HIGH COURT OF AUSTRALIA

McHUGH J

Matter No S428/2005

BONNIE HWANG (AN INFANT BY HER NEXT FRIEND LI XIA YU) PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ANOR DEFENDANTS

Matter No S498/2005

ROGER WENJIE FU (AN INFANT BY HIS NEXT FRIEND HUI LING HUANG) PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ANOR DEFENDANTS

Hwang v The Commonwealth
Fu v The Commonwealth
[2005] HCA 66
Date of Order: 27 October 2005
Date of Publication of Reasons: 28 October 2005
S428 and S498/2005

ORDER

1. *The writ of summons filed by the plaintiff, Bonnie Hwang, on 15 September 2005 is struck out and the action is dismissed.*

2. *The writ of summons filed by the plaintiff, Roger Wenjie Fu, on 11 October 2005 is struck out and the action is dismissed.*

3. *The plaintiff in each matter is to pay the costs of the summonses and the costs of the actions.*

Representation:

B Levet for the plaintiffs in each matter (instructed by Michaela Byers)

A Markus for the defendants in each matter (instructed by Australian Government Solicitor)

CATCHWORDS

Hwang v The Commonwealth
Fu v The Commonwealth

Constitutional law – Validity of *Australian Citizenship Act* 2005 (Cth) – Whether Constitution provides power with respect to citizenship – Whether such power arises from express or implied terms of Constitution – Whether power with respect to citizenship arises from status as independent sovereign nation.

Constitutional law – Citizen – Whether "citizen" is synonym for "the people of the Commonwealth" – Relationship between citizenship and alienage – Citizenship as status to which other rights attach.

Constitutional law – Relationship between Constitution and international law.

Australian Citizenship Act 2005 (Cth).
Migration Act 1958 (Cth).

Words and phrases: "the people of the Commonwealth", "alien", "citizen".

1 McHUGH J. In these two proceedings, which were heard together, the defendants have applied to strike out the writ of summons filed on behalf of each plaintiff. Each writ of summons incorporated a statement of claim. The defendants contend that neither statement of claim discloses an arguable cause of action and that each action "is entirely misconceived, and should be dismissed summarily." In the actions, the orders sought by the plaintiffs are identical, save for the difference in the plaintiffs' genders. In the action in which Bonnie Hwang is the plaintiff, she seeks the following orders:

> "1. Declaration that the Plaintiff acquired Australian Citizenship by birth in Australia and that he [sic] has retained Australian Citizenship since that date, alternat[iv]ely;
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> 2. Declaration that the Plaintiff acquired Australian Nationality as subject of the Queen: by birth in Australian [sic] and that she retained such Australian Nationality since that date;
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> 3. Declaration that section 10(2) of the *Australian Citizenship Act* 1948 (Cth) is beyond the power of the Federal Parliament, alternat[iv]ely the *Australian Citizenship Act* 1948 (Cth) is ultra vires the Constitution;
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> 4. Declaration that section 198 of the *Migration Act* 1958 does not apply to the Plaintiff; and
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> 5. Costs."

2 The statement of claim in each action does not plead any facts that would support the making of the orders sought. Instead, the statements of claim allege two conclusory "grounds" of law and 11 paragraphs of "Particulars" consisting of legal argument. The writs and statements of claim disclose no cause of action and are so defective that they constitute an abuse of process of the Court. It follows that the Grounds and Particulars must be struck out as an abuse of the process of the Court.

3 The question then arises as to whether I should dismiss the actions. Counsel for the plaintiffs conceded that the statements of claim need "to be amended to allege certain facts" relevant to the plaintiffs. In his written submissions, he contended that "[f]or the purpose of the application to strike out, the Court is asked to assume that the facts of this matter is [sic] the same as that which faced the Court in *Singh v The Commonwealth*[1], namely that the plaintiff is a child born in Australia of non resident parents." In *Singh*, a majority of this Court held that a child under the age of 10 years who was born in Australia, who was automatically entitled to Indian citizenship by descent, and whose parents

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1 (2004) 78 ALJR 1383; 209 ALR 355.

were aliens, was herself an alien and liable to be deported under the *Migration Act* 1958 (Cth) ("the Migration Act"). Despite the material facts of these two cases being assumed to be the same as the material facts in *Singh*, counsel for the plaintiffs contends that that decision does not authorise the deportation of the plaintiffs. In his written submissions he contends:

> "Whilst the matter cannot be distinguished from *Singh* on its facts, there are issues of law here raised that were not argued in *Singh*:–
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> (a) Firstly it is asserted that the Commonwealth does not have any constitutional power over citizenship, and that in consequence section 198 of the *Migration Act* must fail;
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> (b) Secondly, if (as was asserted by Gleeson CJ in *Singh*) the Commonwealth has acquired a power over citizenship, it is a power which is subject to extra-constitutional international law obligations."

4 As par (a) of this submission implies, s 198 of the Migration Act is concerned with citizenship or, more precisely, non-citizenship. Section 4(1) of the Migration Act declares that its object "is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens." Section 4(4) declares that to advance its object, the Migration Act "provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act." Section 198(1) imposes obligations on officers of the Commonwealth to remove from Australia "as soon as reasonably practicable an unlawful non-citizen". Section 5 defines a "non-citizen" as "a person who is not an Australian citizen." Section 13(1) declares that a "non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen". Section 14(1) of the Act declares that a "non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen."

5 Hence, the power conferred by s 198 to remove a person from Australia is conditioned upon that person, *inter alia*, not being a citizen as defined by the *Australian Citizenship Act* 1948 (Cth) ("the Australian Citizenship Act"). Relevantly, s 10 of that Act declares:

> "(1) Subject to this section, a person born in Australia after the commencement of this Act shall be an Australian citizen.
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> (2) Subject to subsection (3), a person born in Australia after the commencement of the *Australian Citizenship Amendment Act 1986* shall be an Australian citizen by virtue of that birth if and only if:
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> (a) a parent of the person was, at the time of the person's birth, an Australian citizen or a permanent resident; or

(b) the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia."

6 As I have indicated, counsel for the plaintiffs contended in his written submissions that the Parliament of the Commonwealth had no constitutional power to make laws with respect to citizenship. In oral argument, however, counsel for the plaintiffs conceded that the Parliament of the Commonwealth did have power to make laws with respect to citizenship. But he contended that this was a power that did not exist at federation and was the product of international law operating on Australia's emergence as a fully independent sovereign nation at some time after federation and probably not before 1948. Counsel for the plaintiffs contended that, because international law was the source of the constitutional power to make laws with respect to citizenship, it was subject to all the restraints of international law. In particular, counsel contended that the constitutional power with respect to citizenship was subject to the restraints imposed by the *Convention on the Rights of the Child*, Art 3(1) of which provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

7 There is no substance in this submission. Even if the argument of counsel for the plaintiffs was accepted in its entirety, it is impossible to see how it could lead to the conclusion that s 198 of the Migration Act was invalid. If Art 3(1) constitutionally bound the Parliament of the Commonwealth, it would require no more of the Parliament as a legislative body than to make "the best interests" of children a primary consideration in determining whether it should enact legislation. Article 3(1) does not prohibit "legislative bodies" from enacting legislation that affect the interests of children including legislation that authorises their deportation.

8 Contrary to the submission of counsel for the plaintiffs, however, the power of the Parliament to make laws with respect to citizenship does not depend upon international law. If it arises simply from the emergence of Australia as an independent nation, it is because of *the fact* that it is an independent sovereign nation and that other nations recognise it as such. Hence, if the power of the Parliament to make laws with respect to citizenship arises only from its status as an independent sovereign nation, it is the fact of independent sovereignty and not the whole body of international law that authorises the Parliament to make such laws.

9 The indisputable fact that Australia has emerged as an independent sovereign nation is itself sufficient to authorise the Parliament to make laws with

respect to citizenship. This Court has long recognised that, in addition to the legislative powers specifically conferred on the Parliament of the Commonwealth, it has legislative powers that arise from its nature and status as a polity. Some of those powers arise from the need to protect the nation against internal subversion[2]. Others arise from the national status of the Commonwealth as a sovereign body and as the polity who speaks to the world on behalf of Australians[3]. It is hardly to be supposed that the national government of an independent sovereign state such as Australia does not have the power to declare to the world who are the citizens of Australia. This is not a matter that concerns the States. They do not speak on behalf of Australia. If the Parliament of the Commonwealth does not have the power to declare who are the citizens of Australia, no Australian polity has the power. Subject to any constitutional prohibitions, every sovereign country has the undoubted right to determine who shall enter the country and who shall constitute the political membership of the community of that country. That is to say, within the limits of its constitutional powers, every sovereign country has the right to determine who are its citizens and to declare by legislation what are the rights, privileges, immunities and duties of members of that community. It is the Commonwealth that speaks to the world on behalf of the Australian community, and it is the Parliament of the Commonwealth that, subject to any express or implied constitutional prohibitions, has the power to determine who are its citizens. Since the adoption of the Statute of Westminster in 1942 at the latest, the power of the Parliament of the Commonwealth, arising from its status and existence as a national polity, has extended to making laws with respect to citizenship because Australia is a sovereign independent nation.

10 However, it is a mistake to think that the power of the Parliament of the Commonwealth to make laws with respect to citizenship did not exist at federation. For many years, the existence of United Kingdom legislation may have made it impossible, as a practical matter, for the Parliament to enact citizenship legislation. But, independently of Australia's emergence as a sovereign nation, the Parliament has and always has had the power to make laws with respect to citizenship. That power arises from the express and implied powers of the Parliament of the Commonwealth to declare who are the persons who are members of the Australian community. It arises partly by implication out of the Parliament's status as the national Parliament and its entitlement to

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2 *Burns v Ransley* (1949) 79 CLR 101 at 116; *R v Sharkey* (1949) 79 CLR 121 at 148-149; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187-188.

3 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 269; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 373-374, 388-389, 470, 505; *Davis v The Commonwealth* (1988) 166 CLR 79 at 94.

define who are "the people" who make up the Australian community. And it arises partly out of its express power to make laws with respect to immigration, naturalisation and aliens.

11 The Constitution recognises that there is an Australian community of people by its reference to "the people" of the Commonwealth. And at federation, although the Constitution contained no express reference to the term "citizen" other than the reference in s 44(i) to "a citizen of a foreign power", there seems no doubt that being one of "the people of the Commonwealth" was recognised as synonymous with the concept of being a citizen of Australia.

12 When a legislature enacts laws conferring citizenship on members of the community, it gives individuals a legal status that entitles them to or denies to them rights, privileges or immunities or that imposes upon them legal obligations. The term "citizenship" has a number of diverse meanings, and an exhaustive definition is difficult – maybe impossible – to formulate. But in a legal context, it ordinarily defines the persons who are members of a particular community. It is therefore concerned with the legal status of those persons who are, temporarily or permanently, within that community. In many jurisdictions, citizenship automatically carries with it legal rights, privileges, immunities and duties. The Constitution itself recognises this in s 44(i) when it refers to any person who "is a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power".

13 As the preamble to the Australian Citizenship Act shows, however, that Act is concerned only with the "formal membership of the community of the Commonwealth of Australia". The Australian Citizenship Act is not itself concerned with creating rights, privileges, immunities or duties. It creates a status upon which other federal legislation, or for that matter State legislation, may operate to confer or deny rights, privileges, immunities or duties. Numerous federal statutes confer on citizens or deny to non-citizens such entitlements or obligations. The Migration Act, the *Commonwealth Electoral Act* 1918 (Cth) and the *Australian Passports Act* 2005 (Cth) are prominent examples.

14 Throughout the Constitution, there is frequent reference to "the people" of the Commonwealth. In its context, it is a synonym for citizenship of the Commonwealth. The first preamble of the Constitution refers to "the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania" agreeing "to unite in one indissoluble Federal Commonwealth". Quick and Garran, in their monumental work on the Constitution, declare[4] that the words of the first preamble "proclaim that the Constitution of the Commonwealth of

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4 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 285.

Australia is founded on the will of the people whom it is designed to unite and govern." Covering cl 5 of the Constitution declares that the Constitution is "binding on the ... people ... of every part of the Commonwealth". Section 24 of the Constitution declares that the House of Representatives shall be "composed of members directly chosen by the people of the Commonwealth". Quick and Garran took the view that the expression "the people of the Commonwealth" was equivalent to citizenship of the Commonwealth. In discussing s 24 of the Constitution, the learned authors state[5]:

> "A federation is, as we have already seen, defined by some authorities as a State having a dual system of government ... hence, in a federation it is said there is a dual citizenship. It follows that each natural-born or naturalized subject of the Queen permanently residing within the limits of the Commonwealth is entitled to be considered as a citizen of the Commonwealth, and, at the same time, a citizen of the State in which he resides."

15 The authors go on to say[6]:

> "In one capacity such a person is described by the Constitution as one of 'the people of the Commonwealth;' in the other he is one of 'the people of a State.' From this dual citizenship, and, in order to assist in its preservation, every person living under such a form of government has a duality of political rights and powers. He is entitled, not only to assist in carrying on the government of his State, as a part of the Commonwealth, but to assist in the government of that wider organization of the nation itself. In the latter work, taken and considered by itself, he has also a dual right and power; viz, to join in returning members to the House of Representatives in which centralizing, consolidating, nationalizing, and progressive elements of the community are represented, and also to assist in returning members to the Senate, in which the moderating, restraining, conserving and provincial elements of the community are represented. The duty of a citizen having these dual functions, and of the Federal Parliament so dually constituted, will be to reconcile and harmonize all these apparently conflicting yet necessary and inevitable forces."

16 Two sections of the Constitution excluded certain persons from being counted as "people of the Commonwealth". Thus, s 25 declares that:

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5 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 449.

6 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 450.

> "[I]f by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted."

Similarly, s 127 of the Constitution (now repealed) provided that "[i]n reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."

17 Thus, the concept of "the people of the Commonwealth" – the citizens of the Commonwealth – was critical to the operation of the Constitution. Sections 25 and 127 of the Constitution made it plain that certain persons were excluded from membership of the Australian community. And it is not open to doubt that the power of the Parliament to make laws with respect to immigration[7] and aliens[8] enabled it to exclude certain persons from becoming members of the Australian community. Conversely, the power of the Parliament to make laws with respect to naturalisation[9] enabled the Parliament to include certain persons among "the people of the Commonwealth". Why then should it be thought that at federation the Parliament of the Commonwealth had no power to declare the conditions upon which other persons who are not aliens or immigrants are to be numbered among the people of the Commonwealth? That is to say, to declare the conditions upon which persons living in or connected to the Australian community were citizens of Australia. It is not lightly to be supposed that at federation the national Parliament of Australia did not have the power to declare to the world who were the citizens of Australia. As I have indicated, this is not a matter that concerns or has concerned the States. Their constitutional concern is with the citizens of their respective States, not the citizens of Australia.

18 The power to make laws with respect to naturalisation and aliens may itself be sufficient authority for the enactment of a citizenship Act such as the Australian Citizenship Act. Every grant of legislative power carries with it "power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter"[10] of the grant of power. In *Singh*[11], this Court held that the Parliament has a wide discretion to declare who are aliens for the

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7 Section 51(xxvii).

8 Section 51(xix).

9 Section 51(xix).

10 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

11 (2004) 78 ALJR 1383; 209 ALR 355.

purpose of the power conferred by s 51(xix) of the Constitution. It must follow that the Parliament also has a wide discretion to determine the persons who are not aliens, which is simply a negative description of a person who is not a citizen of the country where that person is located[12]. But in any event, the Parliament has express power to legislate with respect to immigration, naturalisation and aliens. Those powers, together with the national status of the Parliament and the Constitution's insistence that the House of Representatives is to be chosen by the people of the Commonwealth, authorise the Parliament to define the conditions on which membership of the Australian community – that is to say, citizenship – depends. No doubt the Parliament does not have unlimited power to declare the conditions on which citizenship or membership of the Australian community depends. It could not declare that persons who were among "the people of the Commonwealth" were not "people of the Commonwealth" for any legal purpose. But it can declare, for example, in exercising the power conferred by s 30 concerning the qualification of electors of members of the House of Representatives, that persons such as infants are not "people of the Commonwealth" for the purpose of s 24 of the Constitution. And, as long as it does not exclude from citizenship, those persons who are undoubtedly among "the people of the Commonwealth", nothing in the Constitution prevents the Parliament from declaring who are the citizens of the Commonwealth, which is simply another name for the Constitutional expression, "people of the Commonwealth".

19 The Australian Citizenship Act has stood for over 50 years. This is the first time that a party has persisted in a challenge to its validity. In *Singh*[13], a challenge to its validity was withdrawn. The failure of any interested party to challenge its validity over such a long period of time is not relevant in determining whether it is a valid enactment of the Parliament of the Commonwealth. If the Australian Citizenship Act was invalid when it was enacted, delay in challenging its validity cannot alter that condition. But in my opinion, is not open to doubt that that Act is a valid Act of the Parliament of the Commonwealth. It is authorised by the legislative power inherent in the Commonwealth as a sovereign, independent nation. Furthermore, for the reasons I have given, independently of Australia's emergence as such a nation, it was authorised by the express and implied powers of the Commonwealth that existed at federation and continue to exist today.

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12 The *Macquarie Dictionary* defines "alien" as "1. one born in or belonging to another country who has not acquired citizenship by naturalisation and is not entitled to the privileges of a citizen ... 4. residing under another government or in another country than that of one's birth, and not having rights of citizenship in such a place of residence."

13 (2004) 78 ALJR 1383; 209 ALR 355.

20 It follows that the statements of claim filed in the present proceedings do not raise an arguable cause of action even on the assumptions of fact which counsel for the plaintiffs has asked me to assume. The writs of summons must therefore be struck out and the actions dismissed. The plaintiffs must pay the costs of the summonses and the costs of the actions.