HIGH COURT OF AUSTRALIA

NETTLE J

FREDERICK CHETCUTI PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA DEFENDANT

Chetcuti v Commonwealth of Australia
[2020] HCA 42
Date of Hearing: 13 November 2020
Date of Judgment: 26 November 2020
M56/2020

ORDER

1. *There be judgment for the defendant.*

2. *The plaintiff's claim made by writ of summons filed 12 June 2020 is dismissed.*

3. *The plaintiff pay the defendant's costs of the proceeding.*

Representation

G L Schoff QC with G A Costello QC, A Aleksov and K E Slack for the plaintiff (instructed by Lawson Bayly)

S P Donaghue QC, Solicitor-General of the Commonwealth, with C L Lenehan SC and Z C Heger for the defendant (instructed by Australian Government Solicitor)

CATCHWORDS

Chetcuti v Commonwealth of Australia

Constitutional law (Cth) – Powers of Commonwealth Parliament – Naturalisation and aliens – Deportation – Where plaintiff entered Australia in 1948, before commencement of *Nationality and Citizenship Act 1948* (Cth) – Where plaintiff born in Malta and entered Australia as a British subject – Where plaintiff became citizen of United Kingdom and Colonies in 1949 and then Malta in 1964 – Whether within power of Parliament to treat plaintiff as an alien within meaning of s 51(xix) of *Constitution* – Whether plaintiff entered Australia as an alien.

Words and phrases – "alien", "alienage", "aliens power", "allegiance", "Australian independence", "British subject", "citizen", "citizenship", "Crown in right of Australia", "foreign power", "independent sovereign nation", "non-citizen resident British subject", "permanent allegiance", "permanent protection", "Queen of Australia", "sovereign power", "treat as an alien".

Constitution, s 51(xix).
Migration Act 1958 (Cth), s 501.
Nationality and Citizenship Act 1948 (Cth).
Statute of Westminster 1931 (Imp).
Statute of Westminster Adoption Act 1942 (Cth).

1 NETTLE J. The plaintiff was born in Mosta, which is situated in present day Malta, on 8 August 1945 as a British subject. He arrived in Australia on 31 July 1948 and, except for a visit back to Malta between November 1958 and July 1959, he has since resided in Australia. Since 1 September 1994, he has held an Absorbed Person visa. On 2 July 2019, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs cancelled the plaintiff's visa pursuant to s 501(3) of the *Migration Act 1958* (Cth), and the plaintiff is now in immigration detention pursuant to s 189 of the *Migration Act* pending his removal to Malta. By Writ of Summons filed on 12 June 2020, the plaintiff claims a declaration in effect that, because he arrived in Australia as a British subject before the commencement of the *Nationality and Citizenship Act 1948* (Cth), he is not an alien within the meaning of s 51(xix) of the *Constitution* and cannot lawfully be detained or removed from Australia as an unlawful non-citizen. For the reasons which follow, the plaintiff's claim must be rejected.

The facts

2 The agreed facts are as follows. In 1801, Malta was proclaimed a British protectorate. On 15 June 1802, a body known as the "Consiglio Popolare" ("popular council") of the islands of Malta and Gozo, being an early form of representative government for those islands, issued a document known as the "Declaration of Rights". The Declaration of Rights declared, inter alia: "That the King of the United Kingdom of Great Britain and Ireland is our Sovereign Lord, and His lawful successors shall, in all times to come, be acknowledged as our lawful sovereigns".

3 In 1814, British sovereignty over Malta was recognised by Art VII of the Treaty of Paris, which stated that: "The Island of Malta and its Dependencies shall belong in full right and Sovereignty to His Britannic Majesty".

4 In 1914, the *British Nationality and Status of Aliens Act 1914* (UK) was enacted, which provided, inter alia, that any person born within His Majesty's dominions and allegiance was deemed to be a natural-born British subject, but that any such person, who at his birth or during his minority became under the law of any foreign state a subject also of that state, and was still such a subject, could, if of full age and not under disability, make a declaration of alienage, and on making the declaration would thereby cease to be a British subject[1].

5 On 30 July 1948, the Parliament of the United Kingdom enacted the *British Nationality Act 1948* (UK), which provided, inter alia, that a person who was a British subject immediately before the date of commencement of the Act,

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1 *British Nationality and Status of Aliens Act 1914* (UK), ss 1(1)(a), 14(1).

by reason of having been born within the territory comprised at the commencement of the Act in the United Kingdom and Colonies, would, on that date, become a citizen of the United Kingdom and Colonies and, by virtue of that citizenship, retain the status of a British subject[2].

6 By reason of the plaintiff's birth in Malta on 8 August 1945, he was born a British subject, and, on 1 January 1949, upon the commencement of the *British Nationality Act 1948*, he became a citizen of the United Kingdom and Colonies with the status of a British subject.

7 On 31 July 1948, he arrived in Australia on a British passport and commenced living in Australia. Thereafter, until now, he has resided continuously in Australia except for a period of time between 22 November 1958 and 19 July 1959 when he travelled to Malta.

8 On 21 September 1964, upon the commencement of the *Malta Independence Act 1964* (UK), the State of Malta came into being as an independent nation and, on the same day, pursuant to the *Malta Independence Order 1964*, the Constitution of Malta came into effect. By s 23, the Constitution of Malta relevantly provided that every person born in Malta, who was on the day before the commencement of the Constitution a citizen of the United Kingdom and Colonies, became a citizen of Malta on and from the commencement of the Constitution. Accordingly, the plaintiff became a Maltese citizen on 21 September 1964.

9 On 28 April 1993, the plaintiff was convicted in the Supreme Court of New South Wales of murder and, on 25 June 1993, was sentenced therefor to imprisonment for 24 years with a minimum term of 18 years.

10 On 27 November 2008, the plaintiff was notified by the Department of Immigration and Citizenship that his Absorbed Person visa was liable to cancellation under s 501(2) of the *Migration Act*, but he made no response to that notification.

11 On 22 June 2009, a delegate of the Minister for the Department of Immigration and Citizenship decided not to exercise the discretion under s 501(2) to cancel the visa. By letter notifying the plaintiff of that decision, the plaintiff was advised that his visa could be cancelled if "fresh information comes to notice or you incur a liability on new grounds".

12 On 6 April 2011, the plaintiff was convicted in the Burwood Local Court of assault occasioning actual bodily harm and sentenced therefor to two years'

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2 *British Nationality Act 1948* (UK), ss 1(1), 12(1).

imprisonment, to be served concurrently with the sentence of 24 years which he was serving for murder.

13 On 23 September 2011, the plaintiff was notified by the Department of Immigration and Citizenship that his Absorbed Person visa was liable to cancellation under s 501(2) of the *Migration Act*, but he made no response to that notification.

14 On 22 March 2012, the then Minister for Immigration and Citizenship, the Hon Christopher Bowen MP, acting personally, decided not to exercise the discretion under s 501(2) to cancel the plaintiff's visa. As before, by letter notifying the plaintiff of the decision, the plaintiff was advised that "visa cancellation may be reconsidered if you commit further offences or otherwise breach the character test in future".

15 On 28 March 2017, one month before the plaintiff completed the 24-year term of imprisonment, the then Minister for Immigration and Border Protection, the Hon Peter Dutton MP, acting personally, decided to cancel the plaintiff's Absorbed Person visa ("the first cancellation decision") on the grounds that:

(a) the Minister suspected that the plaintiff did not pass the character test because he had a substantial criminal record in that he had been sentenced to a period of imprisonment of 12 months or more within the meaning of s 501(7)(c) of the *Migration Act*; and

(b) the plaintiff did not satisfy the Minister that the plaintiff did pass the character test.

16 On 27 April 2017, the plaintiff completed the sentence of 24 years' imprisonment and was released into immigration detention, but, on 14 August 2017, Rares J of the Federal Court of Australia quashed the first cancellation decision by consent[3].

17 On 14 August 2017, minutes after the first cancellation decision was so quashed, the Minister, again acting personally, decided to cancel the plaintiff's Absorbed Person visa under s 501(3) of the *Migration Act* ("the second cancellation decision") on the grounds that:

(a) the Minister suspected that the plaintiff did not pass the character test because he had a substantial criminal record in that he had been sentenced

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3 See *Chetcuti v Minister for Immigration and Border Protection* [2018] FCA 477 at [2].

to a period of imprisonment of 12 months or more within the meaning of s 501(7)(c) of the *Migration Act*; and

(b) the Minister was satisfied that the cancellation "was in the national interest".

18 On 11 April 2018, Rares J dismissed the plaintiff's application for judicial review of the second cancellation decision, but, on appeal, the Full Court of the Federal Court allowed the appeal on 2 July 2019 and quashed the second cancellation decision[4].

19 On 2 July 2019, after the Full Court quashed the second cancellation decision, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Hon David Coleman MP, decided to cancel the plaintiff's Absorbed Person visa ("the third cancellation decision") on the grounds that:

(a) the Minister suspected that the plaintiff did not pass the character test because he had a substantial criminal record in that he had been sentenced to a period of imprisonment of 12 months or more within the meaning of s 501(7)(c) of the *Migration Act*; and

(b) the Minister was satisfied that the cancellation "was in the national interest".

20 Thereafter, the plaintiff applied to the Federal Court for judicial review of the third cancellation decision. The application was heard by Bromberg J on 24 March 2020, but, as of today, his Honour's decision still stands reserved.

The plaintiff's contentions

21 In brief substance, the plaintiff contended that, because he had the status of a British subject at the time of his arrival in Australia, he could not then have been conceived of as an "alien" in the ordinary understanding of the term, and thereby acquired the status of a non-alien, and thus, he remains outside the reach of s 51(xix) of the *Constitution*. The plaintiff accepted that, at least since his arrival in Australia, the denotation of "alien" has changed as the result of Australia's emergence as an independent sovereign power and the identification of the Crown in right of Australia as distinct from the formerly undivided Imperial Crown. But he argued that, because he arrived before "the sovereign of Australia and Britain ... [became] divisible ... he owed allegiance to the same sovereign" and that, because – the plaintiff contended – he has taken no active step to sever his allegiance to the Crown in right of Australia, he cannot now be regarded as an alien.

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4 See *Chetcuti v Minister for Immigration and Border Protection* (2019) 270 FCR 335.

The defendant's contentions

22 The defendant contended that, even if the plaintiff could not have been conceived of as an alien according to the ordinary understanding of the term at the time of his arrival in Australia, the Parliament's power to treat the plaintiff as an alien was not frozen at that point in time. Rather, Commonwealth legislative power with respect to aliens has evolved over time in accordance with the changing ordinary understanding of "alien" consequent upon Australia's emergence as an independent sovereign nation and the recognition of the Crown in right of Australia as distinct from the Crown in right of other sovereign powers.

23 In the alternative, the defendant contended that, either by the time of the plaintiff's birth in 1945, or by the time of the plaintiff's arrival in Australia in 1948, Australia had already emerged as an independent sovereign nation, and that, because the plaintiff, as a British subject born in Malta, owed his allegiance to the United Kingdom, *ex hypothesi* a foreign power, it was within the legislative competence of the Parliament to treat the plaintiff as an alien from the time of his arrival in this country.

24 In the further alternative, the defendant contended that, from the time of Federation in 1901, and thus the creation of the Australian body politic, it was open to the Parliament to treat British subjects born abroad as aliens.

Alienage

25 As was observed by Gibbs CJ in *Pochi v Macphee*[5], and later confirmed by a majority of six Justices in *Nolan v Minister for Immigration and Ethnic Affairs*[6], s 51(xix) of the *Constitution* confers a wide power to legislate with respect to aliens and is to be construed with all the generality that its terms allow. The only limit is that Parliament may not treat as an alien someone who cannot possibly be regarded as an alien in the ordinary understanding of that term[7]. Thus, generally speaking, it is within the legislative competence of the Parliament to treat as an alien any

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5 (1982) 151 CLR 101 at 109.

6 (1988) 165 CLR 178 at 185-186 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ. See also *Singh v The Commonwealth* (2004) 222 CLR 322 at 384 [155] per Gummow, Hayne and Heydon JJ.

7 *Pochi v Macphee* (1982) 151 CLR 101 at 109 per Gibbs CJ.

person who was born outside Australia, whose parents were not Australians, and who has not been naturalised[8].

26 Assuming for the sake of argument that the plaintiff could not have been treated as an alien when he arrived in Australia in 1948 (on the basis of the supposition that non-citizen British subjects could not then have been conceived of as aliens in the ordinary understanding of the term), there is no question that the ordinary understanding of "alien" has changed since then to include non-citizen resident British subjects[9]. If so, what is there to prevent Parliament presently giving effect to that change by treating the plaintiff as an alien and, by the relevant provisions of the *Migration Act*, attaching consequences to him holding that status?

The significance of *Patterson*

27 The plaintiff called in aid the decision of a majority in *Re Patterson; Ex parte Taylor*[10] that, at the end of the evolutionary process that resulted in the emergence of Australia as an independent sovereign nation and the consequent constitutional recognition of the Queen in right of Australia – as distinct from the Queen of the United Kingdom – non-citizen British subjects then resident in Australia retained their status as non-aliens.

28 The problem with that, however, as four members of the Court subsequently observed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[11], is that the majority judgments in *Patterson* did not yield a binding statement of principle and there were differing views among the majority as to the facts that were material to the decision. As was later held by the plurality in *Shaw v Minister for Immigration and Multicultural Affairs*[12], *Patterson* is now properly to be regarded as authority only for what it decided respecting s 64 of the *Constitution*

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8 *Pochi* (1982) 151 CLR 101 at 109-110 per Gibbs CJ; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

9 See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 38-42 [14]-[28] per Gleeson CJ, Gummow and Hayne JJ.

10 (2001) 207 CLR 391 at 411-412 [46]-[51] per Gaudron J, 432 [123]-[124] per McHugh J, 493-494 [306]-[308] per Kirby J, 517 [371]-[373] per Callinan J.

11 (2002) 212 CLR 162 at 170 [17]-[19] per Gleeson CJ, 187-188 [86]-[88] per McHugh J, 200 [136] per Gummow J, 220 [211] per Hayne J.

12 (2003) 218 CLR 28 at 44-45 [35]-[39] per Gleeson CJ, Gummow and Hayne JJ, see also at 47 [49] per McHugh J, 56 [78] per Kirby J.

and the constructive failure by the Minister to exercise a discretion[13]. *Nolan* remains authoritative, as was later confirmed in *Singh v The Commonwealth*[14].

29 The plaintiff submitted that *Singh* should not be followed. But even if it were open to me, sitting alone, to depart from the authority of that decision[15], I should not be disposed to do so. As I endeavoured to make plain in *Love v The Commonwealth*[16], I consider that *Singh* was correctly decided.

The significance of the plaintiff's time of arrival in Australia

30 Admittedly, as the plaintiff contended, neither *Nolan* nor *Shaw* was expressly concerned with a non-citizen resident British subject who *ex hypothesi* arrived in Australia at a time before the ordinary understanding of "alien" changed to include a British subject born outside Australia, whose parents were not Australians, and who had not been naturalised. It is also to be acknowledged, as the plaintiff emphasised, that the plurality's conclusion in *Shaw* was carefully expressed[17] as determining only that the aliens power extends *at least* to all such persons who entered this country after the commencement of the *Nationality and Citizenship Act* on 26 January 1949.

31 Critically, however, what also emerges from *Nolan*, *Shaw* and *Pochi* is that, just as the denotation of alienage evolved over time, so, too, did the legislative competence of the Parliament to treat as an alien a non-citizen resident British subject notwithstanding that such a person may not previously have been conceived of as an alien in the ordinary understanding of the term.

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13 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 199 [132] per Gummow J.

14 (2004) 222 CLR 322 at 400 [204]-[205] per Gummow, Hayne and Heydon JJ.

15 cf *Re Australian Nursing Federation; Ex parte Victoria [No 2]* (1993) 67 ALJR 571 at 575 per McHugh J; *Free v Kelly [No 1]* (1996) 138 ALR 646 at 646-647 per Brennan CJ; *Ha v New South Wales* (1996) 70 ALJR 611 at 614 per Kirby J; 137 ALR 40 at 44.

16 (2020) 94 ALJR 198 at 247-248 [250]-[254]; 375 ALR 597 at 656-657.

17 See *Shaw* (2003) 218 CLR 28 at 40 [20], 43 [32] per Gleeson CJ, Gummow and Hayne JJ.

32 In *Patterson*, McHugh J[18], and also in effect Callinan J[19], held that, because it was accepted that, on completion of the evolution resulting in recognition of the Crown in right of Australia, resident subjects of the Queen who had been born in Australia thenceforth owed allegiance to the Queen of Australia (and so remained beyond the reach of the aliens power), it was only logical that, thenceforth, Australian resident subjects of the Queen born outside Australia should also be conceived of as owing allegiance to the Queen of Australia (and so likewise remained beyond the reach of the aliens power). But, with respect, there was a logical basis of distinction between those classes of persons in that non-citizen subjects of the Queen born outside Australia continued to owe obligations of allegiance to the Queen in right of the United Kingdom[20], and so continued to owe allegiance to what, as a result of the process of evolution, had become a foreign sovereign power[21]. Of course, that did not mean that Parliament was *bound* to treat such persons as aliens – as the later emergent ubiquity of dual citizenship attests[22]. But the completion of that evolution does mean that it was *open* to Parliament to do so on the basis laid down in *Nolan*: that a non-citizen born abroad, to parents who were not Australians, and thus owing allegiance to a foreign power, is, generally speaking, not beyond the scope of Commonwealth legislative power with respect to "aliens", in the ordinary, contemporary understanding of that term.

33 In *Nolan*[23], and later again in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[24] and *Patterson*[25], Gaudron J reasoned differently from McHugh J and Callinan J, albeit to a similar end, that Parliament's legislative power with respect to aliens did not extend to a non-citizen resident

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18 (2001) 207 CLR 391 at 435-437 [131]-[135].

19 (2001) 207 CLR 391 at 517 [373].

20 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 436 [135] per McHugh J.

21 See *Sue v Hill* (1999) 199 CLR 462 at 503 [96] per Gleeson CJ, Gummow and Hayne JJ. See also Twomey, "*Sue v Hill* – The Evolution of Australian Independence", in Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 77.

22 See *Love v The Commonwealth* (2020) 94 ALJR 198 at 250 [263] per Nettle J; 375 ALR 597 at 660.

23 (1988) 165 CLR 178 at 192-193.

24 (1992) 176 CLR 1 at 54.

25 (2001) 207 CLR 391 at 412 [50].

British subject who had entered Australia before completion of the evolutionary process resulting in recognition of the Crown in right of Australia, unless there had been some change in the relationship between the individual and the Australian body politic, and that "[m]ere change in constitutional and legal thinking with respect to the Crown"[26] could not, of itself, effect a change in the relationship between the individual and the Australian body politic.

34 That reasoning, however, proceeded from a false premise that allegiance to the Sovereign was no longer the criterion of membership of the Australian body politic. In *Singh*[27], Gummow, Hayne and Heydon JJ stated that owing an obligation of allegiance to a sovereign power other than Australia is the central characteristic of alienage. But, as the defendant submitted, that statement requires some explanation. The proposition is more accurately expressed in terms that the central characteristic of alienage is a want of permanent allegiance to Australia and thus the absence of a correlative obligation of permanent protection on the part of Australia[28]. Although both formulations of the proposition reflect the same historical considerations, and, except in a case of dual citizenship, will almost inevitably conduce to the same conclusion, the formulation in *Love* more accurately reflects the historical effects of Empire and of the *Naturalization Act 1870* (UK), and the consequent or coincident judicial recognition in the decades leading up to Federation that the essence of alienage was the want of permanent allegiance to the Sovereign. The absence of permanent allegiance to Australia is the essence of alienage.

35 Furthermore, as Gummow and Hayne JJ had earlier posited in *Patterson*[29], and as was later affirmed by six Justices of the Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*[30], although questions of allegiance and alienage require identification of a relationship between the individual and the sovereign power in question, coming or ceasing to be within the ambit of the aliens power does not in every case depend on joint action on the part of both parties to the relationship: "persons may acquire the status or character of alienage by reason of supervening constitutional and political events not involving any positive act or assent on the part of the person concerned",

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26 *Patterson* (2001) 207 CLR 391 at 412 [50].

27 (2004) 222 CLR 322 at 398 [200].

28 *Love* (2020) 94 ALJR 198 at 245-247 [245]-[250]; 375 ALR 597 at 653-656.

29 (2001) 207 CLR 391 at 468-469 [235].

30 (2005) 222 CLR 439 at 458-459 [35] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

or the individual or the sovereign power may so act unilaterally as to cause the individual to become amenable to an exercise of legislative power under s 51(xix) of the *Constitution*. Accordingly, as their Honours held in *Patterson*[31], upon completion of the evolutionary process that resulted in Australia becoming an independent sovereign nation and the recognition of the Crown in right of Australia, there ceased to be any notion of allegiance to a unified Imperial Crown that might previously have restrained the exercise of legislative power to withdraw the status of non-alien from a non-citizen resident who had earlier been permitted to enter Australia as a British subject.

36 Moreover, in the plaintiff's case, it is not just that, on Australia's emergence as an independent sovereign nation, there ceased to be the notion of allegiance to a unified Imperial Crown restraining the exercise of legislative power to withdraw the status of non-alien from a non-citizen resident British subject. There is also the fact that, on 1 January 1949, the plaintiff became a citizen of the United Kingdom and Colonies by virtue of the *British Nationality Act 1948*, and then, on 21 September 1964, Malta gained independent statehood, whereupon the plaintiff ceased to be a citizen of the United Kingdom and Colonies and became a citizen of Malta owing an obligation of permanent allegiance to Malta. Consequently, even if Gaudron J had been correct in *Patterson* and *Lim* that "[m]ere change in constitutional and legal thinking with respect to the Crown" could not, of itself, effect a change in the relationship between the individual and the Australian body politic[32] (and for the reasons given, that is not correct), here there was in fact the very kind of change in the relationship between the individual and the Australian body politic that Gaudron J contemplated would be sufficient to place a non-citizen resident British subject into the category of persons Parliament could treat as an alien[33]. There can be no doubt that, generally speaking, it is within the legislative competence of the Parliament to treat a foreign citizen, who is not an Australian citizen, as an alien[34].

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31 (2001) 207 CLR 391 at 467 [228]-[230] per Gummow and Hayne JJ.

32 See [33] above.

33 See also *Nolan* (1988) 165 CLR 178 at 193 per Gaudron J; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 458-459 [35]-[36] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

34 See *Singh* (2004) 222 CLR 322 at 398 [200] per Gummow, Hayne and Heydon JJ; *Ex parte Ame* (2005) 222 CLR 439 at 458-459 [35] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

37 Of course, it might be different if the plaintiff had become an Australian citizen: for then his obligation of permanent allegiance to Australia would be clear, despite his allegiance to Malta. But he chose not to do so, whatever his understanding of the consequences.

The significance of *Love*

38 The plaintiff also prayed in aid the recent decision of the majority in *Love*[35] in support of the notion that the essence of an alien is one who "does not belong" to Australia. On that basis, the plaintiff contended that, due to the plaintiff's more or less continuous residence in Australia since his arrival here in 1948, he now so much belongs to Australia that to treat him as an alien would be to obliterate that essential, defining feature of alienage.

39 That contention, however, misconceives the substance of what the majority decided in *Love*. As has been observed, authority establishes that the central characteristic of alienage is a lack of permanent allegiance to the Crown in right of Australia (and thus a lack of a correlative obligation of permanent protection). Properly understood, *Love* decided no more than that, because the common law of Australia recognises, and is taken always to have recognised, Aboriginal societies who have remained continuously united in their acknowledgment and observance of laws and customs deriving from before the Crown's acquisition of sovereignty over the Australian territory, and because the common law of Australia also recognises, and is taken always to have recognised, that membership of such a society is to be determined by the elders and other members of the society in accordance with those rules and customs, such a society and each resident member of it attracts a Crown obligation of permanent protection and owes a correlative obligation of permanent allegiance that is the antithesis of the ordinary understanding of alienage. Nothing that any member of the majority said in *Love*[36] called into question this Court's established jurisprudence that, generally speaking, alienage has nothing to do with a person's experience or perception of being

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35 See and compare (2020) 94 ALJR 198 at 217 [74] per Bell J, 253 [272] per Nettle J, 268 [356] per Gordon J, 288 [451] per Edelman J; 375 ALR 597 at 615, 664, 683, 710.

36 See (2020) 94 ALJR 198 at 213-215 [58]-[62], 216 [69] per Bell J, 247-248 [249]-[254] per Nettle J, 261-262 [316]-[322] per Gordon J, 282 [429] per Edelman J; 375 ALR 597 at 610-612, 613, 656-657, 675-676, 702-703.

connected to the Australian territory, community or polity[37], or with an actual or perceived absence of connection to another country[38].

40 Admittedly, each member of the majority in *Love* expressed his or her reasoning to some extent differently. But common to all was the essentiality of the common law's recognition of the membership of an Aboriginal society continuously united in their acknowledgment of their ancient laws and customs deriving from before the Crown's acquisition of sovereignty over the Australian territory, and the inherent inconsistency of that fact with the permanent exclusion from Australia of a member of such an Aboriginal society. That is what some members of the majority characterised in terms of "belonging", and that is what all members of the majority concluded put such Aboriginal persons beyond the ordinary understanding of "alien".

41 By contrast, here, there is nothing about the common law of Australia that is inconsistent with Parliament treating as an alien a person born outside Australia, whose parents were not Australian citizens, who is a foreign citizen, and who has not been naturalised. And it makes no difference that the person was a British subject at the time of entry into this country (and so *ex hypothesi* might not then have been conceived of as an alien in the ordinary understanding of the term). The notion of allegiance to the Imperial Crown which informed that earlier ordinary understanding of the term, and so perhaps once restrained the exercise of legislative power, has ceased to apply.

42 In the result, it should be concluded that, on the facts of this case, there is nothing which prevents Parliament treating the plaintiff as an unlawful non-citizen, as it has done, and so, in effect, as an alien.

Was the plaintiff an alien when he arrived in Australia?

43 Arguably, that conclusion is sufficient to dispose of the plaintiff's claim and so, in one sense, to render it unnecessary to embark on the defendant's alternative contention that Australia had already sufficiently emerged as an independent sovereign nation by the time of the plaintiff's birth, or his arrival in this country,

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37 See *Patterson* (2001) 207 CLR 391 at 444-445 [160] per Gummow and Hayne JJ, citing *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 577 per Dixon J.

38 See *Pochi* (1982) 151 CLR 101 at 110-111 per Gibbs CJ; *Ex parte Te* (2002) 212 CLR 162 at 170 [17]-[19], 172-173 [26]-[31] per Gleeson CJ, 179 [55]-[56] per Gaudron J, 188-189 [90] per McHugh J, 193 [112] per Gummow J; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 345-346 [37]-[39] per Kiefel CJ, Bell, Keane and Edelman JJ, 355-356 [82] per Gageler and Gordon JJ, 358 [92] per Nettle J; *Love* (2020) 94 ALJR 198 at 249-250 [257]-[261] per Nettle J; 375 ALR 597 at 658-659.

that it was even then within the legislative competence of the Parliament to treat the plaintiff as an alien. It is also a large question which has not been directly considered in any of the previous decisions of the Court, and, therefore, it might be thought, would be better stated as a case for the Full Court to decide.

44 That said, however, although the parties were initially united in their enthusiasm for me to state a case that would have raised the point for the consideration of the Full Court, ultimately, because it is now late in the year with little prospect of the Full Court dealing with the matter until some months into the new year, and with the plaintiff remaining in immigration detention, the parties persuaded me that it would be preferable if I were to decide the matter sitting alone, leaving the parties to seek leave to appeal to the Full Court if dissatisfied with the results.

45 Given that I may be wrong in holding that it is open to Parliament to treat as an alien a non-citizen who arrived in this country as a British subject at a time when, *ex hypothesi*, he could not have been conceived of as an alien in the ordinary understanding of the term, but who, because of the changing denotation of "alien", can now be conceived of as such[39], the outcome of the plaintiff's claim may ultimately turn on whether, at the time of his arrival in Australia, the plaintiff could have been conceived of as an alien in the ordinary understanding of the term. It is appropriate, therefore, that I deal with the defendant's alternative contention.

46 The gist of the defendant's argument in this respect was that Australia became a sovereign independent nation, and the constitutional conception of the Crown became that of the Crown in right of Australia, either by the time of the Balfour Declaration in 1926, or by the time of the enactment of the *Statute of Westminster 1931* (Imp), or by the time of the enactment of the *Statute of Westminster Adoption Act 1942* (Cth), with the result that, when the plaintiff arrived in Australia as a British subject in 1948, he owed allegiance to the foreign power of the United Kingdom, and so even then was an alien.

47 As Gibbs CJ explained in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]*[40], the principal purpose of the *Statute of Westminster* was to give each of the Dominions the autonomy and equality of status with each other and with the United Kingdom that had been recognised by the Balfour Declaration. In order to do so, it was necessary to ensure that the Parliaments of the Dominions were no longer subordinate to the Parliament of the United Kingdom and to remove the fetters on their legislative power that had resulted or had been thought to result from their former colonial status. Thus, s 2 of the *Statute of Westminster* provided that the

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39 See and compare *Ex parte Ame* (2005) 222 CLR 439 at 458-459 [34]-[37] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

40 (1985) 159 CLR 351 at 363-365.

Colonial Laws Validity Act 1865 (Imp) should not apply to any law made by a Dominion Parliament after the commencement of the Statute; s 3 declared that the Parliament of a Dominion had full power to make laws having extra-territorial effect; s 4 provided that, after the commencement of the Statute, no Act of the Parliament of the United Kingdom would extend to a Dominion unless it were expressly declared in the enactment that the Dominion had requested and consented to its enactment; s 5 provided that certain references in the *Merchant Shipping Act 1894* (Imp) should be construed as if references to the Legislature of a British possession did not include the Parliament of a Dominion; and s 6 provided for the cessation of application in any Dominion of s 4 of the *Colonial Courts of Admiralty Act 1890* (Imp) (which required certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause) and so much of s 7 as required the approval of His Majesty in Council to any rules of court regulating practice and procedure in a Colonial Court of Admiralty. Section 10 of the Statute further provided, however, that none of s 2, 3, 4, 5 or 6 should extend to Australia, New Zealand or Newfoundland unless and until adopted by the Parliament of that Dominion, but when so adopted should have effect either from the date of the *Statute of Westminster* or from such later date as was specified in the adopting Act.

48 In Australia's case, it was not until the enactment of the *Statute of Westminster Adoption Act*, which received royal assent on 9 October 1942, that Parliament adopted ss 2, 3, 4, 5 and 6 of the *Statute of Westminster* (with effect from 3 September 1939, being the date of Australia's entry into World War II).

49 I am not persuaded that either the Balfour Declaration or the *Statute of Westminster* was sufficient of itself, or as an indication of the intra-Empire relational developments it reflected, to constitute Australia an independent sovereign nation in the sense that has since been recognised as characterising the United Kingdom as a foreign power. And while the *Statute of Westminster* declared novel constitutional conventions that "affect[ed] the basal conceptions of the legal system under which the Empire was governed"[41], its permissive provisions did not manifest in legal and political reality in Australia until the Statute was incorporated into Australian law[42]. I do accept, however, that, at least by reason of the enactment of the *Statute of Westminster Adoption Act*, Australia

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41 Dixon, "The Statute of Westminster 1931" (1936) 10 *Australian Law Journal* 96 at 98.

42 See *Bonser v La Macchia* (1969) 122 CLR 177 at 223-224 per Windeyer J. See also *Sue v Hill* (1999) 199 CLR 462 at 487-488 [50]-[52] per Gleeson CJ, Gummow and Hayne JJ; *Shaw* (2003) 218 CLR 28 at 38 [14], 40-42 [23]-[28] per Gleeson CJ, Gummow and Hayne JJ.

became sufficiently independent of the United Kingdom to be regarded as an independent sovereign nation and that the relevant constitutional conception of the Crown (as opposed to the statutory description of it which persisted until the *Royal Style and Titles Act 1973* (Cth)[43]) thereupon became the Crown in right of Australia.

50 To say so is not to overlook the several, different views on the point that were expressed in *Shaw*[44] and in *Patterson*[45], or that it was not until the enactment of the *Australia Act 1986* (Cth) that all traces of the United Kingdom's power to legislate with effect in all or any Australian States with respect to matters not within Commonwealth legislative power were finally abrogated[46]. But it is apparent that at least some of the views expressed[47] in *Shaw* and *Patterson* depended on the notion, rejected by the plurality in *Shaw*[48] and by a majority in *Singh*[49], that persons who arrived in Australia as British subjects before the enactment of the *Australian Citizenship Amendment Act 1984* (Cth)[50], or the *Royal Style and Titles Act*, enjoyed a special, privileged status of non-alien non-citizen British subjects. And such vestigial legislative powers as the United Kingdom Parliament retained with respect to the States until the enactment of the *Australia Act* ought not be seen as detracting from the independence that the

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43 See and compare *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261 per Gibbs J; *Nolan* (1988) 165 CLR 178 at 186 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; *Sue v Hill* (1999) 199 CLR 462 at 496 [78], 503 [96] per Gleeson CJ, Gummow and Hayne JJ.

44 (2003) 218 CLR 28 at 47 [49] per McHugh J, 66-67 [109]-[111], 69 [117] per Kirby J, 79 [154] per Callinan J, cf 42-43 [27]-[31] per Gleeson CJ, Gummow and Hayne JJ, 87 [190] per Heydon J.

45 (2001) 207 CLR 391 at 410 [44] per Gaudron J, 436-437 [135] per McHugh J, 485 [282] per Kirby J.

46 See *Sue v Hill* (1999) 199 CLR 462 at 490-503 [60]-[94] per Gleeson CJ, Gummow and Hayne JJ.

47 See especially *Shaw* (2003) 218 CLR 28 at 63-66 [99]-[106] per Kirby J.

48 (2003) 218 CLR 28 at 40 [21]-[22], 42 [27] per Gleeson CJ, Gummow and Hayne JJ.

49 (2004) 222 CLR 322 at 343 [37] per McHugh J, 398-400 [200]-[205] per Gummow, Hayne and Heydon JJ.

50 See *Patterson* (2001) 207 CLR 391 at 408 [35] per Gaudron J, 426 [105] per McHugh J; *Shaw* (2003) 218 CLR 28 at 51 [62], 59 [85] per Kirby J.

Commonwealth as such, as opposed to its constituent States, acquired by Australia's adoption of the *Statute of Westminster* with effect from 1939. For, as Barwick CJ observed[51] in *New South Wales v The Commonwealth*, it was the Commonwealth that became "the nation state, internationally recognized as such and independent", and "[o]nly the Commonwealth has international status". Neither the colonies nor the States ever held that status.

51 I do not overlook either that in *Sue v Hill*[52] it was accepted that the United Kingdom might not have answered the description of a foreign power for the purposes of s 44(i) of the *Constitution* so long as Australian courts were bound as a matter of fundamental law to recognise the exercise of legislative, executive and judicial power by the institutions of government of the United Kingdom, and thus until the commencement of the *Australia Act*. But as was later observed in *Shaw*[53], the *Constitution* contemplates changes in the political and constitutional relationship between the United Kingdom and Australia and it is impossible to read the power to legislate with respect to aliens as subject to an implicit restriction protective of those persons who entered Australia as British subjects. Given then that it is the relationship that is so determinative, logically the position cannot be any different as between a citizen of the United Kingdom and Colonies having the status of a British subject who entered Australia after the commencement of the *Nationality and Citizenship Act* and a British subject who entered Australia *before* the commencement of the *Nationality and Citizenship Act* but after the commencement of the *Statute of Westminster Adoption Act*. Each was susceptible to being classified as an alien within the ordinary understanding of the word, because each was a subject of a foreign power owing permanent allegiance to that foreign power and not Australia. As the plurality observed[54] in *Shaw*, "[i]t can hardly be said that, as the relevant political facts and circumstances stood in 1948, those citizens could not possibly answer the description of aliens in the ordinary understanding of that word".

52 In the result, I am inclined to accept the defendant's contention that, because the plaintiff was born in Malta in 1945, and thus was a British subject owing allegiance to the Crown in right of the United Kingdom as opposed to the Crown in right of Australia, he was born an alien and therefore he arrived here as an alien

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51 (1975) 135 CLR 337 at 373.

52 (1999) 199 CLR 462 at 490 [59] per Gleeson CJ, Gummow and Hayne JJ, 528 [173] per Gaudron J. See also *Shaw* (2003) 218 CLR 28 at 41-42 [25] per Gleeson CJ, Gummow and Hayne JJ.

53 (2003) 218 CLR 28 at 42 [26]-[27] per Gleeson CJ, Gummow and Hayne JJ.

54 (2003) 218 CLR 28 at 40 [22] per Gleeson CJ, Gummow and Hayne JJ.

in 1948. It is sufficient to say, however, that, because the plaintiff entered Australia as a British subject owing allegiance to the Crown in right of a foreign power, it was open to Parliament to treat him as an alien in the ordinary understanding of the term, just as Parliament subsequently did by its enactment of the *Nationality and Citizenship Act*[55].

53 The plaintiff argued that, even if that were so, he subsequently acquired the status of a non-alien on 26 January 1949 on the commencement of the *Nationality and Citizenship Act*, because it excluded[56] any "British subject" from the statutory definition of "alien". But the argument is untenable. As the plurality concluded[57] in *Shaw*, although British subjects were thereby excluded from the definition of "aliens" for the purposes of that Act, they were nonetheless "a class of aliens with special advantages in Australian law"; and so, even then, conceived of as aliens in the ordinary understanding of the term.

54 The plaintiff further invoked the fact that, for a substantial time following the enactment of the *Nationality and Citizenship Act*, Commonwealth legislation attached rights, duties and privileges to persons with the status of "British subject" under that Act which aligned with the rights, duties and privileges of Australian citizens. The right to vote and to be issued with an Australian passport, and the obligation to serve in the military forces of this country when conscripted – which the plaintiff did – are notable examples. But once again, as *Shaw* established, Parliament's conferral of special rights, duties and privileges on alien British subjects did not mean that they ceased to be within the scope of the Parliament's legislative power with respect to aliens[58]. It is simply that they were treated as a class of aliens with special advantages and obligations.

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55 See *Nationality and Citizenship Act 1948* (Cth), ss 7, 12, 25.

56 *Nationality and Citizenship Act 1948* (Cth), s 5(1) (definition of "alien").

57 (2003) 218 CLR 28 at 40 [22] per Gleeson CJ, Gummow and Hayne JJ.

58 *Shaw* (2003) 218 CLR 28 at 38 [15]-[16], 40 [22] per Gleeson CJ, Gummow and Hayne JJ. See also *Ex parte Te* (2002) 212 CLR 162 at 173 [30] per Gleeson CJ.

Was it open to Parliament in 1901 to treat British subjects born abroad as aliens?

55 That leaves the defendant's further alternative contention that Federation under the *Constitution* in 1901 brought into existence a new Australian body politic with power to define the criteria of membership of the body politic[59].

56 It is unnecessary to deal with that contention, and it would be inappropriate[60] to do so, because, if the *Statute of Westminster Adoption Act* were not relevantly sufficient to constitute Australia as an independent sovereign power with power comprehensively to define the criteria of membership of the Australian body politic, it could not be that Federation alone was enough.

Conclusion

57 It follows that the plaintiff's claim will be dismissed with costs.

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59 See *Love* (2020) 94 ALJR 198 at 220 [91] per Gageler J; 375 ALR 597 at 619-620. See and compare *Nolan* (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ, 190-191 per Gaudron J; *Patterson* (2001) 207 CLR 391 at 428 [113] per McHugh J; *Love* (2020) 94 ALJR 198 at 214-215 [61] per Bell J, 221 [96] per Gageler J; 375 ALR 597 at 611-612, 621.

60 See *Knight v Victoria* (2017) 261 CLR 306 at 324 [32] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.