

“Citizenship as a Constitutional Concept: *Singh v the Commonwealth of Australia* and *Rasul v Bush*, President of the United States”¹

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Introduction

In recent times the concept of citizenship and the rights that citizenship protect, have been examined closely both by Australian and American courts in quite different contexts. The High Court of Australia in *Singh v the Commonwealth* [2004] HCA 43 (9 September 2004), (2004) 209 ALR 355 considered the question whether an infant born in Australia to non-citizen parents was a citizen under the Australian *Citizenship Act* 1948 (Cth) and the associated question whether that infant was an “alien” within the meaning of ss 51(xix) of the *Constitution* of Australia.

In contrast the United States Supreme Court in *Rasul v Bush* 542 U.S. (28 June 2004) found the remedy of habeas corpus had extra-territorial effect so that the US courts had jurisdiction for remedies sought by alien prisoners held at Guantanamo Bay Cuba, whether citizens or not.

Citizenship at Common law

The very notion of Citizenship dates back to the American and French Revolutions, when the monarchical concept of allegiance was sought to be replaced by more ‘modern’ notions.²

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² *Ex Parte Dang; Re Minister for Immigration and Multicultural Affairs* (2001) (Unreported, M118/2001, High Court of Australia Transcript 18 April 2002 per Gummow J).

By the end of the 19th Century International law had come to recognise rules for the acquisition of citizenship through three distinct means, namely *jus soli* “right of the soil” or birthright, *jus sanguinis* or “right of blood”, or naturalization. At this time citizenship was granted to every child born on Australian soil. This birthright approach to citizenship was favoured by the domestic law of many countries at the time including the United Kingdom and the United States.

This was also the accepted position under Australian domestic law as expressed by O’Connor J in *Potter v Minahan* (1908) 7 CLR 277. Minahan was born in Australia to an Australian citizen and a Chinese father. He left Australia with his father at the age of five, returning when he was 31. He succeeded in persuading the court that he was not an immigrant and was therefore not subject to the *Immigration Restriction Act* 1901 (Cth). At 305, O’Connor J said:

“A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves, amongst which is a right to depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary.”

The recognition under law of persons as citizens carried with it certain rights, an important example being the right to vote. In *R v Smithers, ex parte Benson* (1912) 16 CLR 99 at 108, Griffith CJ discusses these rights as:

“...the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it; to seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the Courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.”

It may also be expected that citizenship entails a right to re-enter and remain in Australia, rights excluded or lost to citizens imprisoned abroad or to those extradited to other countries. The former is no more evident than in the well-publicized detention of the Australians David Hicks and Mamdouh Habib, in Guantanamo Bay Naval Station Cuba for several years without charge. Both filed petitions for the writ of habeas corpus seeking release from custody, access to counsel and freedom from interrogation in *Rasul v Bush* (above).

Citizenship under statute

The position in Australia under section 10 of the *Australian Citizenship Act 1948* (Cth) is that a child born here is an Australian citizen, provided a parent was at the time a citizen or permanent resident of Australia, or the parent had throughout the period of 10 years beforehand been ordinarily resident in Australia.

In Canada the subject is covered by the *Citizenship Act 1947* which originally provided for citizenship of persons born in Canada or on Canadian ships, later repealed and replaced with provisions allowing children born abroad to apply for a grant of citizenship, provided the child's mother was a Canadian citizen. This Act was further amended to extend citizenship to a child where either parent is a Canadian citizen. Despite these definitions, there is evidently some reluctance by the Canadian Courts to displace the 'jus soli' principle. In *Attorney-General of Canada v Shirley (Starrs) McKenna and Canadian Human Rights Commission*,³ it was held that it was not the adopted or family status which governed their treatment under the *Citizenship Act*, but their status as foreign nationals by birth, birthplace being a ground for the differentiation based on long-standing international convention.

In the United Kingdom grants of citizenship are governed by the *British Nationality Act*, which is broader than other comparable legislation, as it grants citizenship to those born in England, provided either parent is a British Citizen or is 'settled' in the United Kingdom. It should be mentioned that the scope of 'settled' is not defined by the legislation.

So far as the United States is concerned Section 1 of the Fourteenth Amendment guarantees citizenship at birth to almost all individuals born in the United States, an entrenched constitutional guarantee oddly enough not extended to native American Indians who were awarded citizenship by birthright under the *Citizenship Act 1924*.⁴

³ *Attorney-General of Canada v Shirley (Starrs) McKenna and Canadian Human Rights Commission* [1995] 1 F.C. 694.

⁴ For further reference see Houston 'Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants' 33 Vand. J. Transnat'l L. 693.

Constitutional Implications

It is accepted constitutional jurisprudence that the Commonwealth Parliament has ample grants of power contained within both ss 51 (xix) [Naturalization and aliens] and (xxvii) [Immigration and emigration] to define Australian citizenship and the rights which attach, subject to one highly significant qualification that Parliament cannot expand the power under s 51(xix) to include those who do not answer the description of "aliens" within the meaning of the *Constitution*.⁵

So far as the meaning of "alien" in the *Constitution* is concerned, the High Court previously interpreted it to mean "non-citizen".⁶ Brennan J observed in *Cunliffe v Commonwealth* (Migration Agents Case) (1994) 182 CLR 272 at 328 that aliens "have no constitutional right to participate in or to be consulted on matters of government in this country" and that the "Constitution contains no implications that the freedom is available to aliens who are applying or have applied for visas...Nor is there any basis for implying that aliens have a constitutional right". Earlier in *Nolan v Minister for Immigration and Ethnic Affairs*⁷, it was said an "alien" was "[u]sed as a descriptive word to describe a person's lack of relationship with a country...means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state'".⁸

As it happens the *Constitution* is remarkably silent on the meaning of citizenship. The word "citizen" appears only twice, both in section 44(i) which states that a person is unable to be a member of the Federal Parliament if he or she:

"...is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power."

There is an express limitation on the power of the Parliament in section 41 of the *Constitution* to alter the rights of an 'adult person' to vote at a Federal elections, by ensuring they shall retain no less than their rights to vote at State elections, but that is all. Clearly it would be incompetent, for example, for the Commonwealth Parliament to deny the right to vote to women or Aboriginal Australians, or to restrict that right by way of property franchise on citizens, and yet other than section

⁵ *Re Minister for Immigration and Multicultural Affairs: Ex parte Te* (2002) 212 CLR 162, 173 [31].

⁶ *Cunliffe v Commonwealth* (Migration Agents Case) (1994) 182 CLR 272.

⁷ *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

41, the terms of such restrictions would be left ultimately to the High Court of Australia to identify or imply.

Given the 19th Century understanding of what citizenship entailed, this state of affairs is hardly surprising. Indeed it was intentional, as the records of Constitutional Conventions so clearly indicate. The *Constitution* was deliberately left silent, primarily for two reasons; firstly, some framers believed “citizenship” as a term required no definition, and secondly, there was a measure of concern that if it was left to Parliament, the power to legislate with respect to citizenship could ultimately deprive natural-born citizens of their nationality and of their substantial consequential rights. The fact remains that there is no express Constitutional definition or protection of the status of citizenship.⁹

Perhaps Dr Quick was not too wide of the mark when he said during the 1898 Constitutional Convention debate concerning “citizenship”:

“I fear that all the attempts to define citizenship will land us in innumerable difficulties.” Gathering from the records of Constitutional Convention Debates, the framers decided that it would be safer if Parliament was not given the power to define citizenship. The South Australian delegate Sir Josiah Symon opposed the definition of “citizen”:

“I do not think that it is necessary to frame a definition of ‘citizen’. A citizen is one who is entitled to the immunities of citizenship. In short, a citizen is a citizen. I do not think you require a definition of citizen any more than you require a definition of ‘man’ or ‘subject’.¹⁰

Ultimately the conclusion to be drawn from the historical course of events leading to the final version of the *Constitution* strongly suggest that “(T)his...deliberate omission...lead(s) to the irresistible conclusion that the Constitution does not confer on the Parliament of the Commonwealth a broad power concerning citizenship and nationality”.¹¹

⁸ *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 183 citing *Milne v Huber* (1843) 17 Fed Cas 403, 406.

⁹ Rubenstein ‘Australian Citizenship Law in Context’ (2002) 39.

¹⁰ Record of the Debates of the Convention (Melbourne 1898), vol V, 1782.

¹¹ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 397-398 [134] per McHugh J.

Singh v Commonwealth of Australia

The litigation in *Singh v Commonwealth of Australia*¹² came before the High Court by way of a case stated, posing the question for the consideration of the Full Bench “Is the plaintiff an alien within the meaning of s 51(xix) of the Constitution?” The court by a majority of 5-2 answered in the affirmative.¹³ The plaintiff, a child and citizen of India was born in Australia of Indian parents (neither of whom was an Australian citizen). In the event if she were an alien, she was liable to removal from Australia under the *Migration Act (Cth)* 1958; if she were a citizen she was not. The reasoning of the majority in its simplest terms was that since she was as a citizen of a foreign state, and applying the definition adopted in *Nolan*¹⁴, she was therefore not a citizen of Australia.

The leading judgment is that delivered by Gummow, Hayne and Heydon JJ. Their Honours took the view that as of Federation, the term “alien” did not have a fixed legal meaning under the common law. They went on to observe that *Calvin's Case*¹⁵ (a case supporting the concept of *jus soli*) had been “overtaken by statute” and by subsequent legal thought in England and Europe.¹⁶ They concluded that the status of “aliens” is, and always has been to owe obligations to another sovereign power,¹⁷ and although the definition of “aliens” may have changed prior to the nineteenth century, they had “yielded to new circumstances.”¹⁸ The joint judgment ended on the following note:¹⁹

Rather, the meaning of "aliens" was conveniently described in the joint reasons of six members of the Court in *Nolan v Minister for Immigration and Ethnic Affairs* [303] [(1988) 165 CLR 178 at 183] where it was said that "alien" "[u]sed as a descriptive word to describe a person's lack of relationship with a country ... means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state'[304] [*Milne v Huber* 17 Fed Cas 403 at 406 (1843)]." It was common ground that the plaintiff is a citizen of India. She is, therefore, a citizen of a foreign state. She is a person within the naturalization and aliens power.

Gleeson CJ concurred with this conclusion. His Honour reasoned that the plaintiff's case depended on the legal and historical context at that time of section 51

¹² *Singh v The Commonwealth of Australia* (2004) 209 ALR 355.

¹³ Gleeson CJ, Gummow, Kirby, Hayne, and Heydon JJ: McHugh and Callinan JJ dissenting.

¹⁴ *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

¹⁵ *Calvin's Case* (1608) 7 Co Rep 1a.

¹⁶ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 403 [157].

¹⁷ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 402 [154], 411-412, [190], 414 [200], 415 [201].

¹⁸ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 411-412 [190].

¹⁹ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 416 [205].

(xix) was inserted into the *Constitution*, the way in which other legal systems of the Western world approached the concept of “alien” and “alienage”, and the ‘complex racial circumstances’ that resulted from Imperial expansion.²⁰ The Chief Justice specifically adopted the reasoning of the majority that “in the case of someone such as the plaintiff, an Indian citizen, born in Australia of Indian citizens, there was in 1900 no established legal requirement that she be excluded from the class of aliens. At the least, it was a matter appropriate to be dealt with by legislation.”²¹

Justice Kirby reached the same conclusion through a different reasoning process. First he accepted that the legislative power granted to Parliament to make laws with respect to “aliens” was capable of a larger application than supposed at Federation.²² He describe “alienage” as a status, and surmised that “notions of status change over time”.²³ His Honour then considered the effect of periods of “rapid social evolution” on the circumstances and meaning of “alienage”, concluding that the *Citizenship Act* was valid, founded on s 51 (xix) of the *Constitution*. Therefore, Singh was denied citizenship and was liable for removal from Australia as an alien “non-citizen”.

The vigorous dissent, McHugh J makes interesting and lively reading. For example in just the second paragraph of His Honour’s judgment we read:²⁴

In my opinion, a person born in Australia is not, never has been and, without a constitutional amendment, never could be an alien unless that person falls within one of three categories. None of those categories applies to Ms Singh. Over 200 years ago, Sir William Blackstone said [[44] Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10 at 361-362] that “[t]he children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such.” Eight years after the colonies of Australia federated, Griffith CJ, Barton, O’Connor, Isaacs and Higgins JJ made the same comment about a person born in this country in a case where the father was a Chinese alien [[45] *Potter v Minahan* (1908) 7 CLR 277 at 287, 289 per Griffith CJ, 294 per Barton J, 304-305 per O’Connor J, 308 per Isaacs J, 320 per Higgins JJ]. Ms Singh is a natural born “subject of the Queen” of Australia for the purpose of s 117 of the *Constitution* and, unlike an alien, entitled to its protection. If she is a natural born subject of the Queen of Australia, I do not see how anyone could find that she is an alien for the purpose of the *Constitution*. Furthermore, subject to presently irrelevant exceptions, birth in Australia made her a member of the Australian community and one of “the people of the Commonwealth” to whom the *Constitution* refers. The Minister has no power to deport Ms Singh. She is not an alien. The Minister has no power to act as if Ms Singh were not a member of the Australian community.

20 *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 366-367 [30].

21 *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 366 [303].

22 *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 427 [249].

23 *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 428-429 [255].

24 *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 368 [35].

His Honour also analysed the historical and constitutional context surrounding “alienage” as at Federation, and by considering the approach of the common law, particularly *Calvin’s Case*²⁵ and *Storie’s Case*²⁶, all supporting the notion that “common law courts held that the status of a natural born subject was indelible.”²⁷ McHugh J concluded:

“[i]t would have been inconceivable to the makers of the Constitution and the people of Australia generally that a person born within the dominions of the Crown could be an alien unless the person fell within one of the three exceptions to the basic rule. In addition, because a person born in Australia was a subject of the Queen, that person was a member of the [172]Australian community.”²⁸

McHugh J was adamant that the meaning of an “alien” did not change, however the class of person to fall under that rubric did, citing Windeyer J in *R v Commonwealth Conciliation and Arbitration Commission; Ex Parte Association of Professional Engineers*:²⁹ “Law is to be accommodated to changing facts. It is not to be changed as language changes.” His reasoning bluntly proceeded:

“An alien is a person who does not owe permanent allegiance to the Queen of Australia.

A person who is born in Australia owes an obligation of permanent allegiance to the Queen of Australia.

Therefore, a person born in Australia is not an alien.

Ms Singh was born in Australia.

Therefore, Ms Singh is not an alien.”³⁰

Callinan J also in dissent, began by examining the intentions of the framers of the *constitution* at Federation, followed the example found in *Cheatle v The Queen*,³¹ in which the expression “trial by jury” contained in section 80 of the *Constitution*, produced a meaning similar to that given in 1900.³² He continued by canvassing the common law meaning of “aliens” and the principle of citizenship by birthright. Callinan J acknowledged that *Calvin’s Case* had largely been displaced by legislative action, but concluded that the country of birth must be an important consideration, paraphrasing Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex*

²⁵ *Calvin’s Case* (1608) 7 Co Rep 1a.

²⁶ *Storie’s Case* (1571) 3 Dyer 300b.

²⁷ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 377 [172].

²⁸ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 387 [100].

²⁹ *R v Commonwealth Conciliation and Arbitration Commission; Ex Parte Association of Professional Engineers* (1959) 107 CLR 208, 267.

³⁰ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355 at 369 [40]. .

³¹ *Cheatle v The Queen* (1993) 177 CLR 541.

³² *Cheatle v The Queen* (1993) 177 CLR 541, 552.

*Parte Te*³³, where he stated that birth outside Australia will generally mean that the person born is and will be treated as an alien for most purposes. As to the text of the *Constitution* itself Callinan J observed with particular reference to ss44(i) of the *Constitution* (quoted above):³⁴

By using the language of "allegiance, obedience, or adherence" the founders can again be seen to have had in mind the old common law concepts of allegiance owed, in the case of republics, by citizens, and, in the case of monarchies, by subjects. It is also significant that they used the word "acknowledgment" which suggests that a natural born subject could, by a voluntary act, come to owe allegiance or obedience, or to adhere to a foreign power. The reference to subjection to, or citizenship of, or the rights or privileges of, a foreign power must be to those according to Australian domestic law. It cannot be that by the mere legislative act of a foreign power, an Australian national could be deprived of the right of representation, or other rights enjoyed by a natural born Australian. It is also significant that the word "citizen" is not used in reference to an Australian, or for that matter, a British subject, but is used in relation to citizens or subjects of a foreign power in s 44. On no view does that section provide any head of power to legislate with respect to Australian citizenship.

His Honour's ultimate conclusion was one that "accords with the view that prevailed at the Federal Convention in 1898"³⁵ and that "[b]ecause status is involved the court should not give "alien" any extended meaning."³⁶

The rights of Guantanamo Bay aliens: *Rasul v Bush*

A measure of protection is afforded to 'aliens' and illegal 'aliens' under the American Bill of Rights through the Fourteenth Amendment Section 1, which states "*[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws.*" In the American case of *Plyler v Doe*³⁷ which concerned State discrimination against illegal alien children, the majority of the Supreme Court held the level of scrutiny should be 'more stringent than the rational basis test'.³⁸

David Hicks an Australian citizen, was (and still is) held at Guantanamo Bay in Cuba by the United States military, awaiting trial by a military Tribunal for his alleged involvement with the Taliban in Afghanistan. He has not been charged or arrested pursuant to any domestic law of the US; had never been judged to be an 'enemy alien' or 'unlawful combatant' by any court of law; the Taliban had at the time of his 'arrest', caused no American casualties, or any harm to American

³³ *Re Minister for Immigration and Multicultural Affairs; Ex Parte Te* (2002) 212 CLR 162, 170.

³⁴ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 441 [308].

³⁵ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 441 [308].

³⁶ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 447, [322].

³⁷ *Plyler v Doe* (1982) 457 US 202, 214.

personnel; and he had no involvement directly or indirectly, with any terrorist act, including the September 11 attacks.³⁹

In *Rasul v Bush*, the question decided by the Supreme Court of the United States was whether the habeas statute conferred a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercised plenary and exclusive jurisdiction, but not “ultimate sovereignty”.⁴⁰ Received doctrine was that enemy aliens, unlike illegal aliens, held very few rights, under United States law. For example the decision of the court in *Eisentrager v Forrestal*⁴¹ stood for the proposition that enemy aliens were not constitutionally entitled to apply for a writ of *habeas corpus*.⁴² However, there was no previous case deciding that aliens detained in military custody were also devoid of the “privilege of litigation” in US Courts.

It was accepted in *Rasul v Bush* there was an “ascending scale of rights” offered to individuals based on their connection to the United States, and that citizenship “provides a longstanding basis for jurisdiction” and among aliens, physical presence within the United States also “gave the Judiciary power to act”⁴³ and that physical presence in the United States “implied protection.”⁴⁴ This implied protection of non-citizens based on ‘physical presence in the United States’ was extended by the majority to Guantanamo Bay, on the basis that the United States held an indefinite lease over the subject area rendering it for practical purposes a place essentially belonging to the United States. By way of comparison, an ‘alien enemy’ in Australia may not bring an action in an Australian court, except by obtaining the leave of the Crown,⁴⁵ however an action may be brought against an enemy alien.⁴⁶

In the result the court divided 6-3, the opinion of the court being delivered by Stevens J, in which O'Connor, Souter, Ginsburg, and Breyer JJ, joined. Kennedy J filed an opinion concurring in the judgment. Scalia J, filed a dissenting opinion, in

38 Refer to Wells ‘Aliens: The Outsiders in the Constitution’ (1996) 19(1) University of Queensland Law Journal 45, 56. .

39 *Shafiq Rasul et al v George W Bush et al* (2004) 124 S.Ct. 2686., majority opinion p.3.

40 *Shafiq Rasul et al v George W Bush et al* (2004) 124 S.Ct.2686.

41 *Eisentrager v Forrestal* (1949) 84 US App D.C. 396.

42 *Eisentrager v Forrestal* (1949) 84 US App D.C. 396.

43 *Shafiq Rasul et al v George W Bush et al* (2004) 124 S.Ct. 2686.

44 *Shafiq Rasul et al v George W Bush et al* (2004) 124 S.Ct.2686.

45 Edward Sykes & Michael Pryles, ‘Australian Private International Law’ (3rd edn) (1991) 73.

which Rehnquist CJ and Thomas J joined. The majority wrote on the ambit of the writ of habeas in these terms:⁴⁷

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." *King v. Cowle*, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K. B.).

Justice Scalia in his dissent, was characteristically forthright; his opinion commences:⁴⁸

The Court today holds that the habeas statute, 28 U. S. C. §2241, extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied, *Johnson v. Eisentrager*, 339 U. S. 763 (1950). The Court's contention that *Eisentrager* was somehow negated by *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973)--a decision that dealt with a different issue and did not so much as mention *Eisentrager*--is implausible in the extreme. This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change §2241, and dissent from the Court's unprecedented holding.

It was feared that these new rights for 'enemy aliens' were going to trigger a flood of litigation in US courts.⁴⁹ Justice Scalia summarises:

"A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints- real or contrived- about those terms and circumstances. The Court's unheralded expansion of federal court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits." ⁵⁰

The constitutional limits on legislative power

There is no power to make laws with respect to citizenship explicitly stated in the *Constitution*. The question then arises as to the extent of the limited power conferred elsewhere in the *Constitution* to define the criteria for citizenship within constitutional constraints. For instance, could parliament validly alter the *Citizenship Act*⁵¹ to decree that only when both parents are born in Australia and birth is on

⁴⁶ *Porter v Freudenberg* [1915] 1 KB 857.

⁴⁷ Joint judgment pp13-14; footnotes omitted.

⁴⁸ Dissenting judgment pp 1-2.

⁴⁹ For subsequent litigation refer *Hamdan v Rumsfeld*, United States District Court for the Columbia, 8 November 2004 and *In Re Guantanamo Detainee Cases* United States District Court for the Columbia, 31 January 2005.

⁵⁰ *Shafiq Rasul et al v George W Bush et al* (2004) 124 S. Ct. 2686, dissenting judgment pp 11-12.

⁵¹ *Citizenship Act* 1948 (Cth).

Australian soil, the child could claim to be an Australian citizen? No one doubts for a moment that there are constitutional limits on the Federal Parliament in this respect, for as the Chief Justice put it in *Singh* '(E)veryone agrees that the term "aliens" does not mean whatever Parliament wants it to mean'.⁵² The same view emerges from the judgment of McHugh J:⁵³

Section 51(xix) of the *Constitution* empowers the Parliament of the Commonwealth to make laws with respect to "aliens". By necessary implication or assumption, that grant of power recognises that an alien is a person who can be identified by reference to some criterion or criteria that exists or exist independently of any law of the Parliament or indeed of the Constitution itself. It is a corollary of that implication or assumption that the Parliament of the Commonwealth cannot itself define who is an alien. Thus, s 51(xix) implies or assumes that an alien can be defined - but not by the Parliament.

Nevertheless we remain no better informed by the judgments in *Singh* where those limits might be drawn. It is one thing to suppose as Kirby J does that should 'Parliament attempt to push the "aliens" power into extreme instances, so as to deem a person born in Australia an "alien" despite parental or grand-parental links of descent and residence, this Court can be trusted to draw the necessary constitutional line',⁵⁴ but it is quite another to articulate the principles which inform the drawing of that not so bright line.

Conclusion

It is clear that *Singh* stands at the very least for the propositions that section 10 of the *Australian Citizenship Act* 1948 (Cth) is a valid law of the Commonwealth and that a person born in Australia has no "birth right", arising from that fact alone, to claim to be an Australian. And yet the concepts of "citizenship", "aliens" and the rights afforded to both citizens and non-citizens in Australia are no more precise now than they were in 1900. Given the current political climate and the so - called 'war against terrorism' and Australia's proud multicultural heritage, it is perhaps little wonder that the interpretation of these words which meant one thing in 1901 may now be read differently in a markedly different situation. In 1901, the framers would not have expected baby Singh, baby B (the intervener in *Singh*) or the child born on a ship registered in a foreign country on Australian soil, would conceivably fail to be

⁵² *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 351 [5].

⁵³ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 368 [36].

regarded as Australian Citizens. Nor would those responsible for the *Constitution* have anticipated the furor that would result from their conscious decision to leave “citizen” undefined.

The situation in Australia is plainly at odds with that pertaining in the United States,⁵⁵ England and Canada, but these differences derive largely from statute. *Singh* is also perhaps difficult to reconcile with the earlier case of *Potter v Minahan*⁵⁶ so that it would be interesting to speculate what might eventuate should an analogous set of facts arise again.

Presumably under *Singh*, a child born of parents holding temporary protection visas living in Australia for something less than ten years within the community,⁵⁷ would not be a citizen, even though by community standards, they would be. This is especially poignant considering the remark made by Gummow J that “[i]t is true that the notion of absorption into the Australian community has been used in established constitutional discourse.”⁵⁸ And what would be the situation if her parents had remained in Australia for longer than ten years or if she was born in Australia of illegal non-citizens who had been here for as long?

Even so, very large questions indeed remain as to just how far Parliament can validly go to define or rather redefine a “citizen” or an “alien” before it finds itself in constitutional difficulty. It is for reasons like these, one suspects, that led McHugh J to take a narrow view of the scope of that power to the point that Parliament retains merely “some modest power over citizenship and nationality”,⁵⁹ but that is all.

Given the changing political and social circumstances that doubtless will continue to develop, it is likely that the debate about the scope and content of Parliament’s “narrow” power to legislate to restrict the definition of a citizen, or more likely expand the meaning of an ‘alien’ and the High Court’s interpretation of the powers expressed in the *Constitution* concerning these closely related concepts, is far from over.

⁵⁴ *Singh v The Commonwealth of Australia* (2004) 209 ALR 355, 431 [269].

⁵⁵ Refer *United States v Wong Kim Ark*, cited with approval in *Regan v King, Registrar of Voters*.

⁵⁶ *Potter v Minahan* (1908) 7 CLR 277.

⁵⁷ *Australian Citizenship Act 1948* (Cth) s 10(2)(b).

⁵⁸ *Re Woolley; Ex Pare Applicants* [2004] HCA 49, Gummow J.

⁵⁹ *Singh v The Commonwealth of Australia* (2004) 209 CLR 355, 397-398 [134].

