HIGH COURT OF AUSTRALIA

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

LOMANI JOEY KOROITAMANA
(AN INFANT BY HER NEXT FRIEND
SEREANA NAIKELEKELE) AND ANOR APPLICANTS

AND

COMMONWEALTH OF AUSTRALIA & ANOR RESPONDENTS

Koroitamana v Commonwealth of Australia
[2006] HCA 28
14 June 2006
S225/2005

ORDER

1. Special leave to appeal granted.

2. Appeal treated as instituted and heard instanter but dismissed with costs.

On appeal from the Federal Court of Australia

Representation

R C Kenzie QC with S E J Prince for the applicants (instructed by Michaela Byers)

D M J Bennett QC, Solicitor-General of the Commonwealth of Australia with M A Perry QC and K C Morgan for the respondents (instructed by Australian Government Solicitor)

CATCHWORDS

Koroitamana v Commonwealth of Australia

Constitutional Law – Naturalization and aliens – Meaning of "aliens" – Children born in Australia to parents who were neither Australian citizens nor permanent residents – Children entitled to acquire foreign citizenship by registration – Whether children are "aliens" within the meaning of s 51(xix) of the Constitution – Whether children are nationals of Australia for constitutional purposes.

Constitutional Law – Construction and interpretation – Meaning of "aliens" – Relevance of possible statelessness to status of child – Whether Convention on the Reduction of Statelessness and other provisions of international law relevant.

Citizenship, immigration and emigration – Detention and removal of unlawful non-citizens from Australia – Meaning of "aliens" – Children born in Australia to parents who were neither Australian citizens nor permanent residents – Children entitled to acquire foreign citizenship by registration – Provisions of *Australian Citizenship Act* 1948 (Cth) relating to stateless persons not alleged to be engaged – Status of children.

Words and phrases – "aliens".

Constitution, s 51(xix).
Australian Citizenship Act 1948 (Cth), ss 10(2), 23D.
Migration Act 1958 (Cth), ss 189, 198.

1 GLEESON CJ AND HEYDON J. The applicants were born in Australia in 1998 and 2000. Their parents are citizens of Fiji. Under the Constitution of Fiji, the applicants may become citizens of Fiji by registration, but no application for registration has been made by them or on their behalf. Neither applicant is an Australian citizen. They have not resided in Australia for the period of 10 years required by s 10(2)(b) of the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act"). The applicants both hold bridging visas. Such visas are subject to monthly reporting requirements and requirements of renewal.

2 The applicants commenced these proceedings to challenge the validity of s 198 of the *Migration Act* 1958 (Cth) ("the Migration Act") (which provides for the removal of unlawful non-citizens, that is, non-citizens who do not have permission to be or remain in Australia), and s 189 of the same Act (which provides for detention of unlawful non-citizens) in their application to the applicants. Being non-citizens, the applicants would become unlawful non-citizens if their bridging visas were not renewed.

3 The argument has been conducted on the basis that the validity of ss 189 and 198 of the Migration Act, in their application to the applicants, depends upon whether it is within the power of the Parliament to enact legislation which treats the applicants as aliens within the meaning of s 51(xix) of the Constitution. The applicants claim that the power to make laws with respect to "naturalization and aliens" does not extend to a power to treat them as aliens.

4 The proceedings came before Emmett J in the Federal Court of Australia. He stated a case for the consideration of a Full Court, reserving the following questions:

(1) Are the applicants "aliens" within the meaning of s 51(xix) of the Constitution?

(2) If the answer to (1) is "No", is s 198 of the *Migration Act* 1958 (Cth) capable of valid application to the applicants?

(3) If the answer to (1) is "No", are ss 189 and 198 of the *Migration Act* 1958 (Cth) capable of valid application to the applicants?

5 The Full Court (Black CJ, Conti and Allsop JJ) answered the first question in the affirmative and held that the second and third questions did not arise[1]. The Full Court considered that, although the facts were not identical, the outcome of

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1 *Koroitamana v Commonwealth* (2005) 142 FCR 391.

the case was dictated by the reasoning of the majority of this Court in *Singh v Commonwealth*[2].

6 The case stated by Emmett J included the following paragraphs:

> "3. Pursuant to s 12(1) of the Constitution of the Fiji Islands ('Fiji'), as amended on 25 July 1997, a child born outside Fiji on or after the date of commencement of the Constitution may become a citizen by registration if, at the date of the child's birth, either parent was a citizen of Fiji.
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> 4. The mother of both applicants is Sereana Naikelekele. The applicants' mother was a citizen of Fiji at the time of the birth of each applicant, and continues to have that status. The applicants' mother was neither an Australian citizen nor a permanent resident at any time.
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> 5. The father of both applicants is Maika Koroitamana. The applicants' father was also a citizen of Fiji at the time of the birth of each applicant, and continues to have that status. The applicants' father was neither an Australian citizen nor a permanent resident at any time.
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> 6. Neither applicant is a citizen of Fiji as neither applicant has been registered with the Fijian authorities for the purposes of s 12(1) of the Constitution of Fiji. The applicants' parents do not wish or intend to register the applicants, or either one of them, with the Fijian authorities. Neither applicant is a citizen of any other country."

7 Annexed to the case stated was s 12 of the Fijian Constitution. It provides that a child born outside Fiji may become a citizen by registration if, at the child's birth, either parent was a citizen. An application for registration may be made at any time during the child's lifetime and, if he or she is under 21 at the date of the application, may be made on his or her behalf by a parent or guardian. The state of Fijian law for purposes of the decision in this case is a matter of fact. The factual information before the Full Court was as set out above. There is no reason why it should not be accepted at face value. In particular, there is no reason to doubt that, if it be relevant, the applicants have a right to become citizens of Fiji by registration upon application made on their behalf while they are under 21, or upon application made by them at any time thereafter. The relevance of that information is a subject to which it will be necessary to return.

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2 (2004) 78 ALJR 1383; 209 ALR 355.

8 The applicants have sought special leave to appeal from the decision of the Full Court. That application has been referred to a Full Court of this Court, and has been argued fully as on an appeal.

9 The present case and *Singh* are not factually identical, and there was argument about the extent to which the decision in *Singh* left open issues of significance for this case. Two things, however, are clear. First, *Singh* decided that birth in Australia does not of itself mean that a person is beyond the reach of the power conferred on the Parliament by s 51(xix). The applicants cannot claim, and do not claim, that, solely because they were born in Australia, it is beyond the power of Parliament to treat them as aliens. Such a suggestion was expressly disclaimed in argument. This was no more than an acknowledgment of the effect of the decision in *Singh*. In that case the Court held that birth within Australia does not necessarily mean that a person is not, and cannot be treated by Parliament as, an alien[3]. Secondly, all the Justices who were in the majority in S*ingh* rejected the proposition that, at the time of federation, the concept of alienage had an established and immutable legal meaning that deprived Parliament of any substantial room for legislative choice in the matter[4]. On the contrary, "questions of nationality, allegiance and alienage were matters on which there were changing and developing policies, and which were seen as appropriate for parliamentary resolution"[5]. Internationally, two theories, one of which attached controlling importance to descent, and one of which attached controlling importance to place of birth, competed for acceptance. The Constitution did not commit Australia to uncompromising adherence to either theory.

10 The applicants' parents are foreign nationals, being citizens of Fiji. The applicants were born in Australia, but are not Australian citizens. Counsel for the applicants and the respondents joined in submitting (although for different reasons) that those are the only relevant facts. Counsel for the applicants says that the right of the applicants to obtain Fijian citizenship by registration is irrelevant, because they have not (or at least, not yet) exercised that right. Counsel for the respondents says that it would make no difference to the outcome of the case if they had no such right. If in that circumstance they would

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3 (2004) 78 ALJR 1383 at 1384-1386 [3]-[11], 1416 [146], 1427 [204]-[205], 1427 [207], 1438 [272]; 209 ALR 355 at 357-360, 400, 416, 432.

4 (2004) 78 ALJR 1383 at 1391-1392 [30], 1424 [190], 1435 [252]; 209 ALR 355 at 366-367, 411-412, 427-428.

5 (2004) 78 ALJR 1383 at 1391-1392 [30]; 209 ALR 355 at 366.

otherwise be stateless, then there may be consequences under s 23D of the Citizenship Act, but that is not presently in question. On the approach that was adopted by the parties, the difference between the present case and *Singh* is that in *Singh* it was common ground in argument that the plaintiff was a citizen of India by descent from her parents whereas the applicants in this case are not citizens of Fiji[6]. The similarity, of course, is that the parents of the applicants, like the parents of the plaintiff in *Singh*, are citizens of a foreign country.

11 The power conferred by s 51(xix) is a wide power, under which the Parliament has the capacity to decide who will be admitted to formal membership of the Australian community, which now means citizenship[7]. Within the limits of the concept of "alien" in s 51(xix), it is for Parliament to decide who will be treated as having the status of alienage, who will be treated as citizens, and what the status of alienage, or non-citizenship, will entail[8]. The concept of "alien" does not exclude persons born in Australia, where they are children of parents who are foreign nationals.

12 In *Pochi v Macphee*[9] Gibbs CJ said:

> "Clearly the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word."

13 The argument for the applicants was that, in the ordinary understanding of the word "alien", a person born within Australia could not possibly answer the description unless a further characteristic, of which foreign allegiance was the clearest example, could be shown to exist. Hence the significance sought to be attached to the difference from the facts in *Singh.* As the facts of the present case show, this produces a curious consequence. If the argument be correct, the capacity of Parliament to decide whether the applicants may be admitted to Australian citizenship, and the conditions under which that will occur, depends upon the choice of the parents of the applicants as to whether to register them as Fijian citizens. It appears to involve "a considerable fetter on the power of the

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6 (2004) 78 ALJR 1383 at 1416 [142]; 209 ALR 355 at 400.

7 *Re The Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 171 [24].

8 *Singh v Commonwealth* (2004) 78 ALJR 1383 at 1384-1385 [4]; 209 ALR 355 at 357.

9 (1982) 151 CLR 101 at 109.

federal Parliament to identify those who are to be treated, whether for domestic or international purposes, as nationals of Australia"[10].

14 Regard may be had to the variety of circumstances in which a child of foreign nationals may be born in Australia. The parents may be in Australia unlawfully, or for a brief visit, or even unintentionally. They may be in transit to another destination. They may be here for temporary purposes of a business or personal nature. Once one rejects the notion that birth in Australia (except in the case of children of foreign diplomats and members of armed forces) necessarily results in membership of the Australian community, then it is a short step to the conclusion that it is open to Parliament to decide that a child born in Australia of parents who are foreign nationals is not automatically entitled to such membership. It cannot be said of such a person that he or she could not possibly answer the description of alien.

15 It may be added that if, as the applicants assert, their right to obtain Fijian citizenship by registration is irrelevant to their legal status for present purposes, and since the mere fact of birth in Australia does not entitle them to membership of the Australian community, the consequence may be that they are stateless. Reference has already been made to s 23D of the Citizenship Act. It was not argued that Australia is in any presently relevant respect in default in its international obligations towards stateless persons. Subject to the impact of any such obligations, it is open to Parliament to treat a stateless person as an alien[11]. The applicants appear to accept that, but say they are not stateless because they were born in Australia and, since they owe no allegiance to Fiji, they cannot be treated in Australia as aliens. The argument becomes circular.

16 The decision of the Full Court of the Federal Court was correct. Special leave to appeal should be granted and the appeal should be dismissed with costs.

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10 *Singh v Commonwealth* (2004) 78 ALJR 1383 at 1425 [193]; 209 ALR 355 at 413.

11 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 571 [1].

17 GUMMOW, HAYNE AND CRENNAN JJ. The applicants are infants who sue by their next friend. The first applicant was born in Australia on 26 August 2000 and has remained in this country continuously since her birth. The second applicant also was born in Australia. Since her birth on 3 September 1998, she has remained continuously in Australia. The applicants are siblings. They have three siblings, each of whom is an Australian citizen.

18 The parents of the applicants were citizens of the Republic of the Fiji Islands ("Fiji") at the time of the birth of each applicant. The parents continue to have that status. Neither is or has been an Australian citizen or a permanent resident.

19 The *Migration Act* 1958 (Cth) ("the Migration Act") has been administered on the footing that the applicants are not Australian citizens and that this is by reason of their failure to satisfy the criteria in s 10 of the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act") for the acquisition of Australian citizenship by birth. The applicants were placed in immigration detention after they were detained in reliance upon s 189 of the Migration Act. They apprehended their removal from Australia under s 198 of the Migration Act, each as "an unlawful non-citizen". The provisions in ss 13 and 14 of the Migration Act defining respectively "lawful non-citizens" and "unlawful non-citizens" turn upon the status of a person who is not an Australian citizen.

20 The applicants commenced against the respondents proceedings in the Federal Court under s 39B of the *Judiciary Act* 1903 (Cth). A case was stated for the consideration of a Full Court under s 25(6) of the *Federal Court of Australia Act* 1976 (Cth). The questions reserved were answered by Black CJ, Conti and Allsop JJ adversely to the applicants' interests[12]. From that decision, special leave is sought to appeal to this Court. The application has been fully argued as on an appeal. For the reasons which follow, special leave should be granted but the appeal should be dismissed.

21 Paragraphs 3 and 6 of the case stated to the Full Court of the Federal Court are in the following terms:

> "3. Pursuant to s 12(1) of the Constitution of the Fiji Islands ('Fiji'), as amended on 25 July 1997, a child born outside Fiji on or after the date of commencement of the Constitution may become a citizen by registration if, at the date of the child's birth, either parent was a citizen of Fiji.

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12 *Koroitamana v Commonwealth* (2005) 142 FCR 391.

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6. Neither applicant is a citizen of Fiji as neither applicant has been registered with the Fijian authorities for the purposes of s 12(1) of the Constitution of Fiji. The applicants' parents do not wish or intend to register the applicants, or either one of them, with the Fijian authorities. Neither applicant is a citizen of any other country."

22 Neither applicant satisfies the criteria found in s 10 of the Citizenship Act for the acquisition of Australian citizenship by birth. Section 10 is found in Div 1 of Pt III of the Citizenship Act. Section 10A confers citizenship upon certain persons who are adopted by at least one Australian citizen. Section 10B is a general provision for the acquisition upon registration of citizenship by descent of certain persons born outside Australia.

23 Part III is headed "Australian citizenship", and deals with "Citizenship by birth, adoption or descent" (Div 1, ss 10-11), "Grant of Australian citizenship" (Div 2, ss 12-15), and "Loss of citizenship" (Div 4, ss 18-23B). Division 5 includes in s 23D special provisions to prevent certain persons being stateless. Further reference will be made to s 23D.

24 It should be emphasised that this litigation raises no issue respecting the grant of certificates of citizenship to those who become citizens by processes of naturalisation (Div 2). Nor does any issue arise under Div 4. This deals with various matters including the loss of citizenship by renunciation and deprivation of citizenship acquired by naturalisation, and also with the resumption of citizenship in some circumstances.

25 Section 10, which is the critical provision for these applications, states:

"(1) Subject to this section, a person born in Australia after the commencement of this Act shall be an Australian citizen.

(2) Subject to subsection (3), a person born in Australia after the commencement of the *Australian Citizenship Amendment Act 1986* [(Cth)] shall be an Australian citizen by virtue of that birth if and only if:

(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.

(3) Subject to subsection (5), a person shall not be an Australian citizen by virtue of this section if, at the time of the person's birth, a parent of the person was an enemy alien and the birth occurred in a place then under occupation by the enemy.

(5) Subsection (3) does not apply in relation to a person if, at the time of the person's birth, a parent of the person:

(a) was an Australian citizen or a permanent resident; and

(b) was not an enemy alien.

(6) A reference in this section to a permanent resident does not include a reference to a person who is, for the purposes of the *Migration Act 1958* [(Cth)], an exempt non-citizen."

26 The reference in par (a) of s 10(2) to a parent who is "a permanent resident" is to be read with s 5A. This requires certain persons who are not Australian citizens to be taken to be permanent residents for the purposes of the Citizenship Act. It is common ground that s 5A does not advance the position of either parent of the present applicants with respect to the operation of par (a) of s 10(2). Nor does par (b) of s 10(2) apply to the circumstances of the applicants.

27 The focus of oral submissions in this Court was upon par (a) of s 10(2). In fixing upon criteria both of place of birth and of descent, this provision represents a particular combination of the doctrines of the *ius soli* and *ius sanguinis*. The significance attached to these two theoretical bases of nationality law during the nineteenth century and at the time of the adoption of the Constitution was considered in *Singh v The Commonwealth*[13].

28 *Singh* is authority at least for the propositions that (i) the common law of England respecting alienage as understood in 1900 does not mark the boundaries of the power conferred by s 51(xix)[14]; (ii) it is not an essential characteristic of the "aliens" referred to in s 51(xix) of the Constitution that they be born outside Australia; and (iii) the Parliament might treat as an "alien" a person born in

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13 (2004) 78 ALJR 1383 at 1391-1392 [30], 1422-1423 [178]-[184], 1435-1436 [253]; 209 ALR 355 at 366-367, 409-410, 428.

14 *Singh v The Commonwealth* (2004) 78 ALJR 1383 at 1391-1392 [30], 1419 [162], 1426 [200], 1437-1438 [266]; 209 ALR 355 at 366-367, 404, 414, 431.

Australia with a foreign citizenship derived from that of the parents of that person[15].

29 However, the applicants denied that they were within the reach of the legislative power conferred by s 51(xix) of the Constitution for the Parliament to make laws with respect to "Naturalization and aliens". The applicants submitted that (i) a person born in Australia and having then no other "relevant characteristic" cannot be treated by the Parliament as an alien; and (ii) they had no such relevant characteristic.

30 The applicants accepted that the possession of a foreign nationality or allegiance would be such a relevant characteristic and that this was established by *Singh*. But, the submission continued, the applicants, notwithstanding the terms of pars 3 and 6 of the stated case, could not be classified for this purpose as Fijian nationals; it was not to the point that upon registration they would become citizens of Fiji.

31 The applicants also accepted that, if "stateless", they would have a relevant characteristic rendering them objects of the exercise of the aliens power. However, they denied they were stateless. The critical submission for their case was that they were not stateless because they were born in Australia and members of the Australian community in the sense described by McHugh J in his dissenting judgment in *Singh*, where he also spoke of "constitutional citizenship"[16].

32 The applicants continued that the circumstance that they were born to parents of Fijian nationality was not a relevant characteristic. The aliens power would not support a law that defined aliens purely by descent, at least where there was no allegiance to the state of that descent. Further, where, as here, the individuals in question had not yet done anything to dissociate themselves from the Australian community, the status otherwise conferred by the *ius soli* could not be denied by reference to the nationality of their parents.

33 The effect of the submissions was that the provision in s 10(2) of the Citizenship Act, adding as a criterion for Australian citizenship by birth in

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15 *Singh v The Commonwealth* (2004) 78 ALJR 1383 at 1386 [11], 1392 [32], 1427 [203]-[205], 1438 [272]; 209 ALR 355 at 359-360, 367, 415-416, 432.

16 (2004) 78 ALJR 1383 at 1406-1407 [99]-[100], 1415 [139]; 209 ALR 355 at 387-388, 399. See also (2004) 78 ALJR 1383 at 1446-1447 [317] per Callinan J; 209 ALR 355 at 443-444.

Australia that at least one parent was at that time an Australian citizen, was invalid in its application to the circumstances of the applicants. The result was that they were not "unlawful non-citizens" for the purposes of s 189 and s 198 of the Migration Act and the Full Court had erred in deciding to the contrary. The applicants had been born in Australia and at birth owed no allegiance to a foreign power and had not dissociated themselves from the Australian community. That sufficed to deny the application to them of the power conferred by s 51(xix) of the Constitution and rendered beyond power the superadded legislative requirement respecting the parental status.

34 In their submissions, the applicants were anxious to avoid classification as stateless persons. This was because of indications in *Al-Kateb v Godwin*[17] and *Singh* that such persons, as aliens, may be the subject of the legislative power conferred by s 51(xix).

35 On the other hand, the respondents eschewed any reliance upon what was disclosed by the case stated to the Full Court as denying statelessness by reason of an entitlement of the applicants to acquire Fijian citizenship by registration. This was because, on the respondents' submissions, it was enough to support a law made in reliance upon s 51(xix) that it provided as criteria for the acquisition of citizenship at birth the combination of elements of place of birth and descent found in s 10(2)(a) of the Citizenship Act.

36 In particular, and more broadly, the respondents submitted that the applicants were within the class of persons whom the Parliament was entitled to consider aliens because, *semble*, they were not born in Australia to Australian parents.

37 It will be necessary to return to these submissions by the respondents. But first something more should be said respecting the concept of statelessness and the position of the applicants.

38 The aftermath of World War I saw the passage of mass "denationalisation" laws, particularly by the Soviet Union[18]. Even before that

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17 (2004) 219 CLR 562 at 571 [1].

18 See Williams, "Denationalization", (1927) 8 *The British Year Book of International Law* 45 at 46, where it is said that some two million people were deprived of their nationality by these laws. See as to the laws of Nazi Germany, *Oppenheimer v Cattermole* [1976] AC 249; Abel, "Denationalization", (1942) 6 *Modern Law Review* 57 at 59-61.

turn of events, it had been apparent that persons even at birth might be stateless[19] and thus lack the principal link by which they could derive benefits under international law from State protection. This could be a consequence of differing systems for nationality, based on the *ius soli* and the *ius sanguinis*. It is said in *Oppenheim's International Law*[20]:

> "An individual may be without nationality knowingly or unknowingly, intentionally or through no fault of his own. Even by birth a person may be stateless, as where an illegitimate child is born in a state which does not apply *ius soli* to an alien mother under whose national law the child does not acquire her nationality, or where a legitimate child is born in such a state to parents who have no nationality themselves."

39 The English common law was slow to recognise the significance of statelessness and its treatment for the purposes of alienage[21]. However, in 1921, Russell J declared[22]:

> "The dearth of direct authority in English law upon this point is not to be wondered at. In truth the question of statelessness can have seldom arisen as an important or practical question. The division into subjects and aliens is clear and sufficient for the ordinary purposes of the common law; and the stateless person would be one of the aliens. But the present case has raised the question, and, upon consideration of the arguments addressed to me and the statutory enactments before referred to, I hold that the condition of a stateless person is not a condition unrecognized by the municipal law of this country."

The objects of the power conferred by s 51(xix) of the Constitution thus may properly be seen to include as aliens those who are stateless persons of no nationality or who are, at least, ineligible to acquire a nationality.

40 The Citizenship Act makes special provision to prevent persons being stateless where they have been born in Australia but are not Australian citizens.

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19 Loewenfeld, "Status of Stateless Persons", (1941) 27 *Transactions of the Grotius Society* 59 at 60.

20 9th ed (1992), vol 1, §396.

21 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 596 [80]; Parry (ed), *A British Digest of International Law*, (1965), vol 6 at 3.

22 *Stoeck v Public Trustee* [1921] 2 Ch 67 at 81-82.

The side note to s 23D of the Citizenship Act reads "Special provisions to prevent persons being stateless". Section 23D(1) states:

> "The Minister shall, upon application made in accordance with the approved form for the grant of Australian citizenship to a person under this subsection and if the Minister is satisfied that the person:
>
> (a) was born in Australia;
>
> (b) is not, and has never been, a citizen of any country; and
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> (c) is not, and has never been, entitled to acquire the citizenship of a foreign country;
>
> register that person as prescribed as an Australian citizen, and the person is an Australian citizen as from the date upon which the registration is effected."

41 The criterion in par (c) of s 23D(1) respecting entitlement to acquire the citizenship of a foreign country is further explained in s 23D(1A). This states:

> "Where the Minister is satisfied that a person has or had reasonable prospects, at a particular time, of acquiring the citizenship of a foreign country if the person were to apply, or to have applied, at that time for the grant of such citizenship, the person shall be taken, for the purposes of subsection (1), to be or to have been entitled to acquire the citizenship of that country at that time."

42 Section 23D assumed its form as presently relevant after the enactment of the *Australian Citizenship Amendment Act* 1986 (Cth). On the Second Reading Speech in the House of Representatives on the Bill for that Act, the responsible Minister referred to amendments to s 10 of the Citizenship Act designed to produce the result, as it now stands, that automatic citizenship is restricted to a child born in Australia who has one parent who is either an Australian citizen or a permanent resident at the time of the child's birth[23]. The Minister continued[24]:

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23 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 February 1986 at 868.

24 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 February 1986 at 868.

> "Clause 8 of the Bill [which amended s 23D of the Citizenship Act] will ensure that a child born in Australia, who is not eligible to acquire Australian citizenship by birth, is an Australian citizen provided the child is not and never had been eligible to acquire the nationality or citizenship of another country. This will fulfil Australia's international obligations to prevent statelessness."

43 It will be apparent that, the external affairs power conferred by s 51(xxix) apart, such a law also, in so far as it alters what otherwise would be their status, is a law with respect to aliens.

44 The reference by the Minister to international obligations appears to have been to Art 1 of the Convention on the Reduction of Statelessness ("the Convention")[25], which was done at New York on 30 August 1961 and entered into force for Australia on 13 December 1975. Article 1(1) of the Convention reads:

> "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted:
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> (a) at birth, by operation of law, or
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> (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this Article, no such application may be rejected[26].

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25 *Australian Treaty Series*, (1975), No 46.

26 Paragraph (2) of Art 1 states:

> "A Contracting State may make the grant of its nationality in accordance with sub-paragraph (b) of paragraph 1 of this Article subject to one or more of the following conditions:
>
> (a) that the application is lodged during a period, fixed by the Contracting State, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years, so, however, that the person concerned shall be allowed at least one year during which he may himself make the application without having to obtain legal authorization to do so;

(Footnote continues on next page)

A Contracting State which provides for the grant of its nationality in accordance with sub-paragraph (b) of this paragraph may also provide for the grant of its nationality by operation of law at such age and subject to such conditions as may be prescribed by the national law."

45 If the applicants fail in their submission that they are not stateless because of what they assert is the constitutional consequence of their birth in Australia, they would, on their submission, be considered stateless. That, they concede, would be sufficient to attract to them the exercise of the power conferred by s 51(xix) and to support s 10(2)(a) of the Citizenship Act.

46 The question would then arise as to the applicability of s 23D. That in turn would require attention to the position of the applicants with respect to the law of Fiji. The issue would arise as to whether, given the terms of the case stated, the applicants fall outside s 23D because, in the terms of par (c) of s 23D(1), the Minister could not be satisfied that they are not entitled to acquire the citizenship of a foreign country. In any event, no application has been made under s 23D and it will be unnecessary for this appeal further to consider s 23D.

47 It is convenient now to return to the critical submission made by the applicants concerning Australian "constitutional citizenship".

48 There is support in the decisions of this Court neither for the "constitutional citizenship" of those born in Australia, nor for the retention of that character until supervening dissociation with the Australian community by the constitutional citizen. The applicants could point to no authority for those propositions. That absence of authority is not surprising because to accept the applicants' argument would cut across the now settled position that it is for the

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(b) that the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all;

(c) that the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge;

(d) that the person concerned has always been stateless."

Parliament, relying upon par (xix) of s 51 of the Constitution, to create and define the concept of Australian citizenship[27].

49 The consequence is that, on the terms of their own case, the applicants were born stateless and this was a relevant characteristic then rendering them aliens. That is a sufficient basis to dismiss the appeal.

50 However, another submission by the applicants also should be expressly rejected. This was that, in the circumstances of this case, the Fijian nationality of their parents could not be a "relevant characteristic", at least where the applicants as yet owed no allegiance to Fiji. The combination of criteria of place of birth and of descent found in par (a) of s 10(2) of the Citizenship Act is an instance of the subsequent legislative working out of the cross-currents between the approaches to concepts of alienage and citizenship understood in 1900.

51 We return to the respondents' submissions. It is unnecessary to express any view upon the respondents' submissions in their broadest form. This was that it was sufficient to attract the aliens power that a person was not born in Australia to Australian parents. No issue arises here respecting the status conferred by naturalisation nor respecting loss of citizenship with or without "denationalisation" as mentioned earlier in these reasons. Nor, given the presence of s 23D of the Citizenship Act, and the form of the case stated, is it necessary to consider any operation of the respondents' submissions to render persons born in Australia stateless.

52 Special leave should be granted, but the appeal should be dismissed with costs.

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27 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 173 [31], 180 [58], 188-189 [90], 192 [108]-[109], 215-216 [193]-[194], 219-220 [210]-[211], 229 [229].

53 KIRBY J. This is the latest in a series of cases in which this Court has been asked to clarify the meaning of the constitutional notion of alienage[28] and its antonym, the constitutional notion of Australian nationality.

Citizenship, alienage and nationality

54 In Australia, nationality is not expressed in the Constitution in terms of citizenship. Although the notion of citizenship is referred to in the Constitution for limited purposes, nationality, for historical reasons prevailing at the time the Constitution was adopted, connoted a different idea. Originally, that idea involved the status of being a "British subject". That was the nationality status generally operating throughout the British Empire in 1900, including in Australia[29]. When the Constitution was adopted, citizenship was commonly regarded as a notion apt for republics and not for membership of the community of a constitutional monarchy, such as Australia.

55 Citizenship is thus a later statutory notion in Australia. It was first introduced by the *Nationality and Citizenship Act* 1948 (Cth)[30]. For a time, the status of being a "British subject" and an "Australian citizen" continued side by side[31]. Now citizenship stands alone in the federal statute book.

56 Because of the evolution of the statutory expression of citizenship, and the gradual emergence of ideas of national independence and a distinctive national identity in Australia, it is easy to confuse the *statutory* status of citizenship with the *constitutional* status of nationality. In the Constitution, nationality is reflected expressly in provisions governing the qualification necessary to be elected to the Federal Parliament[32]; disqualification from holding such an office[33]

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28 Constitution, s 51(xix) (Naturalization and aliens).

29 Rubenstein, *Australian Citizenship Law in Context*, (2002) at 8, 10, 35. See *Singh v The Commonwealth* (2004) 78 ALJR 1383 at 1428 [214]; 209 ALR 355 at 417-418.

30 Renamed the *Australian Citizenship Act* 1948 (Cth) by the *Australian Citizenship Act* 1973 (Cth), s 1(3).

31 The status of "British subject" was removed by the *Australian Citizenship Amendment Act* 1984 (Cth), ss 7, 33 and 34. These provisions entered into force on 1 May 1987: s 2(2) and *Commonwealth of Australia Gazette*, S68, 24 April 1987. See *Re Paterson; Ex parte Taylor* (2001) 207 CLR 391 at 442 [153].

32 Constitution, s 34(ii) (House of Representatives); cf s 8 (Senate).

33 Constitution, s 44(i). See *Sue v Hill* (1999) 199 CLR 462 at 473 [5], 504 [100].

and a provision guaranteeing to a "subject of the Queen", resident in any Australian State, freedom from any disability or discrimination that would not be applicable if that person were a "subject of the Queen" resident in another State[34]. As well, in the covering clauses to the Constitution and in other provisions supplementary notions appear concerning the "people" of the Commonwealth and the "electors" of the Commonwealth, the latter alone enjoying the power to approve formal amendments to the Constitution by referendum[35].

The applicants' claim to Australian nationality

57 The applicants contest the right of the Commonwealth, acting through the Minister for Immigration and Multicultural and Indigenous Affairs (together "the respondents"), to remove them from Australia.

58 The scheme of the federal legislation, purporting to permit that course is found in the combined operation of the *Australian Citizenship Act* 1948 (Cth), s 10(2) and the *Migration Act* 1958 (Cth), s 189. Such provisions are expressed by reference to the statutory expressions "citizens", "lawful non-citizens" and "unlawful non-citizens". The applicants contest their removal on the basis that the respondents lack constitutional power to remove them. They deny that they are "aliens", within the meaning of that expression in the Constitution[36]. Certainly, they are not and never have been "immigrants"[37]. They were born in Australia. They assert that they are Australian nationals. They thus appeal to a higher law than the statutory provisions governing citizenship. They contend that they are protected by their Australian constitutional nationality so that, whatever the Federal Parliament has enacted in respect of "citizens", "lawful non-citizens" and "unlawful non-citizens", such enactments cannot adversely affect them.

59 The facts of the applicants' case[38] and the terms of the federal legislation invoked by the respondents[39] are set out in other reasons. There is no need for me to repeat this material. On the face of things, the applicants' case bears a

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34 Constitution, s 117.

35 Constitution, s 128.

36 Constitution, s 51(xix).

37 Constitution, s 51(xxvii).

38 Reasons of Gleeson CJ and Heydon J at [1]-[8]; reasons of Gummow, Hayne and Crennan JJ at [17]-[18].

39 Reasons of Gummow, Hayne and Crennan JJ at [19], [25].

strong resemblance to the arguments considered and decided in *Singh v The Commonwealth*[40]. This case is not complicated by reason of the applicants, through their parents or otherwise, being born British subjects or owing allegiance to the Queen in some other right[41]. The applicants' parents are nationals of the Republic of the Fiji Islands ("Fiji"). Fiji was formerly a dominion of the Crown. However, it severed that allegiance long before the applicants were born. Nor is this a case where the applicants could invoke, through their parents or otherwise, any other form of statutory Australian citizenship such as was granted in the Territory of Papua before its independence, impermanent though such citizenship proved to be[42].

60 The plaintiff in *Singh*, like the present applicants, was born in Australia. She also lived continuously in this country for six years before the determination of her case. This notwithstanding, this Court, by majority[43] held that she had no constitutional right to remain in Australia. The provisions of the *Australian Citizenship Act* and the *Migration Act* providing for her removal as an unlawful "non-citizen" were valid. They were sustained, in her case, by the "aliens" power in the Constitution, s 51(xix). That power was not confined to notions of alienage as it was understood in the United Kingdom and other common law countries at the time the Australian Constitution was adopted. At such time, that notion had substantially been confined to the acquisition of nationality by virtue of the person's place of birth within the Crown's dominions (*jus soli*) rather than as a right of blood, acquired by lineage through the child's parents, usually its father (*jus sanguinis*)[44].

61 It is inherent in the outcome of *Singh* that the majority of this Court rejected a constitutional notion of Australian nationality defined by reference to a place of birth in Australia. Had that notion been adopted, Ms Singh could not have been removed as an "alien". Legislation providing for her removal, expressed in terms of her status as a statutory non-citizen, could not then have prevailed over her constitutional rights of nationality. The fact that this Court's

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40 (2004) 78 ALJR 1383; 209 ALR 355.

41 Considered in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

42 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 79 ALJR 1309; 218 ALR 483.

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

44 But see *Singh* (2004) 78 ALJR 1383 at 1403 [81]-[82]; 209 ALR 355 at 382-383.

decision was adverse to Ms Singh indicates that such a view of constitutional nationality (and its antonym, alienage) was rejected.

62 The reasons for the rejection of the constitutional idea of nationality as a birthright were differently expressed in the several reasons in *Singh*. However, basically, they reflected the recognition by all members of the majority, that, at the time the Constitution was written and thereafter, two criteria for nationality by birth existed in the world – *jus soli* and *jus sanguinis*. In that circumstance, consistent with the accepted norms for the construction of the Australian Constitution, notions of alienage and of nationality could adapt, as Parliament provided, by reference to one, both or a mixture of these competing approaches, so long as the persons designated as "aliens" truly answered that description in accordance with the judgment of this Court[45].

63 Given the apparent similarity in the essential facts of this case and those of *Singh*, how, then, do the applicants seek to distinguish their entitlements to be free from removal from Australia from those found adversely to Ms Singh?

64 The applicants relied on the point of distinction that, when Ms Singh was born, by the law of the nationality of both of her parents (India), she was automatically entitled to Indian citizenship by descent[46]. The applicants therefore submitted that, at birth, Ms Singh owed allegiance to a foreign nation, India. She could not (without enabling Australian legislation applicable to her case) concurrently owe allegiance to Australia as well as India. No enabling legislation so provided in her case.

65 In these proceedings, the applicants argued that, at the moment of their birth and to the present time, they owed no competing allegiance to (nor were they citizens of) any other foreign state. If they were not nationals of Australia, they would be stateless persons. And because international law reflects an international abhorrence towards statelessness[47], the impediment to the recognition of Australian nationality (and the denial of alienage) present in *Singh* should cause no obstacle in the applicants' cases. In their cases, as they put it, they owed allegiance to, and only to, Australia. Constitutionally speaking, they

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45 *Pochi v Macphee* (1982) 151 CLR 101 at 109.

46 *Singh* (2004) 78 ALJR 1383 at 1428 [209]; 209 ALR 355 at 416-417, citing *Citizenship Act* 1955 (India), s 4 (as in 1998).

47 Now given effect by the Convention on the Reduction of Statelessness, done at New York on 30 August 1961 in accordance with General Assembly Resolution 896(IX), 4 December 1954 and entered into force with respect to Australia on 13 December 1975: see [1975] ATS 46.

were thus Australian nationals. They were not aliens. They were not, therefore, subject to removal from Australia on the grounds of their lack of statutory status as "citizens". The Parliament's attempt to so provide lacked support in the Constitution and was inconsistent with the Constitution's terms.

Background of international law on nationality

66 In the present age, I accept that the Australian constitutional notions of alienage and nationality are to be understood in the context of any universal principles of fundamental human rights applicable to and accepted by, the community of civilised nations[48]. Thus, the Supreme Court of the United States, in elucidating the Eighth Amendment to the United States Constitution, has taken into account the virtually unanimous opposition of "the civilized nations of the world" to punishments that inflict statelessness on the offender[49]. In deriving the meaning of the word "aliens" in the Australian Constitution, and an understanding of the constitutional notion of nationality, this Court may have regard to applicable principles of international law. They are not binding as a rule of law is. However, they provide an often useful context for the exposition of what Australian law requires. The relevant principles of international law include the terms of Art 15 of the Universal Declaration of Human Rights[50]. This provides:

> "(1) Everyone has the right to a nationality.
>
> (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

67 Similarly, Art 24.3 of the International Covenant on Civil and Political Rights ("the ICCPR")[51], to which Australia is a party, provides:

> "Every child has the right to acquire a nationality."

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48 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 624 [174]-[175] referring to *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 658.

49 *Trop v Dulles* 356 US 86 at 102-103 (1958); cf *Roper v Simmons* 543 US 551 at 575 (2005).

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

51 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.

68 To like effect are Arts 7 and 8 of the Convention on the Rights of the Child ("the CRC")[52], to which Australia is a party. Relevantly, these provide:

> "7.1 The child shall be registered immediately after birth and shall have the right from birth to a name [and] the right to acquire a nationality …
>
> 7.2 States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.
>
> 8.1 States Parties undertake to respect the right of the child to preserve his or her identity, including nationality … as recognized by law without unlawful interference.
>
> 8.2 Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

69 The foregoing provisions of international law afford the background against which the particular provisions of the Convention on the Reduction of Statelessness ("the CRS") were adopted[53]. I will not repeat the provisions of the applicable articles of that Convention. They too are set out in other reasons. Clearly, the Convention was designed as one of several treaty provisions adopted by the international community, including Australia, to carry into effect the principles stated in the Universal Declaration of Human Rights.

70 In the absence of clear textual obstacles, this Court should, so far as possible, adopt a meaning of the Australian constitutional concepts of alienage and nationality which is compatible with these basic statements of international law[54]. We should do so because, today, our Constitution operates in a world that

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52 Adopted and opened for signature by the United Nations General Assembly, Resolution 44/25, 20 November 1989; entered into force on 2 September 1990 in accordance with Art 49. Entered into force with respect to Australia 16 January 1991: see [1991] ATS 4.

53 See reasons of Gummow, Hayne and Crennan JJ at [44].

54 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; *Al-Kateb* (2004) 219 CLR 562 at 622-624 [167]-[176].

is shaped and informed by international law, especially by the international law of human rights as it expresses universal human values.

The binding force of the decision in *Singh*

71 *A possible factual difference*: Nevertheless, there are two impediments to the acceptance of the applicants' arguments concerning the ambit of the two Australian constitutional concepts in issue in this case.

72 The first is a factual impediment. It concerns the specific principle for which this Court's decision in *Singh* stands. It has been assumed that *Singh* was a case of competing allegiance on the basis that Ms Singh was, from birth, a citizen of another country, India, and for that reason was not capable, without legislative facilitation, of becoming and being a national of Australia. I do not pause to question how, in the context of Australian constitutional notions, a statutory provision in the law of India, concerning the status of Ms Singh, could necessarily exclude the application to her, in an Australian court, of Australian constitutional notions of nationality. That problem was not addressed in *Singh*. Presumably this was because of concentration by the Court on the ambit of the power to make laws with respect to "aliens" instead of addressing the positive attributes of Australian nationality which Ms Singh, by inference, was claiming.

73 Most members of the majority in *Singh*[55] accepted that Ms Singh was a citizen of India by descent from her parents. However, in my reasons in *Singh*[56], I noted amendments to the *Citizenship Act* 1955 (India) effected in 2003[57]. Those amendments provided that a person, such as Ms Singh, who was "born outside India", where either parent was a citizen of India, would become a citizen of India only if their "birth is registered at an Indian consulate"[58]. If such a provision applied to Ms Singh, it would have placed her in a legal position very similar to (if not identical with) that of the present applicants. Indeed, the acquisition of nationality ("citizenship") in the case of children born overseas, by a procedure of registration at a designated foreign mission of, or authorised by, the country of the parents' nationality is not at all unusual. It is a matter of common international practice. Thus, s 10B of the *Australian Citizenship Act* provides for the acquisition of Australian citizenship by descent where

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55 (2004) 78 ALJR 1383 at 1384 [2] per Gleeson CJ, 1416 [142] per Gummow, Hayne and Heydon JJ; 209 ALR 355 at 356, 400.

56 (2004) 78 ALJR 1383 at 1428 [210]; 209 ALR 355 at 417.

57 *Citizenship (Amendment) Act* 2003 (India) noted in *Gazette of India* [2004] AIR (Acts) 7.

58 *Citizenship (Amendment) Act* 2003 (India), s 4(1).

designated persons register the birth of a child born outside Australia to an Australian parent.

74 Whatever might have been the facts concerning the Indian citizenship status of Ms Singh when she was born in Australia, whether she was assumed to be a citizen of India at her birth and whether, in default of registration, she lost or had lawfully disclaimed that citizenship at the time of the hearing in this Court, it is appropriate to treat the authority of *Singh* as confined to a case where, as was accepted by the majority, the child born in Australia owed a foreign allegiance because of the acquisition at birth, by descent under the *jus sanguinis* from a parent, of the nationality of another country. On this footing, as a matter of legal analysis, the decision in *Singh* does not require the same decision in the applicants' case. It is distinguishable. It does not govern the disposition of this application.

75 *Not a case of statelessness*: This conclusion leaves a remaining obstacle in the way of the applicants. As the provisions of the Constitution of Fiji make clear, the primary rule[59] for nationality of a child born to Fijian parents (apart from a child of diplomats or of parents neither of whom is a citizen) is stated thus: "Every child born in Fiji … becomes a citizen at the date of birth". The secondary rule is citizenship by registration. Section 12 of the Constitution of Fiji provides:

> "(1) A child born outside Fiji … may become a citizen by registration if, at the date of the child's birth, either parent was a citizen.
>
> ...
>
> (4) An application for registration under subsection (1) … may be made at any time during the child's lifetime and, if he or she is under the age of 21 at the date of the application, may be made on his or her behalf by a parent or guardian."

76 The parents of the applicants have taken no steps to register the applicants as citizens of Fiji. They assert that they have no intention of doing so. However, under the Constitution of Fiji, the child itself may at any time during its lifetime apply for registration. Any such child is thus entitled to citizenship save in certain limited circumstances[60].

77 In the agreed facts, on the face of the Constitution of Fiji, a person, such as either of the applicants (or a parent or guardian on their behalf) who sought

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59 Fiji Constitution, s 10.

60 Fiji Constitution, s 12(5), (6), (7) and (8).

registration of the applicants, or either of them, as citizens of Fiji, would have an enforceable legal entitlement to secure that registration and thus to obtain Fijian citizenship for them. At least, this would be so at the applicants' present respective ages and during their state of immaturity. There would be no impediment. The nationality status of the parents would meet the specified constitutional preconditions. The contrary was not suggested.

78 These circumstances therefore demonstrate that, as a legal and practical matter, there is no risk that an interpretation of the Australian Constitution which denied the applicants Australian nationality and treated them as "aliens" for Australian constitutional purposes, would condemn them to an international status of statelessness. In the applicants' cases, such status could readily be cured by the parents, acting in the applicants' best interests, performing the simple act of registration which is an entitlement belonging to both of the applicants by reason of the citizenship of their parents. It follows that this is not a true case of statelessness, such as was presented to this Court in *Al-Kateb v Godwin*[61]. In this case, the consideration of potential statelessness can therefore be ignored.

The ordinary understanding of the word "aliens"

79 These conclusions bring me to the last issue. This is whether it is constitutionally impermissible for Australia to insist, in effect, that the applicants should acquire Fijian nationality, contrary to the wishes and intentions of their parents pursuing what they presumably conceive to be in the applicants' best interests.

80 The only way this question could be answered in the affirmative is if it were shown that, by their birth in Australia without any other present nationality, the applicants acquired the constitutional status of Australian nationality and thus necessarily fell outside the constitutional status of "aliens". However, that proposition cannot stand with the holding of this Court in *Singh*. If, as was decided there, the content of the "aliens" power (its "denotation") could, after federation, expand in some limited circumstances to include certain persons born in Australia, the constitutionally protected notion of nationality would contract to the identical extent. Legislative expressions of nationality, articulated in terms of citizenship would, to that extent, be valid. The interlocking provisions of s 10(2) of the *Australian Citizenship Act* and s 189 of the *Migration Act* would, under the constitutional powers so explained, be sufficient to authorise the respondents' asserted power to remove the applicants from Australia as "unlawful non-citizens".

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61 (2004) 219 CLR 562 at 596 [79]-[80].

81 It only remains to say, once again, as Gibbs CJ did in *Pochi v Macphee*[62], that the Federal Parliament cannot "simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word". This Court stands as a guardian against any parliamentary attempt to impose on the words artificial or extreme meanings of the kind postulated in *Pochi*[63].

82 However, as in *Singh*, so in this case. The effect of the operation of s 10(2) of the *Australian Citizenship Act* on the applicants is not extreme, whether viewed from the standpoint of developments of the notions of alienage and nationality in Australian constitutional law or in the law of other nations, as recognised by international law. In particular, it is not extreme because it denies the applicant children a right to acquire a nationality to which they are entitled or because it subjects them to a condition of statelessness in international law. They are not stateless. They are entitled, immediately on registration, to acquire the nationality of their parents – the citizenship of Fiji. It will be noticed that the statements of international law subsequent to the Universal Declaration of Human Rights are not expressed in terms of a "right to nationality" as such but of a "right to acquire a nationality"[64] or to be granted nationality[65]. The applicants undoubtedly now enjoy the right to acquire Fijian nationality. They are not stateless.

Conclusion and orders

83 The Full Court of the Federal Court of Australia was therefore correct in its conclusion that the applicants are "aliens" within the meaning of s 51(xix) of the Constitution. They are not constitutionally protected nationals of Australia. This conclusion is not necessarily determinative of any other entitlements which the applicants may enjoy.

84 Special leave to appeal should be granted; but the appeal should be dismissed with costs.

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62 (1982) 151 CLR 101 at 109.

63 See *Singh* (2004) 78 ALJR 1383 at 1438 [267]-[269]; 209 ALR 355 at 431.

64 Art 24.3 of the ICCPR and Art 7.1 of the CRC set out above in these reasons at [67]-[68].

65 Art 1 of the CRS set out in the reasons of Gummow, Hayne and Crennan JJ at [44].

85 CALLINAN J. The recent decision of this Court is *Singh v The Commonwealth*[66] and its application to other cases can produce unhappy results. This is one. Both of the applicants are infants who were born in Australia and have always lived here. They are siblings. Their three siblings are Australian citizens. Their parents are Fijian nationals. They can become Fijian citizens by registration[67]. They are effectively stateless persons, absent registration or success in these proceedings. As the joint judgment of Gummow, Hayne and Crennan JJ points out they do not however satisfy the criteria prescribed by s 10 of the *Australian Citizenship Act* 1948 (Cth) ("the Act").

86 If I were free to do so I would find in favour of the applicants for the reasons given by McHugh J and myself in *Singh*. I must accept however that *Singh* is a very recent decision of the Court and is authority for the propositions stated in the joint judgment of Gummow, Hayne and Crennan JJ[68]. This case is, I must also accept, relevantly indistinguishable from *Singh* in the application of the Act to it. Accordingly I am bound to and would join in the orders proposed by their Honours.

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66 (2004) 78 ALJR 1383; 209 ALR 355.

67 Constitution of the Republic of the Fiji Islands, s 12(1).

68 At [28].