hence the reference to a *grant* of a right of residence.

13 The recommendations made by the Report were reflected in Pt IV of the Papua New Guinea Constitution. The provisions of direct relevance to the present case are ss 64 and 65, which are as follows:

> "64. Dual citizenship
>
> (1) Notwithstanding the succeeding provisions of this Part but subject to Subsection (2), no person who has a real foreign citizenship may be or become a citizen, and the provisions of this Part shall be read subject to that prohibition.
>
> (2) Subsection (1) does not apply to a person who has not yet reached the age of 19 years, provided that, before he reaches that age and in such manner as is prescribed by or under an Act of the Parliament, he renounces his other citizenship and makes the Declaration of Loyalty.
>
> (3) A person who has a real foreign citizenship and fails to comply with Subsection (2) ceases to be a citizen of Papua New Guinea when he reaches the age of 19 years.
>
> (4) For the purposes of this section, a person who –
>
> (a) was, immediately before Independence Day, an Australian citizen or an Australian Protected Person by virtue of –
>
> (i) birth in the former Territory of Papua; or
>
> (ii) birth in the former Territory of New Guinea and registration under Section 11 of the Australian Citizenship Act 1948-1975 of Australia; and
>
> (b) was never granted a right (whether revocable or not) to permanent residence in Australia,

has no real foreign citizenship.

Division 2 – Acquisition of Citizenship

65. Automatic citizenship on Independence Day

(1) A person born in the country before Independence Day who has two grand-parents who were born in the country or an adjacent area is a citizen.

(2) A person born outside the country before Independence Day who has two grand-parents born in the country is a citizen as from Independence Day if –

> (a) within one year after Independence Day or such longer period as the Minister responsible for citizenship matters allows in a particular case, application is made by him or on his behalf for registration as a citizen; and
>
> (b) he renounces any other citizenship and makes the Declaration of Loyalty –
>
> > (i) if he has not reached the age of 19 years – in accordance with Section 64(2) (dual citizenship); or
> >
> > (ii) if he has reached the age of 19 years – at or before the time when the application is made.

(3) In Subsection (1), 'adjacent area' means an area that immediately before Independence Day constituted –

> (a) the Solomon Islands; or
>
> (b) the Province of the Republic of Indonesia known as Irian Jaya; or
>
> (c) the islands in Torres Straits annexed to the then Colony of Queensland under Letters Patent of the United Kingdom of Great Britain and Ireland bearing date the 10th day of October in the forty-second year of the reign of Her Majesty Queen Victoria (that is, 1878), not forming on Independence Day part of the area of Papua New Guinea.

(4) Subsections (1) and (2) do not apply to a person who –

(a) has a right (whether revocable or not) to permanent residence in Australia; or

(b) is a naturalized Australian citizen; or

(c) is registered as an Australian citizen under Section 11 of the Australian Citizenship Act 1948-1975 of Australia; or

(d) is a citizen of a country other than Australia, unless that person renounces his right to residence in Australia or his status as a citizen of Australia or of another country in accordance with Subsection (5).

(5) A person to whom Subsection (4) applies may, within the period of two months after Independence Day and in such manner as may be prescribed by or under an Act of the Parliament, renounce his right to permanent residence in Australia or his status as an Australian citizen or as a citizen of another country and make the Declaration of Loyalty.

(6) Where in his opinion it is just to do so, the Minister responsible for citizenship matters may in his deliberate judgement (but subject to Division 4 (Citizenship Advisory Committee)), extend the period of two months referred to in Subsection (4), but unless the Minister is satisfied that the applicant –

(a) assumed in error that he was a citizen; or

(b) did not know that he was not a citizen; or

(c) had no reasonable opportunity or not enough time to determine his status,

the period may not be extended beyond a further two months."

14 Sub-section (1) of s 64 declares the general prohibition against Papua New Guinea citizenship on the part of any person who has a real foreign citizenship, subject to certain presently irrelevant qualifications. Plainly, the section treats Australia as a foreign country, as it was from Independence Day. The concept of "real foreign citizenship" is defined in sub-s (4). The reference, in s 64(4)(b), to a grant of a right to permanent residence in Australia is clearly related to the reference in s 65(4)(a) to a person who has a right to permanent residence in

Australia. According to the then current Australian immigration laws, in the absence of such a grant, persons of the kind referred to had no such right. Although the applicant had not reached the age of 19 years on Independence Day, he had no real foreign citizenship for the purposes of s 64 unless he was a person who had been granted a right to permanent residence in Australia. No such right was ever granted to the applicant. Accordingly, the procedure of renunciation provided for in s 64(2) did not apply to him.

15 The applicant was a person falling within the terms of s 65(1). The procedure for renunciation of an Australian right of residence, or Australian citizenship, provided for in sub-s (5) only related to a person to whom sub-s (4) applied. The applicant contends, and the respondent denies, that sub-s (4) applied to him and, therefore, that sub-s (1) did not apply.

16 Counsel for the applicant, while anxious to maintain the position that the ultimate issues for decision by this Court concern the status of the applicant under Australian law including the Australian Constitution, made submissions as to the Papua New Guinea Constitution, and, in particular, s 65. Question 1 in the Case Stated refers to the Papua New Guinea Independence (Australian Citizenship) Regulations 1975 (Cth), which were made under the Papua New Guinea Independence Act. Regulation 4 provided:

> "4. A person who –
>
> (a) immediately before Independence Day, was an Australian citizen within the meaning of the Act; and
>
> (b) on Independence Day becomes a citizen of the Independent State of Papua New Guinea by virtue of the provisions of the Constitution of the Independent State of Papua New Guinea,
>
> ceases on that day to be an Australian citizen."

Questions of constitutional power were raised in relation to that regulation, and the legislation under which it was made. At this stage, however, it is necessary to deal with the meaning of reg 4, which in turn raises a question of the meaning of s 65 of the Papua New Guinea Constitution.

17 It is common ground that the applicant fell within par (a) of reg 4. The respondent contends, and the applicant denies, that the applicant also fell within par (b). If the contention of the applicant were correct, the practical

consequences would be far-reaching. Before Independence Day most indigenous Papuans had been Australian citizens, although not what the Constitutional Planning Committee, and the Papua New Guinea Constitution, regarded as "real" Australian citizens. If the applicant did not become a citizen of the Independent State of Papua New Guinea by virtue of s 65(1) of the Papua New Guinea Constitution, it seems highly likely that the same applied to most other Papuans living on Independence Day. (The fact that the applicant was under 19 years on Independence Day is irrelevant unless he had a real foreign citizenship within the meaning of s 64(4), that is to say unless he had been granted a right to permanent residence in Australia.) The consequences of such a conclusion would be so extreme, and so obviously contrary to the recommendations of the Constitutional Planning Committee, that the clearest language would be required to compel their acceptance. (It should be added that we were informed by counsel that they had found no decision of any Papua New Guinea court on the point.)

18 The question whether the applicant became a citizen of the Independent State of Papua New Guinea on Independence Day by virtue of the provisions of the Papua New Guinea Constitution, which is the question raised by par (b) of reg 4, turns upon the meaning and effect of s 65 of that Constitution. Section 65 is to be understood in its context. The historical and social context has been referred to briefly. It is described more completely in the Final Report of the Constitutional Planning Committee. The whole of Ch 4 of Pt 1 of that Report is instructive. The textual context requires particular consideration of s 64. Another significant part of the context in which s 65 was written is the immigration law of Australia as it stood in 1975, and, in particular, the provisions of the Migration Act at that time. Those provisions evidently were taken at face value by the framers of the Papua New Guinea Constitution, as appears from the definition of real foreign citizenship in s 64(4). In construing s 65 of the Papua New Guinea Constitution, and in identifying the context as an aid to the resolution of any doubts that may arise, what is significant is the Australian immigration legislation as it applied to the people of Papua and New Guinea at the time of independence.

19 Counsel for the applicant contends that "[t]he applicant maintained his Australian citizenship pursuant to [reg 4] by virtue of his right to permanent residence in Australia[,] and by not taking up the opportunity, provided in s 65(5) of the Papua New Guinea Constitution[,] of renouncing that citizenship in order to become a Papua New Guinea citizen." The argument is that, on Independence Day, the applicant, and all persons born in Papua, who had previously been Australian citizens, fell within s 65(4)(a) of the Papua New Guinea Constitution. The applicant, so it is said, (and, presumably, most other Papuans) did not

become a citizen by virtue of s 65(1). In order to become a citizen of Papua New Guinea it was necessary for the inhabitants of Papua, individually, to renounce their Australian citizenship under s 65(5). The applicant never made any act of renunciation of his Australian citizenship. Nor, it appears, did most indigenous Papuans. Therefore, it is said, the applicant did not become a citizen of Papua New Guinea on Independence Day, and remains an Australian citizen for the purposes of the Papua New Guinea Constitution.

20 In considering whether this was the purpose and effect of s 65 of the Papua New Guinea Constitution, it is necessary to keep in mind the rejection of dual citizenship, which was such an important issue in Papua New Guinea before Independence Day, and which was implemented (subject to qualifications) by s 64. The rejection of dual citizenship meant that, for most Papuans, the corollary of retaining Australian citizenship was not obtaining citizenship of Papua New Guinea. From the point of view both of Papua New Guinea and of Australia that was a foundational aspect of the constitutional arrangements of the new Independent State. A policy against dual citizenship (subject to qualifications) was adopted by Papua New Guinea, and respected by Australia.

21 On this point, the argument for the applicant depends upon the proposition that he was, on Independence Day, a person who had a right to permanent residence in Australia, within the meaning of s 65(4)(a) of the Papua New Guinea Constitution. This is not an abstract or theoretical question. It concerns the meaning of words in an instrument of nationhood and government, dealing with a practical issue affecting the membership of the new Independent State. When the framers of the Papua New Guinea Constitution referred to persons who had a right to permanent residence in Australia, part of the contextual background in which that reference was made was an Australian immigration law which, according to its terms, and as it was administered, denied people such as the applicant a right to permanent residence in Australia in the absence of a specific grant. That background explains the terms of s 64(4).

22 At the time, s 6(1) of the Migration Act provided that an immigrant who entered Australia without an entry permit was a prohibited immigrant. Such a person was liable to deportation under s 18. Sections 6 and 7 provided for the discretionary grant of entry permits, which might be temporary or permanent. A right of permanent residence (in practice, a right to re-enter Australia free of the constraints of s 6) could be acquired by a person who was granted a permanent entry permit (s 15). Before Independence Day, Papua was an external Territory of Australia. External Territories were excluded from the definition of Australia in s 17 of the *Acts Interpretation Act* 1901 (Cth). The Migration Act did not

define Australia in any manner inconsistent with the definition in the *Acts Interpretation Act*. Section 5(4) of the Migration Act referred to persons who had left Australia but not "entered any country other than a Territory outside Australia". That was consistent with an external Territory being outside Australia. The Migration Act defined "immigrant" to include persons entering Australia for temporary or permanent purposes. The Act applied, and was administered on the basis that it applied, to persons entering mainland Australia from external Territories. As is evident from the Report of the Constitutional Planning Committee, that historical fact was known to the framers of the Papua New Guinea Constitution; it was, indeed, a fact of which they were acutely aware. It led them to describe their Australian citizenship as other than "real". It was asserted that s 65 of the Papua New Guinea Constitution should be interpreted in the light of an understanding that "the applicant's Australian citizenship at birth (and non-alien status) carried with it a right to permanent residence in Australia as a matter of both statutory construction and as a matter of constitutional principle". In this connection reliance was placed upon a passage in the judgment of this Court in *Air Caledonie International v The Commonwealth*[4] where reference was made, in a different context, to the right of an Australian citizen to enter the country being unqualified by any law. Clearly, that passage was not referring to the right of inhabitants of Papua to enter mainland Australia, which was qualified by the Migration Act. As has been observed, in construing s 65 what is important is the law as it was applied to the inhabitants of Papua, an application that is reflected in the language of ss 64 and 65. The understanding of Australian law reflected in ss 64 and 65 of the Papua New Guinea Constitution was not erroneous. When Australia acquired Papua as an external territory, it was not obliged constitutionally to give inhabitants of that external territory an unfettered right of entry into mainland Australia. To the contrary, the broad power conferred by s 122 of the Australian Constitution supported laws restricting such entry by those inhabitants. In any event, where the question is one of construing s 65 of the Papua New Guinea Constitution, the understanding of Australian law and practice clearly revealed in the text is what matters.

23 It is improbable in the extreme that it was the purpose of s 65 of the Papua New Guinea Constitution to exclude from citizenship of the new nation all indigenous Papuans living at Independence Day unless they took positive steps to

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4 (1988) 165 CLR 462 at 469. See also the observations of Starke J in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 580.

renounce their Australian citizenship. The purpose was the opposite. Although indigenous Papuans were Australian citizens before Independence Day, they were treated by Australian law, and regarded by the framers of the Papua New Guinea Constitution as not having, on that account alone, a right to permanent residence in Australia. The right to permanent residence referred to in s 65(4)(a) is the same as the right referred to in s 64(4)(b), that is to say, the right which a small number of Papuans had received by grant, not a right which all Papuans had by virtue of birth in the Territory of Papua at a time when it was an external Territory of Australia. The construction which the applicant seeks to place on s 65 must be rejected. On Independence Day, the applicant became a citizen of Papua New Guinea by virtue of the Papua New Guinea Constitution. That Constitution was antagonistic to dual citizenship. In recognition of that policy of the new Independent State, Australia, by reg 4, withdrew the applicant's Australian citizenship. That withdrawal was not arbitrary. It was consistent with the maintenance of proper relations with the new Independent State, and with the change that occurred in Australia's relationship with the inhabitants of that State. It is necessary now to consider whether that regulation was valid.

The validity of reg 4

24 Reference has already been made to s 4 of the Papua New Guinea Independence Act. Regulation 4 was made pursuant to s 6 of the same Act, which empowered the Governor-General to make regulations making provision for or in relation to matters arising out of or connected with the attainment of the independence of Papua New Guinea. The regulations treated citizenship as such a matter. The Court was provided in argument with many examples of legislation enacted by the United Kingdom Parliament in the 1960s and 1970s in which it was provided that a person who, before the day on which a former colony attained independence, was a citizen of the United Kingdom should, on independence, cease to be a United Kingdom citizen[5]. In fact, reg 4 appears to have been modelled on such provisions. The provisions vary in certain respects, but they show that there was nothing unusual in what was done, or attempted, in reg 4, and, further, that providing for what was to happen in relation to

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5 eg *Aden, Perim and Kuria Muria Islands Act* 1967 (UK) s 1; *Bahamas Independence Act* 1973 (UK) s 2; *Barbados Independence Act* 1966 (UK) s 2; *Botswana Independence Act* 1966 (UK) s 3; *Fiji Independence Act* 1970 (UK) s 2; *Guyana Independence Act* 1966 (UK) s 2; *Jamaica Independence Act* 1962 (UK) s 2; *Malaysia Act* 1963 (UK) s 2; *Nigeria Independence Act* 1960 (UK) s 2.

citizenship was within the contemplation of s 6 of the Papua New Guinea Independence Act.

25 It was submitted for the applicant that s 6 should not be construed as extending to the making of a regulation affecting such an important status as that of citizenship. The Papua New Guinea Independence Act, it was said, did not in terms deprive the applicant of Australian citizenship, and the regulation-making power conferred by the Act should not be understood as empowering such deprivation. The power given by s 6 expressly extended to "regulations making modifications or adaptations of any Act". The reference to "any Act" covered the Citizenship Act. The matter of citizenship was one that needed to be dealt with on independence, especially having regard to the stand against dual citizenship taken in Papua New Guinea. Parliament enacted s 6 in the light of an understanding of the terms of the Papua New Guinea Constitution, and its drafting history. The recitals to the Papua New Guinea Independence Act refer to those matters. Section 6 must have contemplated regulations dealing with citizenship. The applicant's submission cannot be accepted.

26 Next, it was submitted that, assuming s 6 purported to empower the making of reg 4, then s 6 itself was invalid. In brief, it was said that the Parliament lacked the legislative capacity to deprive the applicant of his Australian citizenship in the manner attempted in reg 4. In this respect, the absence of any step on the part of the applicant to renounce his Australian citizenship was said to be significant, not so much for the purposes of s 65 of the Papua New Guinea Constitution, as for the purposes of the Australian Constitution.

27 Section 4 of the Papua New Guinea Independence Act provided for the cessation of any Australian sovereignty, sovereign rights, or rights of administration in respect of or appertaining to the whole or any part of Papua New Guinea on the expiration of the day preceding Independence Day. For the purposes of domestic law, Australia assumed, and exercised, the rights referred to in s 4 by or under legislation enacted by the Parliament pursuant to s 122 of the Constitution (the territories power).[6] That section covers both internal and external Territories, including territories "otherwise acquired by the Commonwealth". It was pointed out in *Fishwick v Cleland*[7] that, in the context,

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6 *Fishwick v Cleland* (1960) 106 CLR 186.

7 (1960) 106 CLR 186 at 197-198.

acquisition is a broad and flexible term covering developing conceptions of the authority of the Crown in right of Australia over external territories. In that case it was held to cover authority over the Territory of Papua New Guinea. The variety of circumstances and conditions that could apply to territories within the contemplation of s 122 was considered in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[8].

28 The capacity to acquire and exercise sovereignty, sovereign rights, and rights of administration in respect of external territories necessarily includes the capacity to make provision for the bringing to an end of those rights. The capacity to acquire external territory necessarily implies a capacity to relinquish such territory. It is not in dispute that s 4 of the Papua New Guinea Independence Act was within the legislative power of the Parliament. That power was conferred by s 122 of the Constitution.

29 The acquisition of an external territory by Australia, as contemplated by s 122, involves the establishment of relations between Australia and the inhabitants of that territory. There is no single form of relationship that is necessary or appropriate. The kinds of relationship that may be regarded by Parliament as appropriate are as various as the kinds of territory that may be acquired, and the forms of acquisition that may be adopted. Just as acquisition of a territory ordinarily involves the creation of relationships, the relinquishment of a territory involves the alteration or termination of relationships. The steps that may be taken for the purpose of such alteration or termination are also various.

30 The relations that may exist between Australia and the inhabitants of external territories are not necessarily identical with those that apply to the people united in a Federal Commonwealth pursuant to covering cl 3 of the Constitution, the people of the Commonwealth referred to in covering cl 5, or the people referred to in s 24. For example, the Constitution does not require that the inhabitants of an external territory should have the right to vote at federal elections. The references in the Constitution to "the people of [particular States]" or "the people of the Commonwealth" serve a significant purpose in their various contexts, but they do not have the effect of binding Australia to any particular form of relationship with all inhabitants of all external territories acquired by the Commonwealth, whatever the form and circumstances of such acquisition.

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8 (1999) 200 CLR 322 at 331 [7].

31 One aspect of the acquisition by the Commonwealth of sovereignty and the exercise of sovereign rights by the Commonwealth in respect of an external territory and its inhabitants is the making of laws concerning the entry and re-entry of such inhabitants to and from that territory and to and from Australia. This may also be a matter in its latter aspect upon which the Parliament may exercise the immigration power found in s 51(xxvii). The apparent reliance upon one head of power does not deny support by another, the question being one not of intention but of power from whatever source it is derived[9].

32 The manner in which that power was exercised in relation to Papua New Guinea in the Migration Act has already been described. It is unnecessary to consider whether the legislation was also supported by s 51(xxx) (relations with islands of the Pacific). The Constitution does not require that all inhabitants of all external territories acquired by Australia should have an unfettered right of entry into, and residence in, mainland Australia. There is no reason why Parliament cannot treat such an inhabitant as an immigrant.

33 Another aspect of such relations between Australia and the inhabitants of an external territory to which the law-making power conferred by s 122 extends is the status of such inhabitants within what may be called for this purpose the Australian community. This also is a matter upon which the Parliament may make laws under s 51(xix) (naturalization and aliens). The Citizenship Act treated the inhabitants of Papua and New Guinea as citizens. The validity of that legislative provision is not in dispute. Indeed, an assumption of its validity is the foundation of the applicant's argument. It cannot be said, however, that such provision was necessary or inevitable. It represented a legislative choice. Parliament is not obliged to confer Australian citizenship upon all inhabitants of all external territories. Furthermore, the powers under which it may legislate to confer such citizenship when a territory is acquired enable Parliament to legislate to withdraw such citizenship when rights of sovereignty or rights of administration in respect of such territory come to an end.

34 It was argued for the applicant that there is a limitation inherent in the power conferred by s 51(xix) that prevents that power from being applied unilaterally (that is, without the consent of the individual manifested by renunciation or some similar act) to change a person's status from non-alien to alien. This proposition, respecting a limitation upon the s 51(xix) power,

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9 *R v Hughes* (2000) 202 CLR 535 at 548 [15].

overlooks the present significance of the territories power conferred by s 122. We are presently concerned only with whether any such limitation exists in relation to the inhabitants of external territories. What follows is to be understood in that context.

35 In any event, no limitation of the kind proposed applies to the power conferred by s 51(xix). The extent of the power of Parliament to deal with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which citizenship may be acquired and lost, and to link citizenship with the right of abode, has been considered most recently by this Court in *Singh v The Commonwealth*[10]. Two points of present relevance emerge from that consideration. First, the legal status of alienage has as its defining characteristic the owing of allegiance to a foreign sovereign power[11]. Secondly, changes in the national and international context in which s 51(xix) is to be applied may have an important bearing upon its practical operation. Decisions such as *Sue v Hill*[12], *Shaw v Minister for Immigration and Multicultural Affairs*[13], and *Singh* illustrate the manner in which changes in national and international circumstances may affect the application of terms such as "foreign" and "alien".

36 In *Singh*[14], a majority of the Court rejected the view that concepts of alienage and citizenship describe a bilateral relationship which is a status, alteration of which requires an act on the part of the person whose status is in issue. The change in the relationship between Australia and the Independent State of Papua New Guinea was given as an example of the difficulty involved in such a view[15].

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10 (2004) 78 ALJR 1383; 209 ALR 355.

11 *Singh v The Commonwealth* (2004) 78 ALJR 1383 at 1426 [200]; 209 ALR 355 at 414.

12 (1999) 199 CLR 462.

13 (2003) 78 ALJR 203; 203 ALR 143.

14 (2004) 78 ALJR 1383 at 1391-1392 [30]-[31], 1426 [198]; 209 ALR 355 at 366-367, 414.

15 (2004) 78 ALJR 1383 at 1426 [198]; 209 ALR 355 at 414.

37 As is pointed out earlier in these reasons, the capacity to acquire an external territory and the power to make laws for the government of that territory necessarily implied a capacity to legislate for the consequences of the cessation of those powers of government. When Papua ceased to be an external territory of Australia, and became part of the sovereign Independent State of Papua New Guinea, the people of Papua owed allegiance to the new sovereign State. Their rights and obligations were declared by the Papua New Guinea Constitution, and the membership of the new nation was defined by the provisions of that Constitution relating to citizenship. It was within the power of the Parliament, cognisant of those provisions, to respond to the change in sovereign rights, and the new realities affecting the relationship between the inhabitants of Papua and their government, by treating those inhabitants as aliens and withdrawing their Australian citizenship. Parliament did this, knowing that the Papua New Guinea Constitution gave them automatic citizenship of the new Independent State.

38 The power in s 122 pursuant to which Parliament enacted legislation to deal with the acquisition of the external Territory enabled it also to enact legislation to deal with the relinquishment of sovereign rights and rights of administration over that Territory. The power pursuant to which Parliament could enact legislation to treat the inhabitants of the Territory as citizens enabled it also to treat the inhabitants of the new Independent State as aliens.

Migration Act, ss 189, 196 and 198

39 It follows from what has been said that the above provisions are capable of valid application to the applicant.

Costs

40 It was submitted that, even if the applicant fails, he should not be ordered to pay costs because he has raised "significant and fundamental matters of public interest". The applicant commenced these proceedings, and his arguments have failed. The ordinary consequences as to costs should follow.

Answers to Questions

41 The questions stated for the opinion of the Court should be answered as follows:

1. Yes.

2. Yes.

3. No.

4. (1) Yes.

5. The applicant.

42 KIRBY J. This application for the constitutional writ of prohibition and other relief, concerns Australian nationality and citizenship. It is important for the applicant who is facing removal from the Commonwealth. He raises objections that this Court must determine. However, the chief significance of the case arises from the potential implications that the proceedings may have for the citizenship and nationality of all Australians. In short, could they be stripped of their status and rights as citizens in the same way as federal law has purported to provide in the case of the applicant?

Deprivation of nationality and its significance

43 The interpretation of a constitutional text obliges courts entrusted with that function to consider more than the meaning of words. They must have a notion of the character of the polity to which the text applies. A national constitution, contained in a document difficult to amend, is typically designed to impose restrictions on the exercise, even by democratically elected legislatures, of powers that may affect adversely the units of the polity as well as individuals, groups and communities within it. Judges with the responsibility of decision-making must look ahead and test propositions advanced in one case for the consequences that might flow in other circumstances, if the interpretation that is advanced is upheld.

44 Mr Amos Ame (the applicant) was born an Australian citizen. This much is undisputed. Such status was accorded to him by Australian federal law[16]. The constitutional validity of that law, as applied to the applicant, was not contested by anyone in these proceedings. On the contrary, the validity of the law was relied upon by the applicant[17]. Yet without the specific knowledge or consent of the applicant, without renunciation or wrongdoing on his part, notice to him, due process or judicial or other proceedings, he was purportedly deprived of his Australian citizenship. This was said to have occurred under the provisions both of Australian[18] and foreign law[19]. Indeed, in the Australian case the change was

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16 *Australian Citizenship Act* 1948 (Cth) ("Citizenship Act"), s 10(1) read with the definition of "Australia" in s 5(1). The Citizenship Act was originally titled *Nationality and Citizenship Act.* It was retitled *Citizenship Act* in 1969 and *Australian Citizenship Act* in 1973: see *Statute Law Revision Act* 1973 (Cth), s 4, Sched 2.

17 For their validity, the relevant provisions relied principally on the Constitution, ss 51(xix), (xxvii), (xxix) and 122.

18 *Papua New Guinea Independence Act* 1975 (Cth) ("PNG Independence Act"), s 6(1) and Papua New Guinea Independence (Australian Citizenship) Regulations ("the Regulations"), reg 4.

purportedly effected not by an Act of the Federal Parliament but by a regulation made by the Executive Government[20].

45 The applicant, having later entered Australia, was taken into immigration detention by officials, purporting to act under the *Migration Act* 1958 (Cth) ("the Migration Act")[21]. He was eventually released from such detention pending the outcome of these proceedings. He contests the right of Senator Amanda Vanstone, the federal Minister for Immigration and Multicultural and Indigenous Affairs (the respondent), to detain him, to subject him to restrictions on his movement within the Commonwealth, or to remove him from Australia. He says that this cannot be done within the true meaning of the applicable Australian law. Least of all, according to the applicant, could such a profound change in his nationality status be effected by a regulation made by the Executive Government. And if it was done in such a way by the federal laws properly construed, the applicant submits that such laws are invalid when measured against the Australian Constitution.

46 For the respondent, this was a simple case in which Australian federal laws had been enacted to give effect to a major political change that occurred, with the support and encouragement of the Government of the Commonwealth, in the achievement of national independence and full sovereignty by the former Australian territories of Papua and New Guinea. In 1975, those territories united in the Independent State of Papua New Guinea under a national constitution that included provisions affecting the applicant's status as an Australian citizen. The applicant does not accept that he was so affected under that Constitution. And, he asserts that he had not been, and could not be, deprived of his Australian citizenship by valid laws of the Federal Parliament. He appeals to this Court to uphold the claim affecting persons like himself, in the transitional category of those born into Australian citizenship in Papua before 1975.

47 In effect, the applicant submitted that this Court should sustain his claim, applying to the Australian laws relied upon by the respondent the strict principles ordinarily invoked where it is suggested that important rights and liberties are removed from a person[22]. If removal could so easily occur in his case, it could, by inference, happen to other Australian citizens, at least to other citizens born in a territory of the Commonwealth, like himself, including internal territories (such

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19 Constitution of the Independent State of Papua New Guinea 1975 ("PNG Constitution"), ss 64, 65. See joint reasons at [13].

20 The Regulations, reg 4.

21 ss 189, 196, 198.

22 *Coco v The Queen* (1994) 179 CLR 427 at 437.

as the Australian Capital Territory and the Northern Territory of Australia) in which live significant numbers of Australian citizens who would not normally regard themselves as vulnerable to so significant a change of status by such a simple legal device.

48 This application is important, in a sense, for the operation within Australia of the Constitution of Papua New Guinea, an independent nation. However, within their jurisdiction and powers, it is for the courts of that country to interpret and apply the constitutional provisions there provided[23]. This Court does not presume (nor was it asked by the applicant) to intrude upon the functions of the courts of Papua New Guinea. However, the jurisdiction and powers of this Court being invoked, purportedly for the protection of the applicant's status as an Australian citizen and his Australian constitutional status as a national of Australia[24], this Court must discharge its own constitutional functions.

49 History, and not only ancient history, provides many examples of legislation depriving individuals and minority groups of their nationality status[25]. Such laws, when made, have sometimes been challenged as contrary to established legal principles governing the equal enjoyment by all nationals of their civil rights[26]. Although the applicant's case fell short of such historical circumstances, and arose out of quite different political events, it was inherent in his argument that this Court should overturn the attempt to deprive him of his status as an Australian citizen lest what happened to him should establish a

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23 This Court was informed by the parties that no decisions of the courts of Papua New Guinea have been delivered concerning the meaning of these provisions.

24 See Constitution, covering cl 3, ss 7, 24, 30, 128.

25 See for example the *Nuremburg Laws* of September 1935 by which Germans of defined Jewish ethnicity living in Germany were stripped of German nationality: Fraser, "Law Before Auschwitz: Aryan and Jew in the Nazi Rechtsstaat", in Cheah, Fraser and Grbich (eds), *Thinking Through the Body of the Law*, (1996) at 66. There are many other examples: *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 416 [163].

26 Typically, such claims failed. Thus, the German courts held that the previously propounded rule of civil equality did not apply because, under the new law, Germans of Jewish ethnicity were civilly dead: Curran, "Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law", (2002) 35 *Cornell International Law Journal* 101 at 169-170.

precedent for treating Australian nationality and citizenship as an insubstantial and readily erasable legal category[27].

The facts, applicable laws and questions

50 *The facts and relevant laws*: The facts in this case are stated in the reasons of Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons")[28]. So are the applicable provisions of the Constitution of Papua New Guinea and the report of the Constitutional Planning Committee out of which that Constitution arose[29]. Also set out there are the provisions of the relevant Australian federal laws designed, so far as it was considered possible and appropriate, to give Australian parliamentary and governmental endorsement to the decision on its national future made in Papua and New Guinea itself. That decision provided for the independence and full sovereignty of the new Independent State of Papua New Guinea, as from the appointed Independence Day[30].

51 *Autochthonous constitutionalism*: In providing for the new nation, care was taken, within Papua New Guinea (and respect was given within Australia), to achieve an autochthonous foundation for the constitution of the new nation. Whereas, in form and at first in law, the Australian Constitution derived its legal authority from its enactment by the United Kingdom Parliament[31], viewed from within Papua New Guinea, the foundation for that country's future constitutional arrangements was the decision of the people to adopt, and give to themselves, a constitution in the form approved by those people through their Constituent Assembly[32].

52 In its terms, the Constitution of Papua New Guinea derives its authority from "the people" who "do now establish this sovereign nation and declare ourselves, under the guiding hand of God, to be the Independent State of Papua

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27 cf Simmons, "In Civilian Dress and with Hostile Purpose: The Labeling of United States Citizens Captured on American Soil as Enemy Combatants: Due Process vs National Security", (2004) 37 *Indiana Law Review* 579.

28 Joint reasons at [1]-[4].

29 Joint reasons at [9]-[13].

30 Joint reasons at [8], [16] referring to the PNG Independence Act, s 4, and the Regulations, reg 4.

31 *Commonwealth of Australia Constitution Act* 1900 (Imp) (63 & 64 Vict c 12).

32 PNG Constitution, Preamble.

New Guinea"[33]. The first of the assertions in that Preamble to the Constitution is that "all power belongs to the people – acting through their duly elected representatives". Although the Australian Constitution also makes reference, in the first of the Covering Clauses, to the people of the various colonies who "have agreed to unite in one indissoluble Federal Commonwealth under the Crown … and under the Constitution hereby established", and although the form of the Australian instrument followed extensive colonial and inter-colonial debates and plebiscites of qualified electors in Australia approving the Constitution, the Australian instrument, in its terms, initially traced the establishment of the Constitution to the authority of the Imperial Parliament. The people of Papua New Guinea determined not to follow that precedent.

53 It is clear from the report of the Constitutional Planning Committee that the question of citizenship was regarded both as sensitive and important for Papua New Guinea[34]. Reference is made in the joint reasons to the relevant debates, and the resolution of them[35]. The references included one to the vivid metaphor, expressed to the Constitutional Planning Committee by the people who were consulted, that "no man … can stand in more than one canoe"[36].

54 *Invocation of Australian rights*: For the applicant, such verbal imagery and the provisions of the Constitution of Papua New Guinea were ultimately irrelevant to his claim in this Court[37]. He came before an Australian court, to uphold his asserted nationality rights as a person born an Australian citizen. He asserted that his rights had not been lawfully abolished under Australian law. Moreover, he argued that if, contrary to this argument, the attempt at abolition had been technically successful, it failed because of a want of relevant constitutional power in the Federal Parliament to so provide or because the endeavour was inconsistent with the basic features of the Constitution that protected Australian nationals (now called "citizens") from deprivation of their status in the manner attempted in his case.

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33 PNG Constitution, Preamble.

34 Papua New Guinea, Constitutional Planning Committee, *Final Report of the Constitutional Planning Committee*, (1974) Pt 1 ch 4 ("Citizenship") ("PNG Constitutional Report") at 1-3 [1]-[24].

35 Joint reasons at [9]-[11].

36 PNG Constitutional Report at 12 [88]; cf 2-3 [16]-[18]. See joint reasons at [10].

37 Thus, under the PNG Constitution, dual citizenship is generally not permitted (s 64(1)) and only citizens of Papua New Guinea may be elected to Parliament and may own freehold land (s 56(1)(a) and (b)). Many of the fundamental rights provided for in the PNG Constitution are restricted in their application to citizens: see eg ss 50, 51, 52, 55, 56.

55 Ultimately, it was inherent in the applicant's submission that this Court's duty was to give effect to the Constitution and valid laws of the Australian Commonwealth. It might pay respectful attention to the Constitution and laws of Papua New Guinea, a friendly neighbouring country. But it was neither entitled, nor obliged, to modify or ignore Australia's constitutional and legal requirements, such as he invoked, because of any suggested inconvenience that this might cause for assumptions hitherto adopted in Papua New Guinea. In short, the applicant asked this Court to apply Australian law and to do so with appropriate vigilance, given the significance of the status of nationality ("citizenship") and the historical examples of the wrongful deprivation of that status that had occurred where courts had been powerless, or insufficiently attentive, to protect it.

The issues

56 *Statutory and constitutional issues*: The materials placed before this Court and the questions stated for the opinion of the Full Court[38] present the following issues for decision. In accordance with a practice of the Court, I shall state the issues in an order that addresses first the meaning and application of the Australian laws, nominated as the source and origin of the removal of the applicant's Australian citizenship. I shall do this before consideration of the constitutional validity of such laws, so construed[39]. Such a course is usually adopted, so as to avoid unnecessary invalidation of legislation, where a dispute can be resolved without recourse to such a drastic constitutional remedy.

57 *The issues for decision*: Approached in this way, the issues are:

(1) *The Regulation issues*: These issues are:

(a) Under reg 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations ("the Regulations"), did the applicant cease to be an Australian citizen under the *Australian Citizenship Act* 1948 (Cth) ("Citizenship Act") on Papua New Guinea's Independence Day[40]?

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38 Joint reasons at [4].

39 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7; *R v Hughes* (2000) 202 CLR 535 at 565 [66]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81].

40 "Independence Day" is specified in s 3(1) of the PNG Independence Act as 16 September 1975.

(b) If so, was such a provision one that might be made by regulation within the power to make regulations granted by the *Papua New Guinea Independence Act* 1975 (Cth)?

(2) *The Australian constitutional issues*: If the answers to the foregoing issues are in the affirmative:

(a) Was it competent to the Federal Parliament, and to the makers of the Regulations, to provide in such a way for the deprivation of Australian citizenship? Or were such purported laws beyond the powers respectively of the regulation-makers and of the Parliament?

(b) Having regard to the answers to the foregoing questions, is the applicant liable to detention and removal from Australia under the Migration Act as an "alien"[41] or otherwise? Or is such removal unavailable in his case because he has never lost his status as an Australian citizen or because he has never validly lost his constitutional status as an Australian national?

(3) *The costs issue*: Having regard to the answers to the foregoing issues, if the applicant should fail in his challenge to the invocation of the Australian Constitution and the Migration Act, should he be spared an order to pay the respondent's costs, having regard to the public interest in Australia in the resolution of the issues that he presented to this Court?

Regulation issues: Application to the applicant

58 *Foreign law as an Australian factum*: The impossibility of divorcing entirely the entitlements of the applicant under the Constitution of Papua New Guinea from his entitlements under federal law in Australia, is demonstrated by the terms of the Regulations.

59 By reg 4(b), reference is made to the terms of the Constitution of Papua New Guinea. The applicable provisions of the foreign law are expressed as a *factum*, by reference to which the governing law of Australia is to be ascertained. There is no reason of legal principle why the ascertainment of Australian law cannot be performed by reference to a specified law of a foreign country. In the Australian Constitution itself[42] reference is made to "the powers, privileges, and

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41 Constitution, s 51(xix).

42 Constitution, s 49.

immunities ... of the Commons House of Parliament of the United Kingdom" as a *factum* by which the powers, privileges and immunities of the Houses, Members and Committees of the Federal Parliament were to be ascertained until these were declared by the Federal Parliament.

60 Subject to questions of validity, the ascertainment of the content of a regulation made under Australian law, by reference to the law of another nation, although unusual, presents no legal difficulty[43]. Least of all does it present a difficulty in the historical circumstances reflected in the Regulations. They were designed to deal with transitional circumstances necessary in respect of citizenship of the people of Papua New Guinea, to that time administered in an administrative union known as the Territory of Papua New Guinea as it was moving to political independence and legal sovereignty separate from Australia.

61 *PNG Constitution: Australian citizenship*: The applicant relied on s 65(4)(a) of the Constitution of Papua New Guinea to avoid the loss of Australian citizenship in terms of reg 4(b). He argued that, whatever might have been believed, or assumed, in Papua New Guinea or even Australia, under Australian constitutional doctrine, as an Australian citizen, he enjoyed a right to permanent residence in Australia both as a matter of statutory construction and of constitutional principle. The point of statutory construction relied on was that expressed by this Court in *Air Caledonie International v The Commonwealth*[44]. There, the Full Court said[45]:

> "The right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or 'clearance' from the Executive."

62 To any suggestion that this involved reading the Constitution of Papua New Guinea as subject to Australian law, rather than in accordance with the realities and expectations of that independent country, the applicant was entitled to say that such law had also adopted, as a *factum*, the Australian legal position in the expression of the citizenship rights of Australians under Australian law. Constitutional requirements might necessitate a different result. But what did Australian law immediately before Independence Day say of the right to permanent residence in Australia of persons, like the applicant, born in the Territory of Papua who, at birth, had been made an Australian citizen under Australian law?

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43 cf *Queensland v The Commonwealth* (1989) 167 CLR 232 at 239.

44 (1988) 165 CLR 462.

45 (1988) 165 CLR 462 at 469 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

63 Initially, when Papua, then British New Guinea, was placed under the authority of the Commonwealth by Letters Patent of the Crown in 1902[46] (and accepted by the Commonwealth in accordance with the *Papua Act* 1905 (Cth))[47] there was no statutory concept of Australian citizenship. The nationality of all persons born in the Territory of Papua, as much as in the entire Commonwealth of Australia, was that of British subject. This was a nationality concept that operated throughout the British Empire. It was one reflected in the Australian Constitution itself[48]. This notion of nationality followed the rejection, at the Australian constitutional conventions, of the proposal to incorporate in the Australian Constitution the status of citizenship that had been adopted in the Constitution of the United States of America[49].

64 It followed that, upon the acquisition of Papua by the Commonwealth, there was no immediate need for separate legal provision to be made for the citizenship or nationality of those persons thereafter governed under Australian federal law, living in that territory. None was enacted or made.

65 Nor was separate provision made when, in 1920, the former German New Guinea was placed under the administration of the Commonwealth, pursuant to a mandate of the League of Nations and accepted in those terms by the Federal Parliament[50]. However, the separate status, for nationality purposes, of persons born in, or migrating to, New Guinea was recognised during the mandate and later when New Guinea became a Trust territory of the United Nations. This was so because, as such, those persons were not born or located within a dominion of the Crown. They were not, therefore, entitled to the nationality status of British subjects.

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46 Joint reasons at [5].

47 s 5. See joint reasons at [5].

48 Constitution, ss 34(ii), 42, 117.

49 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 3 March 1898 at 1786-1801. The specific concern of Mr Josiah Symon was that, if a power with respect to citizenship were placed in the hands of the Commonwealth, the Parliament could legislate to deprive a person of such citizenship: see *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 2 March 1898 at 1763-1764; *Singh v The Commonwealth* (2004) 78 ALJR 1383 at 1407 [101]-[103] per McHugh J; 209 ALR 355 at 388; cf Koessler, "'Subject', 'Citizen', 'National' and 'Permanent Allegiance'", (1946) 56 *Yale Law Journal* 58.

50 *New Guinea Act* 1920 (Cth). See *Thompson v Minister for Immigration and Multicultural Affairs* (2004) 136 FCR 28 at 38 [32]-[33].

66 The need to provide separately, at least for the citizenship of those born in, or migrating to, the Territory of Papua, only arose as a practical matter when the statutory concept of Australian citizenship was introduced by legislation in terms of the Citizenship Act[51]. Under that Act, out of respect for the separate status of New Guinea as a Trust territory of the United Nations, a distinction was drawn, relevantly, between persons born in Australia (including Papua) and persons born in New Guinea. The former became Australian "citizens". The latter were recognised, instead, as Australian "protected persons"[52].

67 The applicant latched onto this distinction. As a person born in Papua, an external territory of the Commonwealth defined by federal law as part of Australia[53], the applicant claimed identical treatment with all other persons born within the territory of the Commonwealth, as defined by the applicable Australian law. In this sense, inconvenient as it might be for the citizenship rights of persons in the new Independent State of Papua New Guinea (and contrary to the unifying concept of its Constitution), the applicant sought to distinguish Papuans from New Guineans for Australian legal and constitutional purposes. He claimed the benefit of the distinction which, he submitted, was founded both in established constitutional principle (common status as "subjects of the Queen") and on the applicable statutory differentiation (under the Citizenship Act).

68 *The applicant's interpretation rejected*: Against this background of history and enacted law, the applicant argued that he had a vested right, as an Australian citizen by birth, to permanent residence in Australia. Accordingly, he was within the exception acknowledged in s 65(4)(a) of the Papua New Guinea Constitution, as, by inference, were all other persons born in Papua who were Australian citizens by birth on Independence Day. Whilst I regard this contention as presenting an arguable proposition, it is not one that I would accept as the preferable meaning of s 65 of the Constitution of Papua New Guinea, so far as it is incorporated into Australian law by the reference made to it in reg 4(b) of the Regulations.

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51 See ss 10(1) and 5(1) of the Citizenship Act defining "Australia" as including "Norfolk Island and the Territory of Papua". See also *Nationality and Citizenship Act* 1953 (Cth), s 2(a) read with *Acts Interpretation Act* 1901 (Cth), s 17(pa).

52 Rubenstein, *Australian Citizenship Law in Context*, (2002) at 81 [4.3.1.1]. See also Galligan and Roberts, *Australian Citizenship*, (2004) at 21-26.

53 *Acts Interpretation Act* 1901 (Cth), s 17(pa). See also the Citizenship Act, s 5(1), definition of "Australia".

69 First, it is clearly not the way in which the lawmakers, enacting the Australian statutory provisions in 1948, providing for Australian citizenship, thought they were proceeding[54]. The Minister responsible for the Citizenship Act was specifically asked in the Parliament whether a "native of Papua" was, under the legislation entitled to come to Australia and enjoy the right to vote in Australia. He replied, accurately[55]:

> "We do not even give them the right to come to Australia. An Englishman who came to this country and complied with our electoral laws could exercise restricted rights as a British subject, whereas a native of Papua would be an Australian citizen but would not be capable of exercising rights of citizenship."

70 The Minister's statement to the Federal Parliament, and the repeated references to ethnicity and race in the parliamentary debates, reflected a concern, very much alive at the time of the enactment of the Citizenship Act, to preserve to the Commonwealth the power to exclude from entry into the Australian mainland foreign nationals and even British subjects who were "ethnologically of Asiatic origin" or other "pigmentation or ethnic origin"[56].

71 Secondly, this was also the way in which the Citizenship Act was administered in relation to Australian citizens who were "natives of Papua". Indeed, it remained so from the passage of the Citizenship Act until the Independent State of Papua New Guinea gained its independence. An acknowledgment of the perceived realities appears in many documents published in Papua New Guinea before and after such independence. Thus, in the *Encyclopaedia of Papua and New Guinea*, issued just before independence, an entry concerning "Nationality and citizenship" acknowledged that "[l]egally, Papuans have the status of Australian citizens, whereas New Guineans are 'Australian protected persons'"[57]. However, in practice, this distinction was said

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54 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 November 1948 at 3658 (Mr Calwell, Minister for Information and Minister for Immigration).

55 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 November 1948 at 3660.

56 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 November 1948 at 3658.

57 Grosart, "Nationality and Citizenship", in Ryan (ed), *Encyclopaedia of Papua and New Guinea*, (1972) vol 2, 838 at 838. See also Hassall, "Citizenship", in Regan, Jessep and Kwa (eds), *Twenty Years of the Papua New Guinea Constitution* (2001) ch 16, 255 at 255.

to mean little. Members of both communities were treated the same when it came to entry to the Australian mainland.

72 A favourable gloss was put on this position by 1971 when a spokesperson for the Administrator of the Territory of Papua New Guinea proposed a single form of citizenship "in preparation for self-government"[58]. However, the true source of the failure of Australian authorities in Papua and New Guinea and on the mainland to differentiate nationality in practice was more likely based in the determination to control entry into the Australian mainland of all persons, including nominally Australian "citizens" and undoubted British subjects governed under Australian law but "ethnologically" of non-European origin and different skin colour from the majority of the "people of the Commonwealth"[59].

73 The provision of Australian citizenship under the Citizenship Act afforded to Papuans no automatic right to travel to, or reside in, the Australian mainland, or to participate in Australian elections or in other civic duties such as jury service. In practice, such persons, although called "citizens", were required to secure an "entry permit", without which they were treated as a "prohibited immigrant" and liable to deportation[60].

74 Thirdly, the textual foundation for the foregoing practice, as applied to Australian citizens who were "Papuan natives", is found after 1958 in s 5(4) of the Migration Act, as then appearing. That sub-section excluded from the definition of entry or re-entry to Australia, a person who had "left Australia" and "returned to Australia ... without having entered any country other than a Territory of the Commonwealth outside Australia". This provision shows that the Federal Parliament considered that going to an external territory of the Commonwealth (such as Papua) amounted to leaving "Australia". The *Acts Interpretation Act* 1901 (Cth) as then applying[61], which excluded most external territories (including Papua) from the definition of "Australia", confirms the inference, thus arising, that such an external territory was not part of Australia for the particular purpose of exemption from entry permits. Certainly, this was the view of the law taken at that time. The grant of statutory "citizenship" of

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58 Grosart, "Nationality and Citizenship", in Ryan (ed), *Encyclopaedia of Papua and New Guinea*, (1972) vol 2, 838 at 838.

59 see eg Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 November 1948 at 3658.

60 Under the *Migration Act* 1958 (Cth), s 18. See *Minister for Immigration and Multicultural and Indigenous Affairs v Walsh* (2002) 125 FCR 31 at 35-36 [15]-[21].

61 s 17(a).

Australia to natives of Papua must be understood in the light of this significant legal inhibition upon the rights belonging to such "citizens".

75 Fourthly, the foregoing circumstance being well known in Papua (and also New Guinea) at the time the Constitution of the Independent State of Papua New Guinea was adopted, adds a further reason to give meaning to the provisions of that Constitution, as they were understood in that country immediately before independence. It was to cure the indignity of a largely nominal Australian citizenship; to abolish the differentiation between the nationality status of Papuans and New Guineans; and to fulfil the national aspirations of that new nation, that the Constitution of Papua New Guinea drew the distinction expressed in s 64 between "real foreign citizenship" and other such citizenship[62].

76 According to this distinction, whilst Papuans in the Territory of Papua before Independence Day enjoyed, by Australian law, a *form* of Australian citizenship it was not, in fact or law, *full* or *real* citizenship[63]. Indeed, it was no more than nominal citizenship, applicable for limited purposes, such as securing a passport for overseas travel. It conferred few rights and specifically no rights freely to enter the States and internal territories of Australia, as other Australian citizens might do. Nor did it permit its holders to enjoy permanent residence in the States and internal territories of the Commonwealth.

77 On this basis, it could not be said, within the Constitution of Papua New Guinea (and thus within the Regulations, reg 4(b)) that, on Independence Day, the applicant had a "right of permanent residence" in Australia. He had not before that day entered Australia or sought to gain or assert such permanent residence. He was never "granted a right" under the then Australian law, to do so[64]. In referring, as it did, to the grant of such a right, including in relation to persons born in the former Territory of Papua, the Constitution of Papua New Guinea accurately expressed the reality, and the then understanding, of the provisions of the law of Australia.

78 On this footing, the interpretative argument of the applicant must be rejected. Were such an argument necessary, or relevant, to a contemporary issue

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62 PNG Constitution, s 64(1) and (4).

63 Recent discussion of theories of citizenship has focused on the variable meanings of citizenship, noting that its substantial content is dependent on the particular legal, political and social context: see eg Rubenstein, *Australian Citizenship Law in Context*, (2002) at 3-4; Bosniak, "Citizenship Denationalized", (2000) *Indiana Journal of Global Legal Studies* 447.

64 PNG Constitution, s 64(4)(a).

before an Australian court, different considerations would apply. The attitudes to ethnicity and to skin pigmentation, reflected in the understandings and administration of Australian federal law before the independence of Papua and New Guinea were different from those now existing in Australian law. But reg 4(b) of the Regulations expressed legal consequences by reference to historical facts at the given time of 1975. At that time, and by virtue of the provisions of the Constitution of Papua New Guinea, that regulation clearly purported to deprive the applicant of his Australian citizenship of birth. This conclusion presents the issues whether such a provision is valid having regard to the way in which the result was achieved by regulation and, if so, whether the law so providing offended enduring Australian constitutional norms that deprived the regulation of validity.

Regulation issues: Validity and effectiveness of reg 4

79 *Deprivation by regulation*: The applicant next complained that, interpreted as above, the provisions of reg 4(b) of the Regulations fell outside the power to make regulations contained in the *Papua New Guinea Independence Act* 1975 (Cth).

80 The applicable power appears in s 6(1) of that Act in conventional language. It empowered the Governor-General to make provision "for or in relation to matters arising out of or connected with" the attainment of independence of Papua New Guinea. The report of the Constitutional Planning Committee, the body that prepared the Constitution of Papua New Guinea, and the terms of that Constitution itself, make it clear that citizenship of the new Independent State was a matter of great significance for the people of Papua New Guinea[65]. It was also important for Australians whose families derived from the Australian mainland, some of whom had been born in Papua or New Guinea or had established economic and other links with the country. On the face of things, an argument that reg 4(b) of the Regulations fell outside the wide words of connection contemplated by the Act appears hopeless.

81 Nevertheless, the applicant relied on a long line of decisional authority in this Court, from its earliest days[66], to the effect that the fundamental rights of individuals will not be overthrown by or under legislation unless this is done with

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65 Goldring, *The Constitution of Papua New Guinea: A Study in Legal Nationalism*, (1978) at 204.

66 eg *Potter v Minahan* (1908) 7 CLR 277.

"irresistible clearness"[67]. In the contemporary circumstances of substantial and detailed parliamentary legislation, Australian courts are more vigilant to safeguard individual rights against needless or accidental derogations of fundamental rights and freedoms[68]. Many cases, old and new, illustrate the application by this Court of this important principle of interpretation[69].

82 The applicant submitted that the foregoing principle applied in his case because, as it was put, it was unlikely in the extreme that the status of Australian citizenship would be taken away under an elliptical provision in which the deprivation, said to apply to hundreds of thousands of Australian citizens in Papua, was not spelt out in terms by an Australian statute but left to a curious indirect route chartered by reference to the constitutional law of a foreign country. Furthermore, the applicant argued that it was even more unlikely that such an important legal change would be left to be made by the Executive Government. The Parliament had enacted Australian citizenship for Papuan-born subjects of the Crown so that it could be expected that the Parliament itself, if it so intended, would take away the citizenship so granted. It would not leave that serious consequence to rule-making by the Executive.

83 *Regulation valid and effective*: Once again, I accept that these are available arguments. However, in the end, they do not persuade me.

84 First, it has not been unusual in the legislation affording independence to former colonial and equivalent territories for the legislature of the former governing power to leave it to subordinate legislation, or orders in council, to provide for the detail of such nationality and citizenship provisions[70]. Provided such subordinate laws are themselves within power, including any applicable constitutional power, there is no reason why that means might not be deployed. Doing so affords the opportunity, in sometimes complex and controversial circumstances, more readily to amend or supplement legal rules as events prove necessary.

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67 *Potter v Minahan* (1908) 7 CLR 277 at 304. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], 555 [16], 577 [90], 578 [94].

68 cf *Buck v Comcare* (1996) 66 FCR 359 at 364 per Finn J.

69 See eg *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commissioner* (2002) 213 CLR 543.

70 See eg Hong Kong (British Nationality) Order 1986 (UK) (No 948): see Fransman, *British Nationality Law*, (1998) at 584-585, 597.

85 Secondly, there was a particular reason in the present case for the observance by Australia of such deference to the Constitution of Papua New Guinea. This was the strong desire, reflected in the Constitution of the new Independent State, to provide a local or indigenous foundation for its new constitutional law (including in respect of citizenship). This historical fact helps in the understanding of the choice made by the Australian lawmakers of a style of legislation that avoids notions of a "grant of independence". Instead, the Australian lawmakers respected the claim of the new Independent State to make its own laws concerning independence, including on the subject of the citizenship of those persons living within its borders. Both the terms and manner of providing for such citizenship, as expressed in reg 4(b) of the Regulations, reflect these concerns of constitutional policy. Subject to any Australian constitutional disqualification, there is no legal deficit in proceeding in this way.

86 Thirdly, the historical considerations, already described, help to indicate why, in 1975, the Australian lawmakers did not regard it as an impermissible infringement of established rights of Australian citizenship to provide for their abolition in the manner chosen, including by regulation. This was because, up to that time, the Australian lawmakers, like those who drafted the Constitution of Papua New Guinea, did not consider the nominal Australian citizenship afforded to those born in Papua New Guinea after 26 January 1949 as "real … citizenship" of Australia[71].

87 It is true that, under Art 13(2) of the *Universal Declaration of Human Rights*[72], it is provided that "everyone has the right to leave any country, including his own, and to return to his country". It is also true that under Art 12(4) of the *International Covenant on Civil and Political Rights*[73] ("ICCPR"), it is provided that "no one shall be arbitrarily deprived of the right to enter his own country". It is likewise true that Australia is now a party to the First Optional Protocol to the ICCPR and that the provisions of that instrument are available to influence the interpretation of Australian statue law[74], including, in my opinion, a

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71 PNG Constitution, ss 64(1) and 64(4)(b).

72 Adopted by the United Nations General Assembly, Resolution 217A(III), 10 December 1948.

73 Adopted and opened for signature by the United Nations General Assembly, Resolution 2200(XXI), 16 December 1966; entered into force on 23 March 1976 in accordance with Art 49. Entered into force with respect to Australia on 13 November 1980: see [1980] ATS 23.

74 cf *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29] per Gleeson CJ.

law made before ratification of the treaty and signature of the First Optional Protocol[75].

88 However, these provisions do not assist the applicant. As I have demonstrated, the expectations and administration of the Australian law before Independence Day did not treat Australia as the "country" or "own country" of a person such as the applicant. His true "country" remained Papua. The veneer of "Australian citizenship" did not afford him a *right* to enter or "return" to mainland Australia. This may have been in breach of international law, especially as it is now understood. But so have been many aspects of Australian statute law governing immigration before the independence of Papua New Guinea[76] and perhaps since[77].

89 There is no ambiguity sufficient to construe reg 4(b) of the Regulations so as to avoid the deprivation of the basic human right of nationality. When that "right" is examined more closely in this case, and especially when its incidents and practice are examined, the "right" of Australian citizenship granted by statute to Papuans is disclosed as having been a deliberately limited entitlement. In such circumstances, it is scarcely a cause for surprise (and not a reason of invalidity) that the extinguishment of such a status was effected by subordinate legislation, expressed in the manner chosen.

90 Fourthly, it is necessary to add something out of fairness to those who, in 1975, provided for the removal of such Australian citizenship, both under the Constitution of Papua New Guinea and the Australian regulations giving its provisions legal force in Australia. The move would certainly have been viewed by the lawmakers involved, in both countries, as an affirmative step to extinguish the flawed "citizenship" that Australia had previously enacted for people born in the Territory of Papua (like the applicant) and to replace it with a "real citizenship" as afforded under the Constitution and laws of a new, independent and sovereign country having both the right and duty to provide for its own nationals. In place of a veneer of citizenship were substituted substantial and enforceable rights of citizenship of Papua New Guinea that conform to international law. As well, provision was made in transitional cases, in the

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75 *Coleman v Power* (2004) 78 ALJR 1166 at 1211-1212 [245]-[251]; cf 1171-1173 [17]-[24] per Gleeson CJ; 209 ALR 182 at 244-246; 189-191.

76 See eg *Immigration Restriction Act* 1901 (Cth).

77 eg *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737 at 768-769 [169]-[173]; 206 ALR 130 at 172-173; *Re Woolley; Ex parte Applicants M276/2003* (2004) 79 ALJR 43 at 79 [173], 84 [201]; 210 ALR 369 at 416, 423.

limited categories specified, for the retention of any "real" Australian citizenship earlier acquired[78]. The applicant fell outside those special, residual categories. It follows that his arguments based on the Regulations fail. It remains only to consider the constitutional validity of the Australian laws that have such a consequence for him.

The constitutional issues

91 *Deprivation of citizenship: validity*: The applicant submitted that the Australian Federal Parliament lacked power to make, and thus to authorise the Executive Government to make, a federal law in terms of reg 4(b) of the Regulations, depriving him of Australian citizenship previously granted under the Citizenship Act. Thus, he was not an "alien"[79]; nor was he subject to the immigration power[80], the implied nationhood power[81], the external affairs power[82] or any other paragraph of s 51 of the Australian Constitution permitting such a course.

92 The applicant submitted that it was also not within the territories power[83] for the Federal Parliament to enact a law on citizenship that would support reg 4(b) of the Regulations. On the contrary, so it was put, all of the foregoing lawmaking powers were constrained by a broader constitutional principle that prevented the Federal Parliament and the Executive Government of the Commonwealth from depriving a person such as the applicant of his fundamental constitutional status as an Australian national ("citizen"). This status was described by reference to the provisions in the Constitution referring to a "subject of the Queen" or the notion of the "people of the Commonwealth"[84] that ultimately defined Australian constitutional nationality[85].

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78 PNG Constitution, s 64(4).

79 Constitution, s 51(xix).

80 Constitution, s 51(xxvii).

81 *Davis v The Commonwealth* (1988) 166 CLR 79 at 98-99, 101-104, 110-111.

82 Constitution, s 51(xxix).

83 Constitution, s 122.

84 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 35.

85 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 478-479 [264]-[265].

93 The applicant was forced back to such constitutional concepts because Australian "citizenship", the right that had been afforded to him at birth, is not, as such, a constitutional status, at least in this connection[86]. If citizenship is no more than a statutory status, what the Parliament has provided to a person such as the applicant, in terms of the Citizenship Act, it can also take away. It can do so by repeal or by provision for deprivation of statutory rights considered by the Parliament to be no longer applicable[87].

94 However, the applicant here sought to take this Court's jurisprudence at its word. This Court's reasoning has sometimes assimilated constitutional notions of nationality (including the references to "British subject"[88] and "subject of the Queen"[89]) by differentiating "citizens" from "aliens"[90]. The applicant invoked these texts to support his argument that, by affording him the status of citizenship at birth, Australia had conferred on him constitutional nationality. The self-same principle treating non-citizenship of Australia, and citizenship of a foreign state, as determinative of nationality for constitutional purposes[91] was invoked by the applicant, stated in reverse. Because he was born an Australian citizen, with no other citizenship applicable at the time, he acquired Australian nationality. He was a member of the Australian community and owed allegiance in accordance with his citizenship.

95 The applicant thus suggested that the Citizenship Act recognised not only a statutory but a constitutional status. It was not, therefore, competent to the Federal Parliament (at least without renunciation or incompatible action on his part, judged with due process) to deprive him of his constitutional status. The deficit (statutory citizenship by birth or naturalisation) that had deprived Mr Pochi[92], Mr Nolan[93], Messrs Te and Dang[94] and Mr Shaw[95] of immunity from

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86 cf *Sue v Hill* (1999) 199 CLR 462 at 503 [96]-[97], 523-524 [159], 527-528 [171].

87 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355-356 [13], 375-376 [67]-[68]; cf 421-422 [175].

88 *Sue v Hill* (1999) 199 CLR 462 at 527-528 [171] per Gaudron J.

89 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 505 per Brennan J, 525 per Deane J, 553 per Toohey J.

90 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203; 203 ALR 143; *Singh* (2004) 78 ALJR 1383; 209 ALR 355.

91 See eg *Singh* (2004) 78 ALJR 1383 at 1427 [205]; 209 ALR 355 at 416.

92 *Pochi v Macphee* (1982) 151 CLR 101 at 109-110.

the "aliens" power (and hence of deportation from Australia despite long residence here) was inapplicable in his case. On the contrary, he was a natural-born citizen and "national" and thus constitutionally incapable of being prevented from coming to and remaining in Australia, just like any other "citizen". If *he* could be deprived of constitutional nationality, and of rights ordinarily inhering in that notion, the same could be done to any *other* Australian who was also a citizen by birth. Against that risk, notions lying deep in the Constitution provided a protection that should be afforded to him against the possibility that they might one day be needed for others.

96 It will be evident, in this description of the way in which the applicant's case was presented, that I regard it as having more substance than others appear to perceive in it. The deprivation of nationality, including nationality by birth and especially in cases affecting minority ethnic communities[96], has been such a common affront to fundamental rights that I would not, without strong persuasion, hold it to be possible under the Constitution of the Australian Commonwealth. It will be necessary to return to the notion of fundamental rights of Australian nationality inherent in the applicant's arguments, and whether they attached to the applicant. But first, it is appropriate to consider the suggested heads of legislative power under which the respondent Minister supported the federal laws that she said had deprived the applicant of his Australian citizenship.

97 *Deprivation: territories power*: The primary way in which the respondent argued the validity of the Australian laws was by reference to the provision of the Constitution affording the Federal Parliament the power to "make laws for the government of any territory … placed by the Queen under the authority of and accepted by the Commonwealth"[97].

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93 *Nolan* (1988) 165 CLR 178 at 183.

94 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162.

95 *Shaw* (2003) 78 ALJR 203; 203 ALR 143.

96 Notably (but not only) Jews in the German Third Reich and in countries ruled or affected by the Nazi nationality laws. See Curtis, *Verdict on Vichy: Power and Prejudice in the Vichy France Regime*, (2003) at 116-117. Under the Vichy regime in France, laws were successively made to strip of French nationality those who had acquired it after 1927. Such laws were extended to French overseas protectorates and colonies and later expanded to apply to other French nationals.

97 Constitution, s 122. See *Fishwick v Cleland* (1960) 106 CLR 186.

98 The wide ambit of the territories power has been repeatedly emphasised in decisions of this Court. Many decisions have suggested the distinctiveness of the powers afforded by this separate, general conferral of lawmaking authority[98]. On the other hand, from early days, the need has been expressed to integrate s 122 in the Constitution and to read it "with the entire document" so that it is not "disjoined from the rest of the Constitution"[99] but allows the decision-maker to "treat the Constitution as one coherent instrument for the government of the federation, and not as two constitutions, one for the federation and the other for its territories"[100]. In case of uncertainty about the ambit of this power, I favour the latter approach, believing it to be more consonant with general principles of constitutional interpretation[101].

99 The applicant latched onto this issue. He urged that any limitations specifically imposed by the Constitution on the power of the Australian Federal Parliament to deprive him of Australian nationality in the form of citizenship enjoyed at birth (as under the "aliens" power or the "immigration" power) could not be overcome in his case simply because he was born in a territory of the Commonwealth. In this respect, the applicant invoked the reasoning, adopted in another context, by which the Court had declined to permit attempted circumvention of the "just terms" guarantee in s 51(xxxi) of the Constitution by the adoption of a "circuitous device" of legislation relying on some other, specific, head of power to effect the acquisition[102].

100 The applicant submitted that, were it otherwise, it would be constitutionally permissible for the Federal Parliament, in reliance upon s 122 of the Constitution, to deprive all or some Australians born within internal territories of the Commonwealth of their Australian nationality (called citizenship). If it could be done to him, the applicant suggested, it could be done to them.

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98 see eg *Buchanan v The Commonwealth* (1913) 16 CLR 315 at 326-328, 335; *R v Bernasconi* (1915) 19 CLR 629 at 635, 637-638; *Teori Tau v The Commonwealth* (1969) 119 CLR 564 at 569-570.

99 *Lamshed v Lake* (1958) 99 CLR 132 at 145 per Dixon CJ.

100 *Lamshed v Lake* (1958) 99 CLR 132 at 154 per Kitto J.

101 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 566-567, 653; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 372-374 [130]-[132].

102 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J. See also *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372.

101 This apparently startling consequence does not follow as a matter of constitutional analysis. Even if the territories of the Commonwealth are not disjoined from the rest of the nation, a clear textual distinction is drawn in s 122 between "any territory surrendered by any State to and accepted by the Commonwealth", (such as the Australian Capital Territory and the Northern Territory of Australia) and "any territory placed by the Queen under the authority of and accepted by the Commonwealth" or "otherwise acquired by the Commonwealth" (such as Papua and later the mandated, subsequently trusteeship, territory of New Guinea respectively). Given this textual distinction, it is permissible, reading s 122 of the Constitution with the other provisions of that document, to differentiate between the making of laws for the government of territories of the first kind and for the government of territories of the second and third kinds. This is because territories of the first kind are, by definition, within the continental description of Australia as constituted by the former Australasian colonies of the Queen named in the covering clauses[103]. It is the people of those colonies whose assent led to the creation of the united federal Commonwealth under the name of the Commonwealth of Australia.

102 By contrast, other possessions of the Crown at the time of Australian federation (whether New Zealand[104], Papua, the Fiji Islands or other territories potentially then regarded as possible future parts of the Commonwealth) are to be treated as having a different status.

103 Such differentiation finds still further reflection in s 122 of the Constitution by the recognition that the representation of territories "in either House of the Parliament" was to depend on action of the Federal Parliament itself. It was for it to decide "the extent and … the terms" for any such representation. Similarly, when s 128 of the Constitution was amended in 1977[105], to permit the people of the Commonwealth in a "territory" to participate in referendums for the amendment of the Constitution, such entitlement was confined to the electors qualified to vote for the election of members of the House of Representatives in a territory "in respect of which there is in force a law allowing its representation in the House of Representatives". Only the "internal" territories of Australia have ever fallen within this class. Australian citizens in the Territory of Papua who were not otherwise entitled, never enjoyed rights as "electors", as that word is used in the Constitution.

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103 Covering cl 3. See *Commonwealth of Australia Constitution Act* 1900 (Imp), s 3.

104 Mentioned in covering cl 6 (definition of "The States"). See *Commonwealth of Australia Constitution Act* 1900 (Imp), s 6.

105 *Constitution Alteration (Referendums)* 1977 (Cth), s 2.

104 Inherent in the power to make laws for a territory "placed by the Queen under the authority of and accepted by the Commonwealth" (as Papua was) is a power to make laws providing for the termination of that acquisition and for the independence of that territory. Whether or not this was a notion originally contemplated when the Constitution was adopted, by analogy to the independence secured under the Constitution by the Australian colonies themselves, it is an interpretation apt to the constitutional language and purpose in the political events that have occurred over the intervening century. Such political events inevitably influence the interpretation of a national constitution[106]. Thus, in *Reference re Secession of Quebec*[107], the Supreme Court of Canada remarked:

> "The ultimate success of such a secession [by Quebec] would be dependent on effective control of a territory and recognition by the international community."

105 By these criteria, the enactment of laws providing for the independence and separate sovereignty of the Territory of Papua within the new Independent State of Papua New Guinea (and for consequential changes to the nationality of people resident there) was within the ambit of the lawmaking power provided by s 122 of the Constitution, read with today's eyes.

106 The spectre of the potential misuse of the same power in relation to an *internal* territory can be put aside. The textual foundation in s 122 for the government of such territories is different. The participation in the Commonwealth of Australians resident there is recognised in the language of the Constitution. The divestment from the Commonwealth of such territories, and the deprivation of nationality ("citizenship") status of people of the Commonwealth and electors, by reference to their connection with such territories, would present distinct questions that need not be decided in this case. Subject to what follows, I would hold that the power to *accept* or *acquire* a territory (otherwise than territories surrendered by a State of the Commonwealth), is one that carries with it the power to *divest* the Commonwealth of such a territory. It also necessarily carries with it the power to make laws providing for the future nationality of a person ordinarily resident in such an external territory at the time of that divestment, such as the applicant.

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106 cf *Singh* (2004) 78 ALJR 1383 at 1426 [198]; 209 ALR 355 at 414. See also *Sue v Hill* (1999) 199 CLR 462 at 488 [53], 526 [168].

107 [1998] 2 SCR 217 at 274-275 [106].

107 *Deprivation of nationality: aliens power*: Both the applicant and respondent relied on the "aliens" power[108] under the Australian Constitution to support their respective submissions. The respondent called that power in aid to provide a second and supplementary foundation for the Australian laws limiting and eventually abolishing, the applicant's status as an Australian citizen. The applicant submitted that the aliens power, as elaborated by this Court, did not extend to him because from birth he had enjoyed Australia nationality as a citizen and could not retrospectively be made an alien. Moreover, the applicant argued that the specific limitation on the power to deprive him of his Australian nationality flowed over to limit the use for that purpose of the general provisions of the territories power. In this respect, he said, the general grant was subject to the specific restriction.

108 In *Re Patterson; Ex parte Taylor*[109], a majority of this Court overruled the earlier decision of the Court in *Nolan v Minister for Immigration and Ethnic Affairs*[110]. In respect of a substantial number of British subjects resident in Australia who are not Australian citizens, this Court rejected the contention that they were aliens within the Constitution susceptible, as such, to removal from the Commonwealth. The majority view in *Re Patterson* rested on a rejection of the earlier opinion that "alien", within the Australian Constitution, was an antonym to "citizen" under the Citizenship Act. Instead, at the time relevant to that case, the majority concluded that persons in the given class enjoyed a status as Australian "nationals", that is Australian subjects of the Queen who could not be deprived of that status by, or under, legislation enacted by the Parliament.

109 Had this view of Australian nationality prevailed in this Court, the applicant in the present case might have enjoyed a foundation for his argument that, being an Australian citizen by birth, he enjoyed Australian nationality under the Constitution and could not be divested of it in the manner attempted, any more than any other Australian national could lose the equivalent status under the Constitution.

110 However, the reasoning in *Re Patterson* was overruled by this Court, in its new membership, in *Shaw v Minister for Immigration and Multicultural Affairs*[111]. Whilst adhering to the view that I expressed in *Re Patterson*, I have accepted that the constitutional doctrine in *Nolan* has, for the time being, been

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108 Constitution, s 51(xix).

109 (2001) 207 CLR 391.

110 (1988) 165 CLR 178.

111 (2003) 78 ALJR 203; 203 ALR 143.

restored[112]. Some day the issue in *Re Patterson* and *Shaw* may be revisited. Certainly, the decision in *Shaw*, like that of *Nolan*, exposes to expulsion and seriously unfair treatment subjects of the Queen who have lived in mainland Australia for years, voted in elections and referenda, performed jury service and other civic duties and fought in the Australian Defence Forces. To me this is an offensive doctrine affecting hundreds of thousands of persons in a residual class of effective Australian nationals. I hope that it will be reversed as its offensiveness to constitutional concepts of nationality and allegiance becomes obvious, and before more wrongs are done under it. For the moment, however, it must be accepted that *Nolan* and *Shaw* state the applicable constitutional rule.

111 This conclusion presents a significant hurdle for the applicant. If the British subjects long resident as of right in the Australian mainland (most of them born in the United Kingdom) enjoy no status as Australian nationals protected by the Australian Constitution, how much weaker is the applicant's claim? Although a citizen, he could not come to, still less reside in, Australia before 1975 without specific permission. He had no right (still less a duty) to vote in Australian elections and referenda. He could perform no jury or other civic service in Australia. To all intents, he was treated as a foreigner; whereas the group denied nationality status in *Nolan* and *Shaw* were (and still are) apparently assimilated as part of the "people" and "electors" of the Commonwealth under the Constitution.

112 The applicant sought to circumvent this difficulty by reliance on suggestions in the reasoning of the newly re-established majority in *Shaw* and *Singh v The Commonwealth*, that the status of "alien" in s 51(xix) of the Constitution had become synonymous with "non-citizen"[113]. Thus, he called in aid the reasoning of Gleeson CJ in *Singh*[114]:

> "Brennan, Deane and Dawson JJ said in *Chu Kheng Lim v Minister for Immigration*[115], that the effect of Australia's emergence as a fully independent sovereign nation with its own distinct citizenship was that alien in s 51(xix) of the Constitution had become synonymous with non-citizen. … Within the class of persons who could answer that description, Parliament can determine to whom it will be applied, and with what consequences."

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112 *Singh* (2004) 78 ALJR 1383 at 1437 [265]; 209 ALR 355 at 430-431.

113 See eg *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 375; cf *Singh* (2004) 78 ALJR 1383 at 1411 [122] per McHugh J; 209 ALR 355 at 394.

114 (2004) 78 ALJR 1383 at 1385 [4]; 209 ALR 355 at 357.

115 (1992) 176 CLR 1 at 25, referring to *Nolan* (1988) 165 CLR 178 at 183-184.

113 Because he had been born an Australian citizen, the applicant argued that he enjoyed, from his birth, an immunity from being treated by the Federal Parliament as a non-national or "alien". He urged that s 122 of the Constitution would be read as "subject to the Constitution" and thus subject to this specific limitation on the powers of the Parliament to deprive a person such as himself, a citizen by birth, of the nationality status that came with that designation.

114 There are many difficulties in this argument. Subject to the Constitution, what Parliament enacts, it can amend or repeal. This is the flaw in suggesting that, by the Citizenship Act, the Parliament conclusively, for all purposes and for all time, defined those who were Australian nationals and thus "non-aliens" for constitutional purposes. It deprives the separate constitutional idea of Australian nationality of any content. The notion that nationality (including for constitutional purposes) is fixed in every case by the place of birth, is not one that gained the acceptance of this Court in *Singh*[116]. It was there held, by a majority[117], that it was competent for the Australian Parliament to impose, in addition to birth, other appropriate tests or disqualifications as the notion of admission to nationality had evolved within the Commonwealth.

115 Although many countries of the world accept variations on a principle of nationality expressed in terms of *jus soli* (law of the place of birth), more have embraced the rule of *jus sanguinis* (law of descent). *Singh* accepts that the Federal Parliament may, within limits fixed ultimately by the courts, enact laws that adopt variations of both of these principles. International law recognises that nationality normally falls to be determined by the domestic law of each nation state[118]. In the view of the majority, the disqualifying element in Ms Singh's case was that, at birth, she was a citizen of a foreign state (India) and thus subject to the "aliens" power in the Australian Constitution[119].

116 Yet even these arguments are not conclusive. Unlike Messrs Pochi, Nolan, Taylor, Te, Dang and Shaw and Ms Singh, the applicant was not at birth a

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116 (2004) 78 ALJR 1383; 209 ALR 355.

117 Gleeson CJ, Gummow, Hayne, Heydon JJ and myself; McHugh and Callinan JJ dissenting.

118 Brownlie, *Principles of Public International Law*, 6th ed (2003) at 373. See *Nationality Decrees issued in Tunis and Morocco (Advisory Opinion)* [1922] PCIJ Series B No 4 at 24.

119 *Singh* (2004) 78 ALJR 1383 at 1392 [30], 1416 [144], 1427 [205], 1438 [272]; 209 ALR 355 at 366-367, 400, 416, 432.

"citizen or subject of a foreign State"[120]. At the instant that the Australian legislation and Regulations took effect in 1975, the Constitution of the Independent State of Papua New Guinea came into force and the Australian law was intended to facilitate the achievement of the purposes of that Constitution providing a new and different citizenship for persons living within the borders of that country, having defined links to its territory and peoples. Subject to the exceptions there defined, from the moment those laws took effect the applicant received a new nationality which, under those laws, he still holds. He therefore is, and has since Independence Day been, a citizen of a foreign state. As such, in accordance with *Singh*, it was competent for the Australian Parliament, in addition to the powers it enjoyed under s 122, to provide for the termination of the applicant's statutory status of Australian citizen in consequence of his new status of a citizen of Papua New Guinea. It did not have to do so. It might have provided for dual citizenship (a later legal development in Australia). But as a matter of constitutional power, the legal entitlement existed.

117 The change in the applicant's status as a citizen, as an incident to the achievement of the independence and national sovereignty of a former territory of the Commonwealth, affords no precedent for any deprivation of constitutional nationality of other Australian citizens whose claim on such nationality is stronger in law and fact than that of the applicant. The acceptance of the validity of constitutional powers propounded by the respondent in this case does not therefore present any risk that later laws might purport to divest Australian nationals of their status as such, based on the decision in this case[121].

118 It follows that, having regard to the particular historical circumstances of this case and the fragile and strictly limited character of the "citizenship" of Australia which the applicant previously enjoyed, no requirement was implicit in the Australian Constitution that afforded the applicant rights of due process that might arise in another case in other circumstances of local nationality having firmer foundations[122]. Nor is it necessary, in light of these conclusions, to consider further the fundamental constitutional questions that would arise were the Federal Parliament ever to attempt to extend the deprivation of Australian nationality (including statutory citizenship) beyond the strictly limited categories of cases provided by the present law[123]. The laws which the applicant challenged

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120 *Milne v Huber* 17 Fed Cas 403 at 406 (1843), cited in *Singh* (2004) 78 ALJR 1383 at 1427 [205]; 209 ALR 355 at 416.

121 Patidar, "Citizenship and the Treatment of American Citizen Terrorists in the United States", (2004) 42 *Brandeis Law Journal* 805 at 808-814.

122 cf *Kruger v The Commonwealth* (1997) 190 CLR 1 at 63.

123 Citizenship Act, ss 18, 19, 21.

in these proceedings replace shadows with substance; appearances and mere titles with a new enforceable reality. There is no constitutional infirmity in the Australian laws that have facilitated that outcome[124].

119 As it has been defined by this Court up to *Nolan* and since *Shaw*, the "aliens" power applied to the applicant. Indeed, it did so from his birth. It did so notwithstanding the provision to him of a nominal statutory status of "citizen" which, when examined, fell far short of constitutional nationality. No question therefore arises of depriving the applicant of a supposed status of "non-alien" for Australian constitutional purposes. The territories and aliens powers reinforce and supplement each other. They afford an ample constitutional foundation for the validity of the Australian laws impugned by the applicant.

120 *Deprivation of nationality: conclusions*: It is unnecessary to consider the other heads of legislative power relied on by the respondent to support the validity of the Australian laws in issue in this appeal[125]. Similarly, it is unnecessary to consider the question whether the foregoing interpretation of the specific heads of legislative power offends any fundamental notions concerning nationality, expressed or implied in the Constitution, to which the specific legislative powers are subject. I do not doubt that there are fundamental notions of nationality, sufficiently expressed[126] or necessarily implied, in the Australian Constitution. However, the limited and special circumstances of the applicant's

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124 In addition to becoming a citizen of Papua New Guinea on Independence Day, any previous constitutional status of the applicant as a "subject of the Queen" in right of Australia was changed to his relationship thereafter with the Queen in right of her position as Queen and Head of State of Papua New Guinea: see PNG Constitution, s 82.

125 Most notably, the immigration power (Constitution, s 51(xxvii)). The Minister argued that, notwithstanding the type of citizenship he acquired at birth, the applicant remained an "immigrant" because, by law, he continued to need permission to enter and stay in Australia and, in conformity with that law had sought and obtained extensions of that permission. After arriving in Australia in December 1999, the applicant held substantive visas for less than four months. In the remaining time he has held bridging visas or has not been in possession of a valid visa. cf *Ex parte De Braic* (1971) 124 CLR 162 at 164, 166.

126 eg as a "subject of the Queen", or as a member of the "people of the Commonwealth". Limits on the power of the United States Congress to deprive persons of citizenship were recognised in *Vance v Terrazas* 444 US 252 (1980). See also *Perez v Brownell* 356 US 44 at 64-65 (1958); *Trop v Dulles* 356 US 86 (1958); cf Aleinikoff, "Theories of Loss of Citizenship", (1986) 84 *Michigan Law Review* 1471.

case do not require the refinement of such limitations. Whatever their precise ambit may be, the laws challenged by the applicant fall far short of offending such basic notions.

121 *International law: compatibility*: Like judges of many final courts[127], including recently[128], I regard it as useful and proper to check conclusions affecting constitutional interpretation by reference to any relevant international law, and especially as such law relates to human rights and fundamental freedoms. Clearly, laws depriving people of a former status as citizens, utilising criteria that might be portrayed as based on racial or ethnic considerations, are arguably suspect. They invite consideration of any applicable principles of international law to check the validity of conclusions reached within the paradigm of Australian municipal law. When this approach is adopted in the present case, it is clear that the conclusion to which the foregoing analysis has brought me conforms to international law.

122 Expressing the general position of customary international law in the case of the succession of states, Professor Ian Brownlie has stated that[129]:

> "[T]he evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality."

123 The *Universal Declaration of Human Rights*, Art 15, declares that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". Although the applicant submitted that the Australian laws which he challenged (and the counterpart Constitution and laws of Papua New Guinea) amounted to an arbitrary deprivation of his Australian nationality, when examined against repeated state practice, the contrary is the case.

124 Regulation 4 of the Regulations was not "arbitrary". It operated only in relation to a person who had already acquired citizenship of the new Independent

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127 eg *Lawrence v Texas* 539 US 558 at 576 (2003); *Reference re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313 at 350; *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 at 463 [55]; *Vishaka v State of Rajasthan* 1997 AIR 3011 at 3015 (SC); cf *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1134-1136 [184]-[191], cf 1112-1115 [62]-[73] per McHugh J; 208 ALR 124 at 170-173, 140-145. See also Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy", (2002) 116 *Harvard Law Review* 16 at 69.

128 *Roper v Simmons* 161 L Ed 2d 1 at 27 (2005) per Kennedy J for the United States Supreme Court.

129 Brownlie, *Principles of Public International Law*, 6th ed (2003) at 628.

State under the Constitution of Papua New Guinea. This the applicant did. He did not lose a right to a nationality. He was not rendered stateless. His nationality status simply changed, by reason of the change of the sovereignty of the place of his birth, his long-term residence and the place of birth and residence of his forebears.

125 Draft Articles on Nationality of Natural Persons in Relation to the Succession of States have been adopted by the International Law Commission[130], designed to express the pre-existing international law and practice in this regard. By their Preamble, they pay due regard to the *Universal Declaration of Human Rights* and obligations of international law. Relevantly, they provide that "persons ... having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession" (Art 5). Moreover, the successor state is required to "attribute its nationality to persons ... having their habitual residence in its territory" (Art 24(a)). The "predecessor State" [in the applicant's case, Australia] is required to "withdraw its nationality from persons [who are] qualified to acquire the nationality of the successor State in accordance with article 24" (Art 25(1)). Such withdrawal of nationality is, under the Draft Articles, only restricted in the case of persons who "have their habitual residence" in the territory of the predecessor state; or continue to have an "appropriate legal connection" with the predecessor state; or have their habitual residence in a third state and have an "appropriate legal connection" with the predecessor state (Art 25(2))[131].

126 Although these Draft Articles were prepared, and adopted[132] after the Independence Day of Papua New Guinea and the making of the Australian laws

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130 United Nations, International Law Commission, *Report of the International Law Commission on the Work of its Fifty-first Session*, (1999) ch 4, "Nationality in Relation to the Succession of States".

131 The applicant relied on the "right of option" mentioned in the Draft Articles (Arts 16 and 24). However, this right does not apply to the applicant in its terms and customary international law does not appear to support the automatic conferral of such a right on persons affected by state succession: Brownlie, *Principles of Public International Law*, 6th ed (2003) at 628-630.

132 Adopted by the United Nations General Assembly, Resolution 51/160, 16 December 1996, par [8]. The Convention on Nationality between Chile and other countries of Latin America, relied on by the applicant, permitting an election by persons affected by succession of states is a deviation from the general principle observed in customary international law: Weis, *Nationality and Statelessness in International Law*, 2nd ed (rev) (1979) at 148-149.

in question in this case, such laws fully conform to the Draft Articles. To the extent that the Draft Articles express customary international law, there is no disconformity with such law. Nor is there any disharmony with the universal principles of human rights in the conclusion to which I have come concerning the validity of such laws under the Australian Constitution.

127 Similarly, there is no inconsistency between the state practice reflected respectively in the Australian laws and the Constitution of Papua New Guinea (on the one hand) and the common state practice evident in the devolution of territorial sovereignty to independent nations created out of territories formerly governed by a colonial or like power.

128 Thus, in the case of the United States of America and its former unincorporated territory of the Philippine Islands, that territory was not treated as part of the "United States" for the constitutional purpose of attracting the protections of the Fourteenth Amendment to the Constitution[133]. Persons born in the Territory of the Philippines were not treated as born in "the United States", and United States citizenship was not conferred on them by statute[134]. By contrast, a statutory form of United States citizenship has been conferred on residents of the territory of Puerto Rico[135]. Whether that right might be revoked by statute, conformably with the United States Constitution, need not be considered by this Court.

129 Countless instances in legislation designed to terminate colonial and like status, including in territories formerly part of the dominions of the Crown, involved laws of the United Kingdom Parliament relevantly similar to those made in Australia in the present instance[136]. There is no departure in the

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133 United States doctrine differentiates the application of the Bill of Rights to "unincorporated" territories: *Dorr v United States* 195 US 138 at 148-149 (1904); *Downes v Bidwell* 182 US 244 at 289 (1901); *Balzac v Porto Rico* 258 US 298 at 312-313 (1922).

134 *Rabang v Immigration and Naturalization Service* 35 F 3d 1449 (9th Cir, 1994), Cert denied *Sanidad v Immigration and Naturalization Service* 515 US 1130 (1995).

135 *Organic Act of Porto Rico* (1917) (US) c 145, 39 Stat 951; 48 USC 731, referred to in *Balzac* 258 US 298 at 306-308 (1922).

136 See eg *Aden, Perim and Kuria Muria Islands Act* 1967 (UK), s 2(1) and Sched; *Bahamas Independence Act* 1973 (UK), s 2; *Barbados Independence Act* 1966 (UK), s 2; *Botswana Independence Act* 1966 (UK), s 3; *Cyprus Act* 1960 (UK), s 4 and British Nationality (Cyprus) Order 1960 [No 2215]; *Fiji Independence Act* 1970 (UK), s 2; *Gambia Independence Act* 1964 (UK), s 2; *Ghana Independence*

(Footnote continues on next page)

Australian laws, impugned by the applicant, from normal state practice observed in many such cases. Nor is there any apparent ground to criticise a conclusion as to Australian constitutional law when that law is measured against the standards of international law and typical state practice. On the contrary, such law and practice afford confirmation of my conclusions. They provide no reason to re-examine the conclusions on the basis that they are inconsistent with international law in matters of legal fundamentals, scrutinised with strictness. The reverse is the case. The concordance of Australian law with international law and practice, including as that law expresses human rights and fundamental freedoms, provides "significant confirmation for our own conclusions"[137], namely that the Australian laws involve no constitutional or other legal infirmity in this case.

Remaining issues and conclusion

130 In the result, the applicant's challenge to the meaning and operation of reg 4 of the Regulations in his case and to the constitutional validity of the Australian laws that had the effect of removing his previous status as a citizen of Australia, fails.

131 This analysis brings me to the remaining issues concerning the application to the applicant of the Migration Act and the disposition of the costs of these proceedings[138]. On each of those issues I agree with what is written in the joint reasons[139]. In the result, the applicant's claim for relief entirely fails.

Act 1957 (UK), s 2; *Guyana Independence Act* 1966 (UK), s 2; *Jamaica Independence Act* 1962 (UK), s 2; *Kenya Independence Act* 1963 (UK), s 2; *Lesotho Independence Act* 1966 (UK), s 3; *Malawi Independence Act* 1964 (UK), s 2; *Malaysia Act* 1963 (UK), s 2; *Malta Independence Act* 1964 (UK), s 2; *Mauritius Independence Act* 1968 (UK), s 2; *Nigeria Independence Act* 1960 (UK), s 2; *Seychelles Act* 1976 (UK), s 3; *Sierra Leone Independence Act* 1961 (UK), s 2; *Swaziland Independence Act* 1968 (UK), s 3; *Tanganyika Independence Act* 1961 (UK), s 2; *Trinidad and Tobago Independence Act* 1962 (UK), s 2; *Uganda Independence Act* 1962 (UK), s 2; *West Indies Act* 1967 (UK), s 12 and Sched 3; *Zambia Independence Act* 1964 (UK), s 3; *Zanzibar Act* 1963 (UK), s 2. See also Bangladesh Citizenship (Temporary Provisions) Order 1972 (Bangl), par 2.

137 *Roper v Simmons* 161 L Ed 2d 1 at 27 (2005) per Kennedy J for the United States Supreme Court.

138 See issues 2(b) and 3, above these reasons at [57].

139 Joint reasons at [41].

Orders

132 It follows that I agree in the answers to the questions stated for the opinion of the Court given in the joint reasons.